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Impact of Brexit on technology and innovation



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General impact

How might the technology and innovation sector be affected when the UK exits the EU in 2019+?

Until the UK exits from the EU it remains a member of the EU and all the EU obligations and benefits remain in place. In the short term therefore, it is business as usual in the UK up to at least March 2019 and probably until the end of the proposed transition period thereafter (2019+).

After Brexit (2019+) the impact upon the technology and innovation sector largely depends upon what model the UK adopts for its relationship with the EU. If the UK remains in the European Economic Area then the changes may be minimal. If the UK joins the European Free Trade Association and negotiates sector specific access to the single market then the landscape depends on the exact nature of that relationship. If the UK distances itself further from the EU then the changes may be more extensive.

There will be ramifications to the sector in light of Brexit, not least given the current uncertainty prevailing in UK politics, markets and as to the UK's future with the EU. The UK has a strong track record in the technology and innovation sector with tax incentives, investment and funding, R&D and other key drivers high on its agenda. Norway (which is not in the EU) is a prime example of how the sector can develop effectively outside of the EU.

In terms of specific key areas, the precise changes remain to be seen. However, set out below are some of the possible issues.

Data privacy

Will the UK still be regarded by the EU Commission as a “safe third country” outside the EU so that personal data can continue to be transferred to the UK from the EU?

The default position once the UK leaves EU is that it will become a third country and personal data can only be provided from the EU to the UK without additional export measures (e.g. EU model clauses or binding corporate rules) or derogations (e.g. consent of the data subject) if the EU Commission finds the UK data protection regime to be “adequate” (meaning it is “essentially equivalent” to the EU regime).

Indeed in January 2018 the EU Commission issued a [notice to stakeholders](#) stating this. This position has been reiterated by the EU Commission Brexit negotiation team on many occasions.

In August 2017 the UK Government [published a different vision](#) based on mutual recognition of each other's data protection frameworks and continued close regulatory cooperation. On [May 23, 2018](#) and [June 6, 2018](#) the UK published more detail on this vision. It is looking for

- An appropriate role of the UK Information Commissioner on the European Data Protect Board.
- Continuing representation under the EU's new One Stop Shop.
- The EU Commission to conduct an assessment to satisfy itself whether the UK would pass the “adequacy” test.
- The arrangement to be enshrined in an international treaty (rather than a unilateral EU Commission adequacy decision).

The EU Commission is reluctant to give a third country influence over EU norms and enforcement setting and has not engaged positively with these proposals.

The UK Parliamentary Select Committee on Brexit and Data is urging the UK Government to accept the jurisdiction of the Court of Justice of the European Union in this area to make the EU Commission's acceptance of this position more likely, while simultaneously asking the EU Commission to start its adequacy assessment of the UK regime as soon as possible to ensure there is no gap at the end of the transition period (the quickest assessment to date took twelve months (Argentina)).

Until the EU Commission rules on the UK's adequacy or the UK negotiates the international treaty it is proposing, EU controllers and processors would only be able to transfer personal data to the UK as set out below.

Following Brexit taking effect, in the event an adequacy agreement is not made in favour of the UK, how can business continue to transfer personal data between the EU and the UK?

The UK will be like any other country outside the EU which has not achieved adequacy. EU exporters will need to implement an export mechanism (EU model clauses or binding corporate rules) or rely on a derogation (for example, consent of the data subject or a public interest exemption).

Will it still be possible following Brexit taking effect for a business operating via its subsidiaries sited across the EU and UK to operate a single process of collecting, aggregating and processing personal data relating to its EU/ UK sales activities?

Yes. Immediately following Brexit the UK and EU rules should be essentially identical. The main immediate difference will be at the enforcement and approvals stage (unless the UK achieves its aims under an international treaty discussed earlier) as the UK will not be a member of the European Data Protection Board or One Stop Shop mechanism and so businesses will need to deal with the UK data protection authorities and the EU lead data protection authority in relation cross border personal data processing breaches and approvals (for example in relation to the prior approval of binding corporate rules).

