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# The Roads to Brexit and What In-house Counsel Should Do Before Getting There

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## What is the EU?

- 28 Member States
- Currently being considered:
  - Albania
  - Macedonia
  - Montenegro
  - Serbia
  - Turkey
- Potentially: Bosnia, Kosovo
- Key Treaties
  - TFEU – Treaty on the Functioning of the European Union
  - TEU – Treaty on the European Union

## What is the EU?

		Population (m)	GDP \$ (bn)	GDP per head \$	Area sq km ( <sup>'000</sup> )	Median age
1.	Germany (1957)	82.0	3,428	42,700	357	45.5
2.	France(1957)	63.5	2,613	36,790	549	40.6
3.	United Kingdom (1973)	62.8	2,476	35,720	244	40.2
(...)						
28.	Malta (2004)	0.4	9	28,960	0.3	40.9

		Population (m)	GDP \$ (bn)	GDP per head \$	Area sq km ( <sup>'000</sup> )	Median age
	China	1,353.6	8,227	9,080	9,600	35.4
	US	315.8	16,245	51,750	9,832	37.4
	Europe	507.5	17,685	34,847	4,385	40.8

## How Does the UK Leave?

- Article 50 of the TEU
  - Two years notice to the European Council
  - Negotiate exit with the Commission
    - Commission will act on the basis of guidelines from the European Council
    - Negotiations will deal with withdrawal process and future relationship between UK and EU
    - Referendum did not give a mandate as to what future relationship should be
    - Agreement must be approved by Council of Ministers and European Parliament (QMV)
  - If no agreement is reached
    - Treaties will not apply from end of two year period
    - European Council could extend period (27 member states required)
    - UK has indicated that it will delay serving of notice
  - In the meantime, EU legislation continues to apply

## How Much Is Certain?

- At Present, the UK Government
  - Is uncertain of timing of serving of Article 50 notice
  - UK constitutional issues
  - Has not established basis of negotiation and future relationship with EU which should include:
    - Trade tariffs
    - Financial regulation
    - Consumer protection
    - Freedom of movement
- In other words, nothing is certain and there are many things on which there is no guidance at all

## What Actions Can You Take Now?

- Due diligence on your company's business
  - Establish extent to which your business is affected by EU legislation
    - Market access
      - Import/export tariffs
      - Regulatory consents
      - Trade policy
    - Current EU personnel
    - Personnel who travel to or live in European Member States
  - Establish extent to which your business relies on EU funding and subsidies
    - EIB loans
    - EU grants and subsidies
- Monitor progress of talks and legislative proposals and update key stakeholders
- Industry bodies to lobby
  - Government resources

