

# What does Europe do for the UK? ...And what does the UK do for Europe?



“The next Conservative Manifesto in 2015 will ask for a mandate from the British people for a Conservative government to negotiate a new settlement with our European partners in the next Parliament.

It will be a relationship with the single market at its heart.

And when we have negotiated that new settlement, we will give the British people a referendum with a very simple in or out choice. To stay in the EU on these new terms; or come out altogether.

It will be an in/out referendum.”

David Cameron  
*UK Prime Minister, January 2013*





# Does it matter?



The UK's relationship with the European Union is currently higher on the political agenda than it ever has been in recent years. In January 2013 David Cameron announced his desire to recast the UK's relationship with the EU and to hold a referendum by 2017 (or perhaps earlier) on

whether or not the UK should remain in the EU on renegotiated terms. In the meantime, the UK Government is conducting a Balance of Competences review to assess the costs and benefits of that relationship.

This isn't just a political, emotional or even economic debate. The reality is that the UK's future as a member of the EU will fundamentally affect all of us in the UK and beyond: it will affect anyone conducting business in or with the UK, as well as individuals living and working in the UK. It is not just the UK for whom this debate is relevant either. Its outcome will affect the EU as a whole, as well as countries outside the EU who currently choose to access Europe principally through their relationships with the UK.

So would an exit devastate the City's status as the gateway to Europe? Or would we be better off without EU membership? Does the UK's position in the EU really affect how the UK and UK-based companies do business globally, our rights or the standards of living and working that we experience as individuals? Is it important for the UK to regain some of the power that appears

to have been transferred to Brussels? Is the debate taking place sufficiently widely and collaboratively across the UK as a whole? The City is starting to form views and engage in discussions on these issues but what about businesses based, and individuals working and living, outside the City? Do they currently have sufficient information, sufficient voice and sufficient engagement? Are we at risk of engaging in mini-debates in our own silos?

Mayer Brown is running a series of events designed to spark informed debate to consider these and other vital questions concerning the UK's future in the EU. It is not possible at this stage to predict the answers to the questions being asked but through this programme of events we intend to provide a platform for an open and informed exchange of opinions and ideas about the UK's present – and future – relationship with the EU. Together we can consider whether we should use the information and opinions gathered at these events to feed into the Government's review of our relationship with the EU and, in doing so, proactively help to shape the future of the UK in Europe.

I, therefore, invite you to contribute to the debate as we seek to find a way through what is shaping up to be one of the biggest debates for businesses and individuals in a generation.

**Sean Connolly**  
**Mayer Brown International LLP**  
*Senior Partner*

# How did we get here?

Europe means different things to different people, different businesses, different industries and different countries. For some of us Europe is synonymous with the EU and a community in which we play a vital part; for others it refers to the Continent, a place to which we may be geographically close but from which we are separated by more than just the Channel.

There are currently 28 Member States in the European Union (“EU”). Of those, 17 Member States (“the Eurozone”) have the euro as the single currency and share an economic and monetary, but not fiscal, union. Yet significant differences and disparities remain within even the Eurozone. All 28 Member States had different motivations for joining the EU and appear to have different visions regarding its future.

In the UK, the “in or out” debate is not a new development – the UK’s relationship with the EU has been contentious from the start. In the aftermath of World War II Winston Churchill proposed “a *kind of United States of Europe*” to ensure “peace, safety and freedom” but did not envisage the UK being part of it. In 1951 France and West Germany proposed the pooling of Franco-German coal and steel resources under a single High Authority. Together with Italy, Holland, Luxembourg and Belgium, they established the European Coal and Steel Community which later became the European Economic Community (“EEC”). But it was to take a further 22 years before the UK joined its continental neighbours in the EEC and when eventually we did accede, it was with significantly different objectives in mind than those which had motivated our European partners: economic reasons were, at least publically, predominant.

The creation of the euro in 1999 was a milestone in EU integration yet the lack of fiscal union has been said to have damned the initiative from the outset. The lack of fiscal – and the concomitant political – union has never been more apparent than in the face of the ongoing sovereign debt crisis in the Eurozone and banking union, the greatest transfer of sovereignty since the creation of the euro, has renewed calls for further integration. Yet at the same time, there is a downturn in EU competitiveness and growth,

increased voter dissatisfaction with the EU and no certainty that the creditor Member States, most notably Germany, are prepared to sign up to the common fiscal backstops that further integration would seem to demand. The recent agreements on banking union have led to suggestions of Treaty change to ensure a sound legal basis to the package. But such Treaty change, whilst giving the UK an opportunity to renegotiate its relationship with the EU, could underline the growing distance between the Eurozone and the countries outside the Eurozone, particularly the UK. Are we on the road to a multi-speed EU with the UK being left behind in the slow lane?