It is possible the UK and EU regimes could start to diverge following Brexit if the UK does not achieve adequacy. If it achieves adequacy it is likely the UK regime will remain closely aligned with the EU regime to maintain the adequacy finding and the free flow of personal data from the EU to the UK.

Consumer and commercial

In the area of consumer protection law and commercial law more generally, a number of EU laws have direct applicability. In addition, the UK has implemented into English law a number of EU requirements. What is the range of potentially affected laws in this area?

In the area of commercial law, the following are key pieces of EU legislation

- *The Commercial Agents Directive*¹, implemented into English law by the Commercial Agents (Council Directive) Regulations 1993². This legislation regulates aspects of the legal relationship between a commercial agent and the person appointing it.

¹ Council Directive 86/653/EEC of December 18, 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

² SI 1993/3053.

- *The Late Payments Directive*³, implemented into English law by various legislation, including the Late Payment of Commercial Debts Regulations 2013⁴ (which introduced new provisions in sections 4 and 5A of the Late Payment of Commercial Debts (Interest) Act 1998), the Late Payment of Commercial Debts (No 2) Regulations⁵, and the Late Payment of Commercial Debts (Amendment) Regulations 2015⁶. The legislation adds an implied term in business-to-business contracts, giving at least eight per cent a year interest on the price of goods or services, plus a fixed sum and reasonable costs of recovering the debt.
- *The Misleading and Comparative Advertising Directive*⁷, implemented into English law by the Business Protection from Misleading Marketing Regulations 2008⁸. This legislation regulates business-to-business advertising and comparative advertising.
- *The Audiovisual Media Services Directive*⁹, implemented into English law by a range of legislation, including the Audiovisual Media Services Regulations 2009¹⁰, the Audiovisual Media Services Regulations 2010¹¹, and the Audiovisual Media Services (Product Placement) Regulations 2010¹². This legislation regulates on-demand programmes and rules on television advertising and product placement.

In the area of consumer protection law, the following are key pieces of EU legislation

- *The Unfair Contract Terms Directive*¹³, *the Consumer Rights Directive*¹⁴ (CRD) and *the Sales and Guarantees Directive*¹⁵, implemented into English law (in part) by the Consumer Rights Act 2015. This legislation regulates the sale of goods, services and digital content to consumers.

³ Directive 2011/7/EU of the European Parliament and of the Council of February 16, 2011 on combating late payment in commercial transactions.

⁴ SI 2013/395.

⁵ SI 2013/908.

⁶ SI 2015/1336.

⁷ Directive 2006/114/EC of the European Parliament and of the Council of December 12, 2006 concerning misleading and comparative advertising.

⁸ SI 2008/1276.

⁹ Directive 2010/13/EU of the European Parliament and of the Council of March 10, 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

¹⁰ SI 2009/2979.

¹¹ SI 2009/2979.

¹² SI 2010/831.

¹³ Council Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts.

¹⁴ Directive 2011/83/EU of the European Parliament and of the Council of October 25, 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

¹⁵ Directive 1999/44/EC of the European Parliament and of the Council of May 25, 1999 on certain aspects of the sale of consumer goods and associated guarantees.

- The CRD, implemented into English law (in part) by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013¹⁶. This legislation consolidates, harmonises and reforms the rules on distance selling and doorstep selling. It makes key changes to other consumer contracts in scope, including as to information requirements and the rules on delivery of goods. It also requires businesses to obtain a consumer's consent for additional charges. The CRD is also implemented into English law (in part) by the Consumer Rights (Payment Surcharges) Regulations 2012¹⁷, which bans charging consumers excessive fees for the use of payment methods.
- *The Unfair Commercial Practices Directive*¹⁸, implemented into English law by the Consumer Protection from Unfair Trading Regulations 2008¹⁹. This legislation makes a trader criminally liable for misleading or aggressive sales practices. In addition the legislation contains a list of commercial practices which are always unfair.
- *The Services Directive*²⁰, implemented into English law by the Provision of Services Regulations 2009²¹. This legislation applies to the majority of private sector businesses providing services to consumers. A trader must: (1) provide consumers with certain information about itself; (2) deal with customer complaints promptly; and (3) not discriminate against consumers in the provision of services on the basis of place of residence.
- *The Equal Treatment Directive*²², implemented into English law by the Equality Act 2010. This legislation prohibits direct discrimination, indirect discrimination, harassment, and victimisation in the workplace and in the provision of goods, services and facilities.
- *The Directive on Alternative Dispute Resolution for Consumer Disputes*²³, implemented into English law by the Alternative Dispute Resolution for Consumer

Disputes (Competent Authorities and Information) Regulations 2015²⁴. This legislation requires traders to give information about alternative dispute resolution entities and about the online dispute resolution platform established by the European Commission.