## Options for Future Trade Relationships

- Before looking at alternative models, it is important to know the UK interests

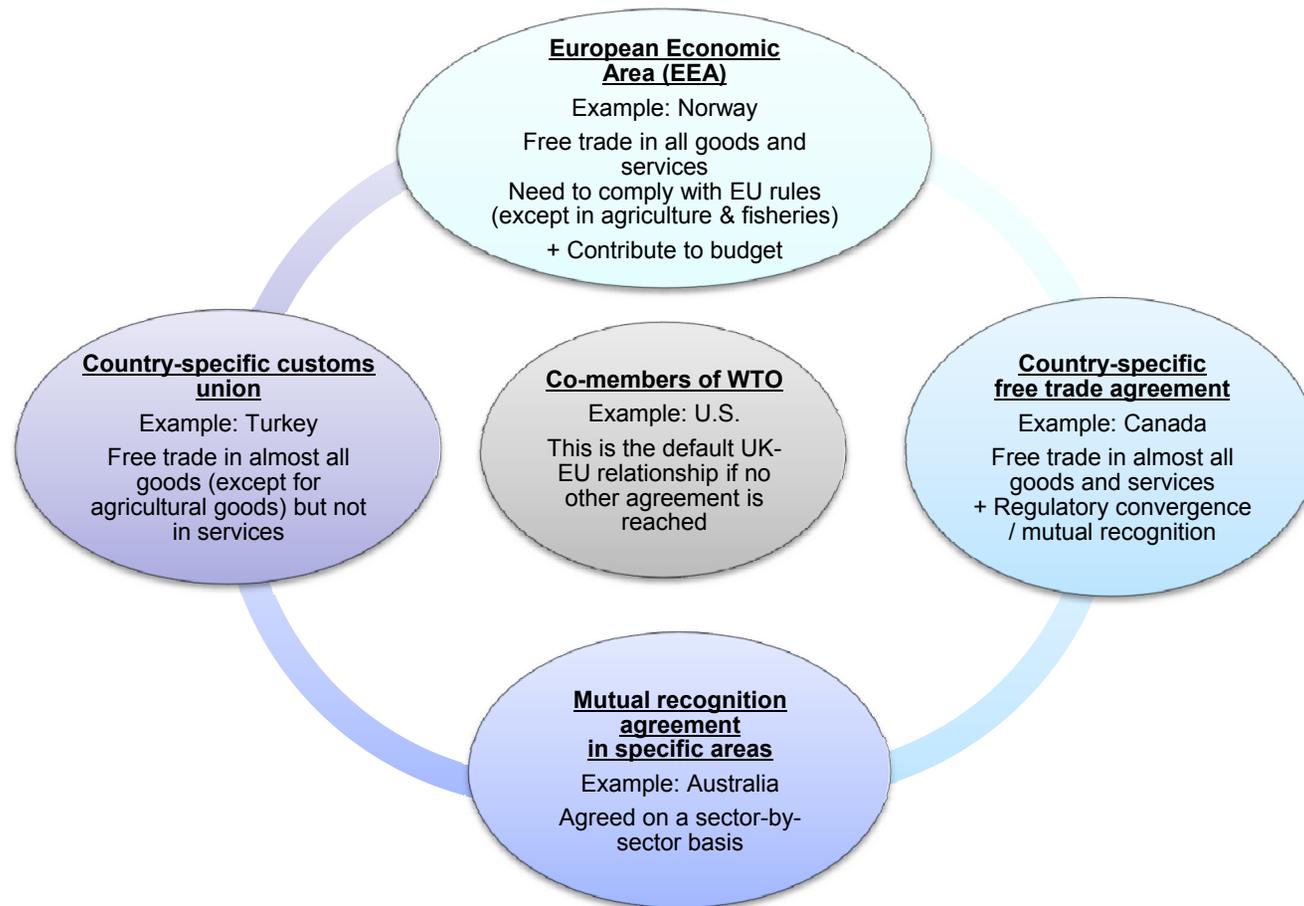
### UK Trade flows:

- UK exported USD 330 billion in **services** in 2014, mainly to the US, EU and Switzerland
- UK exported USD 470 billion in **goods** in 2014, mainly to the US, Germany, The Netherlands, Switzerland and France
  - Calculations show that the UK goods would be subject to almost EUR 4 billion in import duties if there would be no deal with the EU

# Options for Future Trade Relationships – Tariffs

TOP UK DUTYABLE EXPORTS TO THE EU (EUR)				
	Product	2015	MFN DUTY RATE	DUTY AMOUNT
1	Cars	14,064,549,063	10%	1,406,454,906
2	Petrol	7,938,508,051	4.7%	373,109,878
3	Parts of airplanes and helicopters	4,067,820,170	2.7%	109,831,145
4	Polyethylene	667,343,883	6.5%	43,377,352
5	Catalysts	640,475,564	6.5%	41,630,912
6	Car tires	711,635,087	4.5%	32,023,579
7	Car engines (diesel and petrol)	1,870,060,615	2.7%	50,491,637
8	Parts for trucks and buses	1,519,557,919	3%	45,586,738
9	Parts of turbo jets	632,266,214	2.7%	17,071,188
10	Natural gas	2,854,252,498	0.7%	19,979,767
Source: Eurostat July 2016				<b>2,139,557,102</b>