In 1938 Churchill wrote “*We are with Europe, but not of it. We are linked but not comprised. We are interested and associated, but not absorbed.*” Do these words still resonate? There are signs that UK and EU interests are diverging with the argument on bankers’ bonuses being the latest in a series of disagreements on law and policy that have led to the UK bringing six legal challenges in the field of financial services in two years. Does the need for these challenges herald a decline in British influence in Brussels? Has our apathy or tendency to use our vote in the European Parliamentary elections as a protest plus the Conservatives’ resignation from the European People’s Party, the largest Group in the European Parliament, further diminished British influence in the EU? Does the UK already have one foot out the door?

On the 40th anniversary of the UK’s accession to the EU there has never been a greater need for the “*clear thinking and strong effort of the imagination*” that former British Prime Minister Edward Heath called for in 1972 when developing the next stages in the construction of Europe. Neither has there been a better nor more critical time for balanced reflection on the benefits gained from being part of the EU, whilst recognising and tackling the very real challenges that membership of the ‘European family’ brings to us all.

# What do you need to consider?

The EU was established by the EU Treaties and operates solely within the competencies conferred on it by those Treaties. Article 5(2) of the Treaty on the Functioning of the EU states that *“Under the principle of conferral, the Union shall act within the limits of the powers conferred upon it by the Member States in the Treaties to attain the objectives therein.”* If competency is not conferred on the EU, individual Member States retain their national competence.

The EU has the competence to adopt legislation which may take effect automatically within the UK’s domestic legal framework or require the UK to pass national legislation to give effect to the EU laws. The UK may also be affected by the Treaties themselves, which impose obligations, rights and restrictions on all Member States.

The main EU institutions for our purposes are the European Commission, the European Council, the European Parliament and the Court of the Justice of the EU. In most, but not all cases, the Commission has the sole right to propose EU legislation and the Council and Parliament act together to adopt that legislation. The Court of Justice interprets EU law and rules on whether Member States - and the EU institutions - have complied with it.

The UK’s Balance of Competences exercise is considering

everything deriving from EU law that affects what happens in the UK. It involves an examination of all the areas where the Treaties give the EU competence to act and the areas where the Treaties apply directly to the Member States without needing any further action by the EU institutions.

In the following pages, we look at how EU law has affected various subject areas and how that impacts on us in business and as individuals. We question whether it is possible to see the impact as positive or negative and how things might change if the UK were no longer a member of the EU. We do not intend to provide – or pretend to have – the answers but we seek to demonstrate how, in carrying out any cost benefit analysis of the UK’s relationship with the EU, there are very many issues to be placed on the scales and how it is not always clear on which side of the scale they should be placed.

Please get in touch with your thoughts of what else needs to be included in the analysis.



MAYER • BROWN

## Competition



Hands off our much-loved national champions... and some others!



It's not good for my business. Stop it now!

## Corporate



Save our contract law?



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It's all mine...



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UK

Renegotiate

EU IN ↔ EU OUT

2017



# Competition



## Hands off our much-loved national champions... and some others!

The EU imposes complicated rules on the UK that restrict it from rescuing businesses that may be in real trouble and potentially facing bankruptcy. The UK can only mount a rescue if this effort is pre-approved by Brussels. But if Brussels doesn't agree with the rescue effort or if it hasn't been consulted in advance and it later concludes that aid should not have been given, the EU rules oblige it to order the recovery of the aid from the beneficiary with interest even if this means that the beneficiary goes bankrupt or has to be sold to keep it afloat.

The basic logic underpinning these state aid laws is understandable: government rescues distort real competition so propping up a business which is failing, because essentially it isn't giving its customers what they want, does nobody any favours. Brussels is categorical that a Member State cannot be allowed to protect a national champion against foreign competition. At first glance, the theory sounds reasonable. Nonetheless, there is equally a case for challenging Brussels' right to interfere. Shouldn't we be able to make our own decisions on whether or not to rescue businesses operating within our borders? Is this 'one size fits all' approach unduly constraining the UK in order to achieve a harmonised set of rules across Europe? When the financial crisis hit the banking sector in 2008, the UK government had to inject capital into a number of UK banks to save these banks from bankruptcy. The so-called 'rescue packages' had to be submitted to the European Commission for prior approval before they could be implemented by the UK. In making these capital injections, the UK government arguably prevented a more severe financial crisis, which could have taken down other UK and EU banks (not least because banks own each other's debt so there is a domino effect if even one goes down). In other words, the UK's response was responsible and proportionate. But should the UK have had to lose time getting 'foreign' approval - and at what cost to those affected in the meantime? On this occasion, Brussels granted approval. There have been countless other occasions where it has not. One wonders whether we would still have a thriving UK manufacturing industry or have retained hold of Mini, Jaguar or Land Rover if we could have rescued them ourselves?