In the area of e-commerce and information society services, the following are key pieces of EU legislation

- The E-Commerce Directive²⁵, implemented into English law by the Electronic Commerce (EC Directive) Regulations 2002²⁶. This legislation provides for obligations on providers of information society services to provide certain information about themselves and the regulation of how contracts concluded through electronic means are made.
- *The Electronic Identification Regulation*²⁷, which has direct applicability from July 1, 2016. The regulation repealed the E-Signature Directive²⁸. The Electronic Identification and Trust Services for Electronic Transactions Regulations 2016²⁹ came into force on July 22, 2016 and repeal the laws that implemented the E-Signature Directive, namely, the Electronic Signatures Regulations 2002³⁰ and the relevant sections of the Electronic Communications Act 2000. Among other things, the new regulation provides for evidential weight to be given to electronic signatures.

Is it likely that such legal requirements would change on Brexit taking effect, and if so, to what extent?

The extent to which such legal requirements may change when Brexit takes effect depends on the transitional and savings arrangements under the European Union (Withdrawal) Act 2018.

Businesses located in the UK will still wish to sell to consumers and other businesses in the EU. To do that, regardless of the technical position reached under the European Union (Withdrawal) Act on transitional and savings arrangements, such businesses will still need in practice to comply with a significant amount of EU law

16 SI 2013/3134.

17 SI 2012/3110.

18 Directive 2005/29/EC of the European Parliament and of the Council of May 11, 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

19 SI 2008/1277.

20 SI 2008/1277.

21 SI 2009/2999.

22 Directive 2006/54/EC of the European Parliament and of the Council of July 5, 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

23 Directive 2013/11/EU of the European Parliament and of the Council of May 21, 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

24 SI 2015/542.

25 Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

26 SI 2002/2013.

27 EU/910/2014.

28 Directive 1999/93/EC of the European Parliament and of the Council of December 13, 1999 on a Community framework for electronic signatures.

29 SI 2016/696.

30 SI 2002/318.

(not least because such requirements may be imposed on them as part of supply chain requirements from their own business customers within the EU, or because EU laws typically purport to apply extra-territorially in relation to sales of goods and services directed at consumers located in the EU).

A considerable body of English consumer protection law continues to be aligned with EU law after Brexit under the European Union (Withdrawal) Act 2018.

Outsourcing

A significant cost in many outsourcings is employee costs associated with the operation of TUPE³¹ at commencement and termination of an outsourcing. TUPE implements the Acquired Rights Directive³² (ARD). Following Brexit taking effect, if the UK chooses to repeal TUPE, how will this impact upon outsourcing business models?

The impact on outsourcing models of repealing TUPE will depend on what TUPE might be replaced with. Whilst the UK Government has indicated that it will adopt all EU employment legislation in the European Union (Withdrawal) Act 2018, TUPE itself is an extension of the ARD including reference to Service Provision Changes which do not originate from the ARD. Significant pricing assumptions are made by suppliers based on the similar operation (as implemented by member states) of the ARD across Europe. In addition, the Government has confirmed that there will be no change to employee rights in the short term. However, in the medium to longer term, if TUPE no longer applied in the same form in the UK, those assumptions would need to be revisited, with the result that pricing models might need to vary as between the UK and the rest of the EU. Outsourcing suppliers would need to consider whether freedom from the operation of TUPE provides any opportunity to “de-risk” aspects of their service offering.

Intellectual property rights

What will happen to (a) patent rights; (b) trade mark rights; and (c) design rights; (d) copyright, (e) database rights; and (f) EU Top level domain names following Brexit taking effect?