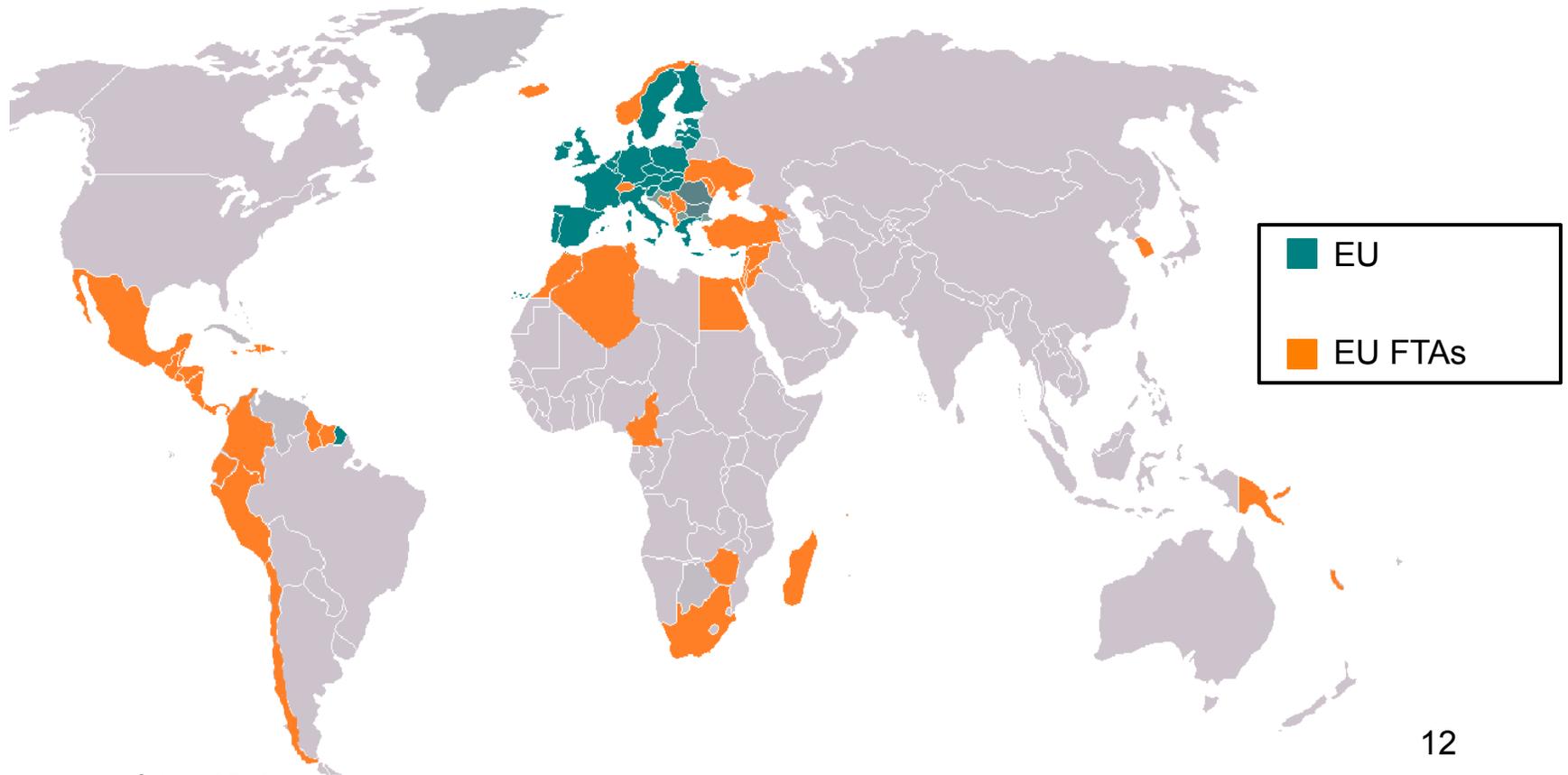
# Potential Models for Future Trade Relationships