## It's not good for my business. Stop it now!

Both the EU and the UK operate merger control laws that are designed to ensure markets operate competitively and in the consumer interest. The UK's rules are based on the EU rules and even if we were not a member of the EU, it seems very unlikely that the UK would change its own approach to the review and control of mergers within its own borders. So would it make any difference to UK businesses engaged in M&A activity if the UK left the EU?

Many UK-based businesses operate beyond the UK's borders. Indeed, many foreign businesses use the UK as a means to gain access to the wider European trading community. Likewise, many EU-based businesses trade into the UK and would inevitably continue to do so even if we left the EU. So the conditions of trade beyond our immediate borders and the competition to UK business presented by our continental competitors would remain relevant to prospects of growth and success for UK businesses. Consider then the scenario where two significant EU-based competitors to a UK business announce a merger that could potentially have a detrimental impact on that UK business. If that merger is sufficiently significant to trigger EU merger control rules, then Brussels would prevent it from completing unless and until it was satisfied that competition in any part of the EU is not significantly damaged by the transaction. In conducting this review, Brussels would include an analysis of the impact on the UK and if the UK's interests were negatively impacted, Brussels would require remedial action on the part of the merging entities. As part of this review process, affected UK businesses have the opportunity to make representations and ensure that their concerns are taken into account. If we exit the EU, this arguably valuable safeguard for UK businesses falls away and the UK may lose its ability to shout 'stop it!' with any expectation of success. There are those who believe its loss could make it a lot harder for UK regulators and UK businesses to ensure that competition within the UK remains vibrant and consumer-friendly.



# Corporate



## Save our contract law?

Brussels favours a greater degree of harmonisation in European contract law. Take, for example, the draft Common European Sales Law (“CESL”); a single proposed contract law regime for consumers and businesses within the EU. Plans are that the CESL will be an optional second contract law regime within each Member State which parties can choose as the governing law of their contract. But could it pave the way for a full scale, compulsory, EU-wide contract law? Is it in the UK’s interests, or those of our foreign business counterparts, for over two centuries of well established, flexible English common law, long recognised as one of the leading contract law systems for international trade, to be wiped out? If so, would London’s reputation as a premier financial centre suffer? What about the monetary cost to businesses created by the uncertainty in understanding a brand new contract law regime in addition to national regimes? But see Consumer and Individuals section.



## Prospectus passports

Companies can ‘passport’ prospectuses between EU countries: in other words, a prospectus that has been approved in one Member State in the EU will be valid in any other Member State. At the moment, a company whose home Member State is the UK can passport out a prospectus which is approved by the UK’s Financial Conduct Authority (“FCA”) into other EU jurisdictions. If we leave the EU, would other Member States still have to accept our passported out prospectuses or would we need a new prospectus for each country whose markets we want to access? And would it really matter? In 2012 only 84 of the 658 prospectuses approved by the FCA were “passport out”. We receive a substantial number of prospectuses that are “passport in”, having been approved by other EU regulators (234 in 2012). If the UK were no longer in the EU, how would this work and would it be a good outcome for UK business? Would it be a good thing for the FCA to devise its own rules on whose prospectuses to accept?



## EU legislation

EU legislation has an impact on all aspects of a company’s life, from company law through commercial and contract law to capital markets. Some of this legislation is seen as a burden but it does create a level-playing field across the EU and is

often designed to protect the consumer. Plus, although the Conservative Government has stopped ‘gold-plating’, how much of the regulatory burden in the UK has been created by the UK’s historic tendency to go further than required by EU legislation when implementing it? If we were to leave the EU, surely much of this legislation, which has now become familiar to us, would remain in English law in some form or another?

**“I cannot say which of the two sets of arguments is stronger, the economic or the political ones, neither am I going to enter into a domestic policy debate, but what I can say is that Europe needs a more European UK as much as the UK needs a more British Europe.”**

**Mario Draghi**

*President of the European Central Bank, May 2013*

# Employment



## A level playing field

Minimum EU standards for employment law can create a more level playing field between businesses across the EU and encourage fair competition. These minimum standards can also encourage free movement of workers which means that businesses can attract the best talent from within the EU without any immigration restrictions and related bureaucracy. Having a set of common employment rights amongst an entire workforce within the EU arguably helps companies manage their business across the EU more efficiently and this helps them to compete more effectively.