Patent right

The current system of national patent protection obtained through the UK Intellectual Property Office (UKIPO) or the European Patent Office (this is not an EU institution) will remain unchanged.

However, an overhaul of the patent regime in the EU is due to come into force enabling proprietors of inventions to apply for a single, pan-EU Unitary Patent (UP) covering most of the EU (some Member States, such as Croatia, Poland and Spain are not part of the UPC Agreement), and with a single Unified Patent Court (UPC) to hear and determine patent disputes on a pan-EU basis. The future of the Unified Patent Court (UPC) system remains in doubt following the UK’s vote to exit the EU, and a complaint filed before the German Constitutional Court challenging the legality of Germany ratifying the UPC Agreement. Nevertheless, the UK has now ratified the Agreement, meaning it will be part of the Unified Patent Court if it commences before Brexit. However, for the UK to be allowed continued participation in a system which relies on EU law primacy and Member States’ submission to the CJEU jurisdiction, and which is based in a EU framework, requires the political will of all participating Member States to be won over (although the strong and extensive support the UPC initiative has from the industry Europe-wide and cross-sectorally would help considerably in this regard). The German constitutional case could potentially be resolved by the summer of 2018, but equally could be delayed significantly. A delay causing the UPC to commence beyond Brexit/the transition period will harm the UK’s chances of UPC participation while a decision upholding the complaint is likely to render UPC a non-starter. With the uncertainty surrounding the UPC initiative, it is unsurprising that the European Union (Withdrawal) Act 2018 makes no mention of it.

Businesses are urged to review their patent protection and future enforcement strategies, bearing in mind that the UPC could be implemented by Brexit, albeit with a question mark over whether UK would be allowed to remain beyond Brexit/the transition period.

³¹ Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

³² Council Directive 2001/23/EC of March 12, 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

Trade mark right

The national trade mark system whereby UK trade marks are obtained via the UKIPO is unchanged.

After Brexit takes effect, EU trade marks will no longer cover the UK. However, it has been agreed that, at the end of the transition period, an owner of an EU trade mark right will, without re-examination, become the holder of a comparable UK right. Similarly, international registrations of a trade mark designating the European Union before the end of transition period will enjoy continued protection in the UK. In more detail, the following has been agreed

- The UK right should have the same filing date, priority date and claimed seniority of the corresponding registered EU trade mark right.
- The UK right will not be liable to revocation on the ground that the corresponding EU trade mark had not been put into genuine use in the UK before the transition period (whether UK-only use prior to the end of the transition period will count for the purposes of assessing genuine use of an EU trade mark is still open to question).
- The UK right can rely upon any reputation it has acquired in the EU before the end of the transition period and thereafter the use made of the mark in the UK (whether reputation of the EU trade mark in the UK prior to the end of transition period will count towards assessing reputation of the EU trade mark in the EU is still open to question).

Whether the registration of the UK right should be free of charge (as suggested by the draft Withdrawal Agreement) is subject to negotiation.

Design rights

The national system of UK Registered Designs obtained through the UKIPO and the UK unregistered design right is unchanged.

After Brexit takes effect, Community registered design rights will no longer cover the UK. However, it has been agreed that, at the end of the transition period, an owner of a Community registered design right will, without re-examination, become the holder of a comparable UK right. Similarly, international registrations of a trade mark designating the European Union before the end of transition period will enjoy continued protection in the UK. The UK right should have the same filing date and priority date of the corresponding Community registered design right, and the term of protection in the UK will be at least equal to the remaining period of protection in the EU.

Whether the registration of the UK right should be free of charge (as suggested by the draft Withdrawal Agreement) is subject to negotiation.

Unregistered Community design rights arising before the end of the transition period will continue to apply in the same way in the UK, with the term of protection in the UK lasting at least equal to the remaining period of protection in the EU. However, the UK has yet to provide for designers to obtain an unregistered design right with the same scope as an unregistered Community design right in the UK. The UK has its own unregistered design right provision, but the scope is different from that of the Community design right (for example, surface decoration cannot be protected), and there are qualification criteria that apply, which means that businesses based in many non-EU countries (e.g. US, China, Japan) often do not qualify.