# Potential Models for Future Trade Relationships

		1	2	3	4	5	6	
		EU	EEA	FTA + deep bilateral agreements	FTA	Customs Union	WTO	Non-WTO member
	Reference country		Norway	Switzerland	Israel	Turkey	USA	Algeria
	Members	EU Member States	Norway, Liechtenstein, Iceland, EU, EU members	EU, Switzerland	EU, Israel	EU, Turkey	163 members incl. UK and EU	
Contribution to EU Budget		Yes	Yes, but limited scope	Yes, but limited scope	No	No	No	No
Goods	Tariffs EU-UK	None	None but for AG	None but for AG	Almost none	No industrial tariffs	WTO negotiated tariff	No limits on tariffs
	Tariffs UK-other countries	EU tariffs	Own tariff	Own tariff	Own tariff	Aligned with the EU tariff	WTO negotiated tariff	No limits on tariffs
	Customs procedures	None	Yes, but simplified	Yes	Yes	Yes	Yes	Yes
	Product standards	Same standards	Alignment	Alignment	To be negotiated	No alignment	No alignment	No alignment
	FTAs with other countries	All EU FTAs apply	UK can participate in the existing EFTA agreements (including Japan, China, etc), subject to the consent of the counterparties	UK can participate in the existing EFTA agreements (including Japan, China, etc), subject to the consent of the counterparties	UK will have to renegotiate all agreements			
Free movement of persons		Yes	Yes	Yes, but limited scope	No	No	No	No
Free movement of services		Yes	Yes	Yes, but limited scope	Yes, but limited scope	No	Limited scope	No

# EU Free Trade Agreements in Force and Provisionally Applied



Situation as of July 2016

# Further Remarks on the FTA Model

## Implications for EU FTA's for the EU

- FTAs may be maintained with EU-27
  - Territorial application of FTA: “Territories in which [Rome Treaty (TEU)] and [Maastricht Treaty (TFEU)] are applied”
  - But, non-EU countries may wish to denounce the FTA (e.g. with 6 months' unilateral notice) or amend the FTA (subject to agreement by both parties)
- Tariff-rate-quotas may be maintained at same quantity for EU-27 as for EU-28
- EU's WTO schedules need to be renegotiated and agreed with all WTO members, including UK (EU's WTO schedule negotiations are ongoing since 2004)

## Implications for EU FTA's for the UK

- EU's FTAs will no longer apply (UK may seek new bilateral FTAs or rejoin EU ones)
- UK will likely adopt new regulatory framework for trade, including trade defense, customs, economic sanctions (consistent with WTO and UN principles)
- UK's WTO schedules need to be renegotiated and agreed with all WTO members (*including EU*)

## Thoughts and Questions on the Models

- Does the UK have to leave the EU before it makes a trade deal?
- Can the UK conclude better deals outside the EU?
- What are the key challenges when negotiating trade deals?
- How realistic is a deal with the EU, and if so which model?

## Reminder on How EU Legislation Applies

- Regulations
  - Direct automatic application
  - Would not survive Brexit without some action from Government
- Directives
  - EU sets results to be achieved and Members States are required to implement local legislation within a specified period
  - Would, in theory, survive, but may not make sense if any related legislation no longer applies
  - Many enacted as secondary legislation under European Communities Act 1972 may not survive
- Decisions of the Court of Justice of the European Union
  - Legacy of decisions may remain, but may not make sense if related legislation no longer applies

## Immediate Issues – Choice of Law

- Rome I (Regulation (EC) 593/2008)
- Rome II (Regulation (EC) 864/2007)
  - Direct effect
  - English courts have long respected party autonomy over choice of English law
  - Rome I and Rome II require EU courts to apply choice of law even in respect of a Non-Member State law
  - Commentators do not think that absence of Rome I and Rome II will affect English Courts' or EU courts' views of parties autonomy to choose English law

## Immediate Issues – Jurisdiction and Enforcement

- Recast Brussels Regulation (Regulation (EC) 593/2008)
  - Direct effect
  - If parties include a jurisdiction clause
    - Court will take jurisdiction
    - Courts of other Member States will decline to hear those proceedings
    - Member States are required to recognise and enforce judgments from other Member States (subject to exceptions)
- In absence of agreement
  - Brussels Convention (predecessor to Recast Brussels Regulation)
  - Lugano Convention (EU + EFTA)
    - UK may need to accede (consent)
  - Hague Convention (EU + others)
    - UK may need to accede
- Commentators believe that we will be likely to continue to be able to enforce judgments post-Brexit, although the process will not be as streamlined