## The advantages of minimum standards

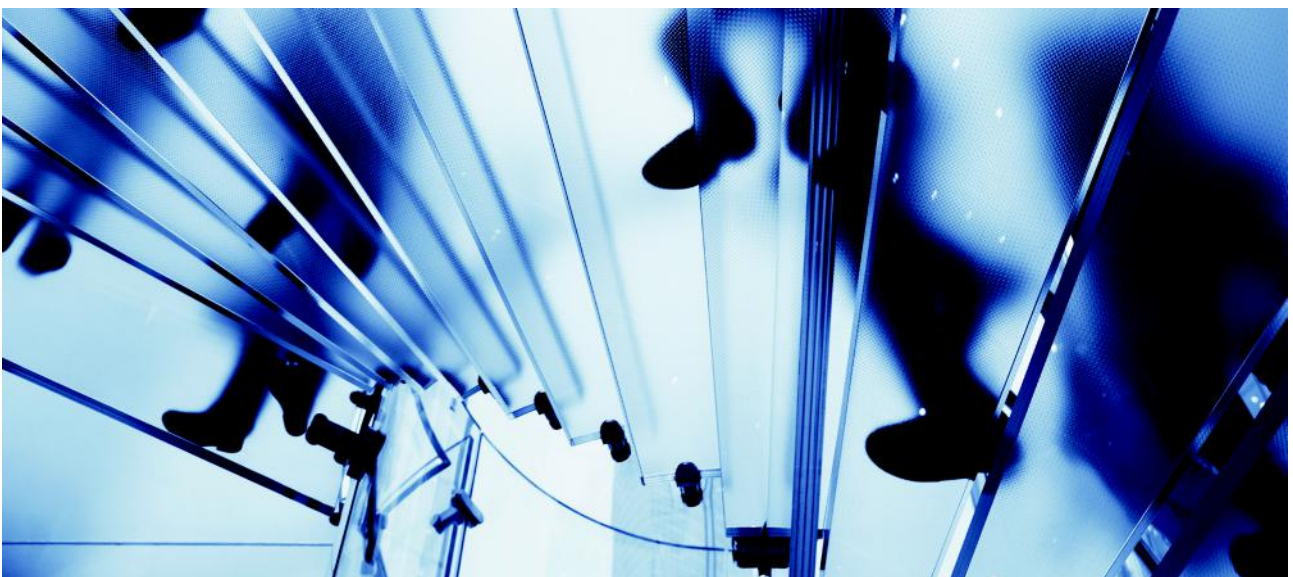
Workforces are happier and more productive with a common set of employment rights applied across all sectors and countries within the EU. A minimum level of employment rights helps shift the focus of competition away from labour costs towards quality and service – which benefits other businesses and consumers in turn. It also helps to prevent businesses adopting a ‘race to the bottom’ mentality on labour costs and can help move the UK towards becoming a highly skilled and productive economy with talent management commitments that develop the best workers.



## The burden of excessive regulation

The excessive volume and prescriptive nature of employment regulations coming from Brussels places a significant burden on businesses, particularly smaller businesses, and it increases labour costs. The Transfer of Undertakings Regulations, for example, has been criticised as presenting significant hurdles for businesses wishing to expand by buying other businesses or parts of other companies: it can potentially mean that the purchasing business is obliged to take on the seller’s workers and respect their existing terms and conditions regardless

of whether these run consistently with its own. The HR-related aspects of such transactions can be time-consuming, challenging and costly for business. The collective redundancy rules imposed by the EU make it hard for businesses to make staff redundant during difficult times and, in extreme cases, this reduces their ability to keep their businesses afloat and, in less extreme cases, reduces the funds available for investment and operational restructures to drive business forward and compete more effectively.



# Environment



## Swimming in sewage?

Pull out of the EU and with it the EU Bathing Water Directive. Some may argue that Britain has no need for nanny-state interfering Eurocrats telling us to clean up our beaches and they may have a point: but the EU Bathing Waters Directive is directly responsible for a huge improvement in the quality of our coastal waters. Until the EU told the UK to clean up its act, people were dying from swimming in sewage-infested waters. In 2013, 42 British beaches still failed to meet minimum EU standards. Pull out and that's the way it will stay.



## Health and Safety

It has been said that there's far too much health and safety red tape coming from Europe. Did you hear about the residents who transformed their street into a green garden lauded by their Council? They've now been told to remove it because it's a 'health and safety hazard'. No more health and safety measures please: we're British! Actually, there's no health and safety reason for this: the real reason for the removal was that it was an obstruction of the highway contrary to the Highways Act 1980 – nothing to do with health and safety or, for that matter, the EU. In fact, most health and safety rules are issued under the Health and Safety at Work Act 1974 which long pre-dates any EU intervention in this area.



## Planning

EU rules on environmental impact assessments ("EIAs") have been criticised for getting completely out of hand. Often they will run to thousands of pages, be completely incomprehensible to the local community and give rise to costly and lengthy legal challenges. Not only do EIAs have to be produced for actual development proposals, but also (under the Strategic

Environmental Assessment Directive) for policies. Many have argued that the EU's 'incremental regulatory creep' in this area is hopelessly misconceived and is threatening our economic recovery: the EU should stick to cross-border activities and not interfere in purely national matters.