Copyright

There is no change to copyright protection in the UK as it is not harmonised across the EU.

Although copyright law per se is not harmonised, the rules governing the way in which copyright protected works can be exploited in certain contexts are governed by EU law (such as the Software Directive and the InfoSoc Directive), and these EU laws have already been implemented into UK legislation. However, there have been calls to harmonise copyright laws, which has led to initiatives such as the “Digital Single Market” (see below).

Database right

Database rights arising before the end of the transition period will continue to apply in the same way in the UK, with the term of protection in the UK lasting at least equal to the remaining period of protection in the EU. However, database rights holders of past and present will need to be mindful of qualification provisions. In order to qualify, the rights holder must be a national of a Member State or who have their habitual residence in the EU, or companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, or where such a company or firm has only its registered office in the territory of the Community, its operations must be genuinely linked on an ongoing basis with the economy of a Member State.

EU domain name

Subject to any transitional arrangement, the .eu Top Level Domain will no longer apply to the United Kingdom as from the withdrawal date. Thus, as of the withdrawal date, undertakings and organisations that are established in the United Kingdom but not in the EU and natural persons who

reside in the United Kingdom will no longer be eligible to register .eu domain names or, if they are .eu registrants, to renew .eu domain names registered before the withdrawal date. Following the withdrawal date, domain names belonging to a proprietor who is not eligible may be revoked.

Agreements between the Registrar and the registrant of a .eu domain name cannot designate UK law as applicable law nor can they designate a dispute-resolution body, unless selected by the .eu Top Level Domain Registry pursuant to Article 23 of Commission Regulation (EC) 874/2004, nor an arbitration court or a court located outside the EU.

After the withdrawal date, UK rights cannot be invoked in revocation procedures for speculative and abusive registration.

Telecoms and media

Will UK consumers continue to reap the benefits from the ever increasing harmonisation of the European telecoms market, such as the abolition of roaming charges, following Brexit taking effect?

To the extent that such EU laws have been implemented into English law, consumers will continue to benefit from them unless or until they are repealed or changed. In respect of any new regulations implemented following Brexit taking effect, the UK – irrespective of the exit model to be adopted by it – will need to negotiate an appropriate partnership agreement with the EU, which may or may not confer on UK consumers all, or some of, the rights enjoyed by EU consumers. The UK will then need to adopt and comply with the relevant EU legislative measures. Alternatively, the UK could look to develop its own laws in a manner that is consistent with evolving EU regulation.

Under the later scenario, however, international roaming charges for UK consumers travelling in the EU might not be subject to legislative protections as the UK Parliament will not be able to legislate for wholesale roaming rates charged back by EU mobile companies. Protections against high EU roaming rates could therefore only be provided through bilateral agreements between UK mobile companies and their EU counterparts.

What are the consequences for UK businesses if the UK remains outside the EU “Digital Single Market” strategy?

Regardless of Brexit taking effect, the EU is proceeding with proposals to advance new rules governing and achieving such a harmonised market (for example, rules regulating services and technologies that use mobile networks (so-called over-the-top (OTT) services); mandating cross-border access to on-line content service; and amendment to copyright rules to reflect new technologies).

In March 2018 Theresa May confirmed in her speech that the UK will remain outside the EU’s “Digital Single Market” (SDM). This decision will be relevant to businesses’ decisions on whether or not to launch online services in the UK (for instance, if - following Brexit taking effect – the UK decides to adopt a less restrictive approach to OTT or to on-line content services, this could encourage establishment in the UK; whereas divergence in regulation between the UK and the EU in some areas could affect the investment decisions of mobile and fixed-line/broadband operators).

The disapplication of EU state aid rules could remove an obstacle to additional Government investment in infrastructure to support isolated areas (for example, remote locations and mobile “not-spots”) and to bring forward next generation network services.

A further proposal related to the SDM concerns the harmonisation of spectrum policy, where harmonisation is being considered under the SDM initiative, although Brexit taking effect should not result in divergence as the UK will still be a member of CEPT and the ITU (the international organisations that deal with these issues).

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