## Specific Issues – General Contracts

- Immediate
  - MAC/Force Majeure
  - References to current legislation
  - Transaction specific arrangements to allow for changes in regulation or funding costs as a result of Brexit (e.g. “flexit”)
  - Secondary effects (currency fluctuations, downgrading)
- Post-Brexit
  - Any references to EU Regulation to be amended
  - Any references to UK legislation to be checked and amended accordingly

## Specific Issues – Free Movement of Workforce

- EU Nationals currently have the right to live and work in UK and vice versa
- Post-Brexit
  - Changes are likely to be subject to a transition period
  - Position for new entrants is more difficult to predict
    - Reciprocal arrangement possible
    - “Leave” campaigners view on immigration
  - Currently, non-EU Nationals in UK are subject to a points-based system
    - No immediate change
    - Explore every option
      - Indefinite leave to remain
      - Registration certificates to record current status
      - Full citizenship
  - UK Nationals in EU
    - Less is known – hopefully a transitional period for current employees
    - Local advice for new entrants

## Specific Issues – Supply Chain

- Brexit possibly impacts your activities, your way of doing business, producing goods, rendering services
- Tariffs, quotas, dumping duties
- Origin rules
- Securities provided to customs
- Customs licenses, e.g. processing, warehousing, rulings, AEO, self-assessment, centralized clearance
- VAT
- Administrative requirements related to import/export, e.g. customs declarations, export/import licenses
- Export controls and sanctions regulations, e.g. Russia

## Specific Issues – Data Protection

- Currently, EU Data Protection Directive (95/46/EC)
  - Implemented differently in each jurisdiction
- General Data Protection Regulation (Regulation (EU) 2016/679)
  - Direct effect from May 2018 (Pre-Brexit)
    - Establishments in EU
    - Establishments outside EU that aim to provide goods or services to individuals in EU or monitor individuals in EU
    - Fines of up to greater of 4% of annual worldwide turnover or €20m for failure to comply
    - Enhanced consent requirements
    - Enhanced accountability and reporting
  - GDPR will continue to apply post-Brexit
  - UK to maintain equivalence
  - Loss of “One-Stop Shop” – single regulator in place of establishment
  - Planning now, regardless of post-Brexit regime

## Specific Issues – Consumer Protection

- Currently, a combination of implemented EU Directives and standalone legislation in UK
- Primary legislation in UK, so will remain in effect
- Could develop in its own direction/pace
- Export to EU
  - Possibly divergent standards
  - Regulatory barriers
- Likely to be compliant at the moment
- Hopefully will continue

## Specific Issues – M&A

- Legal Framework likely to remain the same for both domestic and cross border transactions
  - English law often chosen
- Merger clearances
  - EU Merger Regulation
    - One-stop shop
  - Post-Brexit – EU and UK merger notifications may be required
    - Cost and time implications
- Due Diligence process – possible Data Protection implications
- Employee protections
- Public M&A – unlikely to be any changes to UK Takeover Code

## Specific Issues – Various Others

- Corporate Structure
  - Location of key employees
  - Employees’ professional qualifications recognised
  - Passporting
    - Regulatory (accountancy, banking, financial services)
    - Non regulatory (broadcasting, gaming)
  - Tax Structuring - Tax on Intra-Group Dividends
  - Pension legislation – pension deficit in UK and staff movements (possibly better)
  - Cross-Border Insolvency Regulations – Scheme of Arrangement
- Access to Funding –
  - Prospectus Directive (FSMA/Listing Rules)
  - Capital Markets Union Action Plan (Prospectus Regulation)
  - EIB funding
  - State aid

## Specific Issues – Various Others

- Bank Recovery and Resolution Directive (BRRD – 2014/59/EU)
  - Directive, so implemented by each Member State
  - Unknown whether UK Government will retain relevant legislation
  - Article 55 wording
- Intellectual Property
  - Unitary Patent Scheme
    - Effective 2017
    - Uniform patent protection throughout EU based on one application
    - Single fee, single court
  - Trademark Protection
    - EU Trade Mark system no longer applicable

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