# Financial Services



## The gateway to Europe

London's success as a global financial centre is often said to be being dependent on its access to the EU. Access to other EU markets is reported as being a major reason why businesses from countries outside the EU, such as the US and Japan, choose to set up in the UK. Many financial companies headquartered outside the EU choose London as their regional base because they can then establish branches elsewhere in EU and/or provide cross-border services throughout the rest of the EU on a 'passport' basis. London has benefitted from the integration of the EU wholesale financial services sector: Government figures reveal, for example, that 40% of global over-the-counter derivatives trading and 75% of European trades currently take place in London. This mirrors corporates' activities: Japan has said that 1,300 Japanese companies and the 130,000 British jobs they support rely on our continued membership of the EU. Such activity in turn boosts other industries: the UK has the largest legal market in the EU, English law is seen as the international law of commerce and London is the most globally favoured seat of international dispute resolution, for example. Would all this end with a Brexit?



## Different paths?

Are UK interests the same as those of the rest of the EU? Given the pre-eminence of London, are we in the same position as the rest of the EU on financial services? There are many who believe that the current financial crisis is a Eurozone problem and, as a 'Euro-out', the UK needs to keep its distance and reduce its exposure to the Eurozone. The solution to the Eurozone problem, it is argued, it logically a Eurozone solution...but what will that mean for the UK and the EU as a whole?

Banking union is the greatest transfer of sovereignty since the creation of the euro and will inevitably lead to further integration of the Eurozone. Does this mean that the UK will be relegated to a second tier Member State in a new multi-speed EU? How isolated will the UK end up when one considers that it is only the UK and Denmark (and arguably Sweden, which has yet to join the ERM II) that are not ultimately obliged to join the euro? Does the ECB's attempts to prevent clearing houses located outside the Eurozone handling euro-denominated financial products reveal the EU's future direction of travel?



## Is anyone listening?

Does the UK still have a voice in Brussels? Despite the UK saying that it could not support the new capital requirements directive (CRD IV) if it introduced a cap on bankers bonuses and that this was a matter of significant national concern, the rest of the EU voted in favour. The UK's arguments sounded logical. The UK argued that the provisions were not supported by any evidence or impact assessment, that they would merely encourage an increase in basic pay and pointed out that it is not possible to clawback remuneration in the form of basic pay, nor to reduce basic pay if a troubled bank needed to conserve capital. The UK also raised concerns that a cap on bankers' bonuses would make it hard for the EU to remain competitive with the financial centres of New York, Singapore and Hong

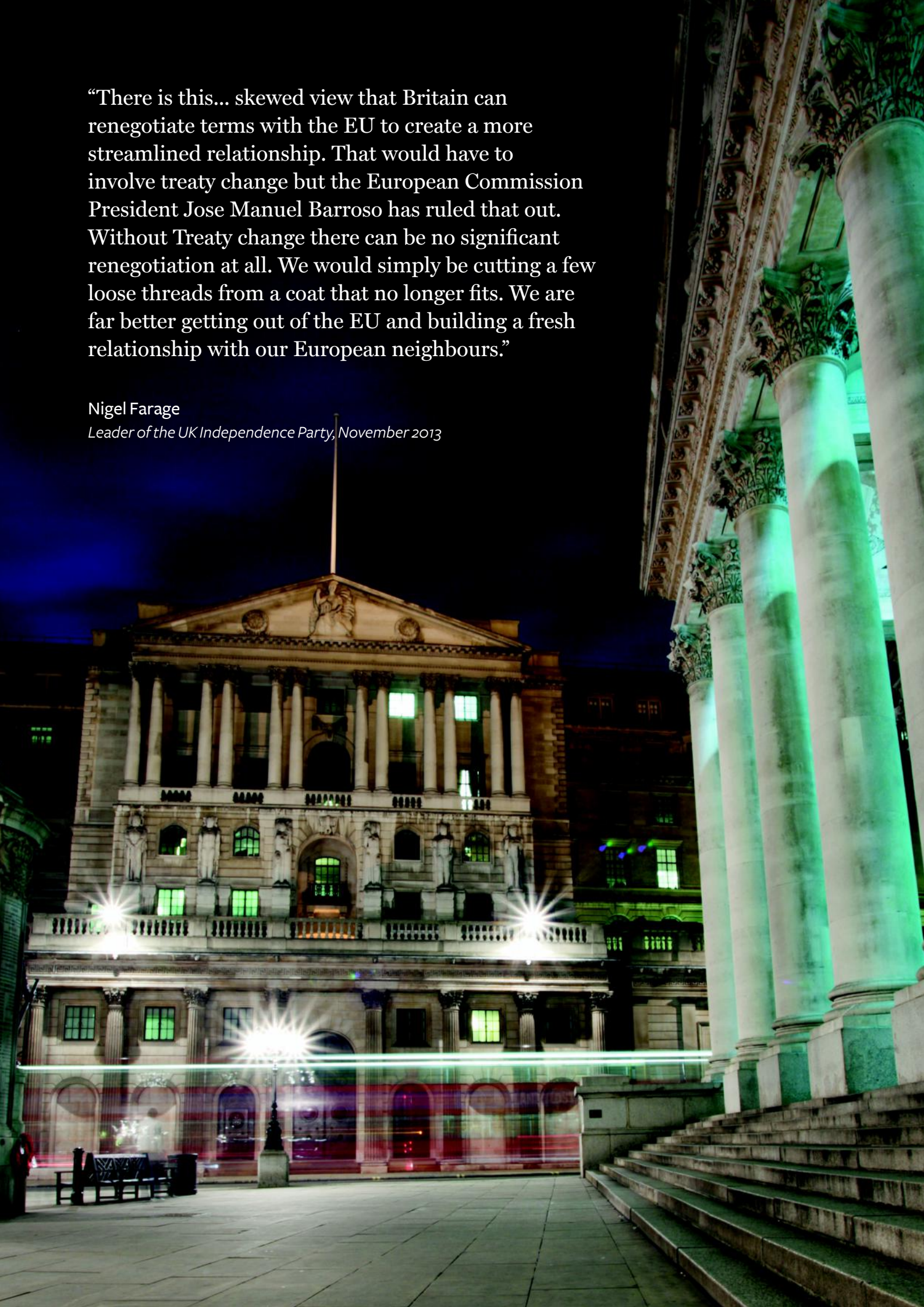
Kong, which have not taken such an approach. But, for the first time on a major financial services dossier, the UK was alone in voting "no" to CRD IV. For some years the UK has shown concern with EU financial services policy and has challenged a number of legislative and policy decisions before the European Court: the ECB's location policy for clearing houses, the short selling regulation, the financial transaction tax and now the cap on bankers' bonuses. Recent legal opinions in the EU have confirmed that the UK's concerns are well-founded but why is the rest of the EU not listening? What does this foretell for attempts to renegotiate the UK's relationship with the EU?



“There is this... skewed view that Britain can renegotiate terms with the EU to create a more streamlined relationship. That would have to involve treaty change but the European Commission President Jose Manuel Barroso has ruled that out. Without Treaty change there can be no significant renegotiation at all. We would simply be cutting a few loose threads from a coat that no longer fits. We are far better getting out of the EU and building a fresh relationship with our European neighbours.”

Nigel Farage

*Leader of the UK Independence Party, November 2013*





# Insurance



## Too much red tape?

In a drive to protect consumers, do EU regulations end up unwittingly tying businesses in too much red tape? Consider the example of the Insurance Mediation Directive – did the EU get the balance wrong or was an excessive burden placed on British businesses because the UK ‘gold-plated’ this directive?



## Solvency II

Solvency II has finally been agreed by the EU but it took over 10 years: in 2004 the Commission envisaged an end date of 2008. Was the Solvency II initiative too big a task and should the EU have pursued a more modest approach such as a Solvency 1.5 or Solvency II lite? The European Parliament has been blamed for part of the delay: did it interfere too much?



## Will we see an increase in cross-border trade?

Are the calls to harmonise insurance contract law across the EU in the same way as the CESL proposal (see Corporate section)

really all about Frankfurt and Paris trying to win a bigger share of the international work which often ends up in London governed by English law? The EU has been mooted for some time the need to harmonise contract law to increase cross-border trade. Who will benefit?

# Intellectual Property



## It's all mine...

Getting the most out of your intellectual property (“IP”) is often an important motivator for many different types of businesses and IP creators. Being able to license IP on terms that don’t undermine it and that maximise return is often a key part of that objective. Likewise, for those that want or sometimes need to use that IP and improve their own business growth potential or perhaps launch a new business idea altogether, getting a licence on fair terms can be just as important. The EU has established detailed rules about how the licensing of IP can and should be handled. Would a British exit from Europe and a retraction from this arguably very exacting framework allow UK licensors to be as one-sided in their licence terms as they would like? Would technology transfer restrictions vanish and troublesome rules like those which stop a licensor insisting on owning all improvements made by a licensee or which stop the use of a licence to carve up a market simply disappear?



## Losing access to the one-stop shop for IP?

An exit would mean that those doing business both in the UK and in the EU would need to spend time and money registering their brands and designs in both places, rather than benefitting from EU-wide IP rights. The big unknown is how this would affect existing rights and even existing litigation.

# Litigation



## Harmonisation, certainty and judicial co-operation

Increasingly almost all disputes involve an international element and the resulting cross-border issues add an additional layer of complexity to litigation. The EU has introduced rules to address this in an attempt to advance the single market and thereby encourage trade. They include rules for:

- determining when the court of a Member State has jurisdiction to hear a dispute;
- facilitating the recognition and enforcement of the judgments of courts of Member States throughout the EU;
- eliminating or reducing parallel proceedings within the EU and thus the risk of conflicting judgments too;
- determining which Member State's laws should be applied in a dispute; and
- increasing the ease with which documents may be served in, and evidence obtained from, other Member States.

By harmonising the way that Member States address such issues and by increasing judicial co-operation in that respect, these rules have undoubtedly been effective - to a degree. Whilst problems have emerged, changes are being implemented to address a number of them.



## Loss of flexibility, discretion and independence - and other concerns

The mechanical application of some of the EU rules comes at a price – specifically, the loss of individual flexibility, discretion and independence. Thus:

- The UK courts have lost much of their discretion on where proceedings should be heard. This is significant as the law of the forum is applied to numerous issues, including rules on procedure and evidence which are not yet harmonised.
- The rules encourage parties to commence court proceedings quickly in order to ensure that their preferred courts are 'first seised'.
- It is not unusual for a dispute to be heard in the courts of a Member State with which it has only a very limited connection.
- Whilst the rules reduce the risk of parallel proceedings within the EU, they may increase the risk of EU/non-EU parallel proceedings where there are significant connections with a non-EU country.
- The EU ideal is based on the premise that the courts of all Member States, and their judicial processes, are equally effective and efficient. However the standard and degree of experience offered currently varies markedly from the courts of one Member State to another. While this remains the case, the premise may be a difficult one for some, including entities based outside the EU, to accept. Ironically, such concerns could thus have the potential to discourage external trade.



## Whose law is it anyway?

There are established EU rules to resolve the question of which law should govern contractual obligations in the event of a conflict of laws, as well which court should hear and which law should apply to cross-border disputes. People doing business in and with the UK benefit from the certainty and efficiency provided by these rules.

EU rules provide for the mutual recognition and enforcement of EU Member States judgments. There are also EU rules which apply throughout the litigation process and which determine, for example, how documents should be served and evidence obtained. Beyond EU borders, the UK has signed up

to an international convention which establishes equivalent rules in some – but not all – of these areas.

So a decision to leave the EU would mean some of these rules which give parties to international contracts the confidence that their choice of governing law and jurisdiction will be respected would no longer be applicable in the UK. This could result in less certainty and greater expenditure on costs as parties spend time disputing which courts should hear their case and which law should be applied: factors that might discourage trade with the UK. But, because the UK has signed up to an international convention having similar effect and so in many cases other equivalents would apply in place of the EU rules, might litigants actually experience little difference?

# Real Estate



## Would foreign capital still want to invest?

Overseas buyers accounted for over 50% of investment into London in 2013 but will the UK's exit from the EU cause this flow of foreign capital to disappear? Or are overseas buyers' decisions to invest in UK real estate motivated, not by membership of the EU, but by other more relevant factors such as the UK's transparent markets, stable environment and rule of law? Is whether the UK stays in or leaves the EU of no relevance or concern to those in the property industry?



## Too high a hurdle for green lettings?

The EU has introduced a number of directives imposing obligations on developers, owners, occupiers, property investors and managing agents to improve the energy efficiency of buildings, including proposals for regular energy audits and influencing UK legislation to make it unlawful to rent property (both residential and commercial) from April 2018 that do not reach a minimum energy efficiency standard. If we remain in the EU, will this increased scrutiny on energy efficiency in buildings help meet the UK government's carbon reduction targets, add value and offer higher rents in the long term? Or will exiting the EU give those in the property industry the opportunity to free themselves from such rules and regulations to allow for greater focus and expenditure on other, more critical business priorities?





# Restructuring, Bankruptcy and Insolvency



## Harmonised approach to EU cross-border insolvency

Council Regulation (EC) No. 1346/2000 on insolvency Proceedings (the “Insolvency Regulation”) improves the efficiency and effectiveness of cross-border insolvency proceedings within the EU. Automatic recognition of proceedings eliminates time and cost which would otherwise be required to seek protection from courts in other Member States in relation to assets located there. The Insolvency Regulation requires cooperation between insolvency office holders in different Member States.

Member States are bound by a single set of rules governing jurisdiction to open proceedings. Further clarity is set to be provided by the proposed changes to the Insolvency Regulation. There is sufficient flexibility to allow for the opening of both main proceedings (where the debtor has its centre of main interests) and subordinate secondary proceedings (where it has an establishment). Without the Insolvency Regulation, at worst there could be multiple competing “main” proceedings in respect of the same debtor in different jurisdictions and at best there could be a race to Court.



## Membership critical to favourable destination status

Membership of the EU is critical to the position of this country as a favourable insolvency and restructuring destination within the EU. The Government’s decision to opt in to negotiations regarding the European Commission’s proposal to amend the Insolvency Regulation is evidence of this. England already has flexibility in relation to the Insolvency Regulation (for instance, in relation to the decision as to the inclusion of schemes of arrangement) to ensure that it works in harmony with domestic law in this area. If the UK were to leave the EU then, given the importance of the Insolvency Regulation to restructuring and insolvency in this country, the Government may in any event opt to enact legislation which mirrors it.









# Tax



## Tax harmonisation?

Managing tax requirements across multiple jurisdictions is a challenge for many businesses and it can be a costly and time-consuming task. A common system of taxation across Europe could provide certainty, accurate apportionment of taxes and reduced compliance burdens – an outcome which would bring significant benefits to business. The Common Consolidated Corporate Tax Base (“CCCTB”) was instigated as a policy by the European Commission in 2001 but is still a work in progress. In practice, the CCCTB would be a form of unitary taxation, with allocations of tax for multinationals being made between Member States but, under the current proposals which are still being discussed, there will not be a common tax rate and so it remains to be seen whether there will be less or more red tape as a result. If the EU can take this forward successfully, staying a member of it could have clear advantages and these would operate in addition to those already resulting from existing EU law which, for example, permits capital (such as interest and royalties) to flow between entities in Member States in certain circumstances without the need to withhold tax and facilitates the cross-border exchange of information about tax and taxpayers.



## Unwanted taxes

The EU is proposing to introduce a Financial Transactions Tax (“FTT”) which would apply to many financial transactions. Although the UK is not one of the Member States that has supported or signed up to the FTT, it will still apply to UK businesses transacting with counterparties in the FTT-zone. could seriously inhibit financial transactions in the UK. There are those who argue that it could even threaten London’s position as a leading financial centre if businesses decide to protest against the tax by shunning the EU altogether. This is one of the topics on which the UK has recently challenged the EU before the EU courts, arguing that the FTT-zone should not be able to apply an extraterritorial tax. As a member of the EU, it has the right to do so. If the UK were not a member of the EU, it would not have the ability to mount such a challenge, but UK businesses would be just as affected by the adoption of such a tax.

“We welcome an outward-looking European Union with Britain in it. We benefit when the EU is unified, speaking with a single voice, and focused on our shared interests around the world and in Europe. We want to see a strong British voice in that European Union. That is in the American interest.”

**Philip Gordon**

*US Assistant Secretary for European Affairs, January 2013*

# Consumers and Individuals

EU legislation has an impact on us as individuals and consumers in almost every aspect of our daily lives. Some of this legislation is seen as burdensome for business and for government but it was often designed to protect consumers and create a level-playing field across the EU. Does EU law always achieve these objectives?

What sort of balance should there be when a regulatory burden is placed on business in order to benefit the individual or consumer? The examples below explore how the benefits and burdens that have been created by the UK's membership of the EU can advantage and disadvantage the individual.



## An end to good bargains?

Would an exit from the EU put an end to cheap Levis or Greek toothpaste? An end to free movement and the principle of exhaustion (not to mention current parallel import bans) would mean that IP rights owners could use their rights to block unauthorised imports and keep prices high. If the UK exited the EU, would or could the UK seek to negotiate a free trade agreement with the EU to preserve this position?



## Saving our contract law?

Brussels favours a greater degree of harmonisation in European contract law. The example of the draft Common European Sales Law ("CESL") (see Corporate section) could have positive benefits for consumers. It proposes an optional contract law regime for consumers and businesses within the EU in addition to national regimes. Will the CESL make cross-border trade easier than it is currently by facilitating the sourcing of goods and services from further afield, resulting in more choice and more competitive propositions?



## The benefits and burdens of labour regulation

The excessive volume and prescriptive nature of employment regulations coming from Brussels places a significant burden on businesses, particularly smaller businesses, and it increases labour costs. For employees, however, it can mean the difference between being able to insist on the same rights as a fellow worker or having to accept a less favourable working situation. And these rules offer increased protection in the event of mergers and acquisitions, where employees are often one of the first casualties in costs-cutting and efficiencies planning. But has the regulation gone too far? If businesses increasingly resent it and if new laws still being imposed increase business cost whilst not making a meaningful difference to employees or employers, do we run the risk that business will exit the UK to set up in a country where workers' rights are less burdensome? If so, job prospects will reduce altogether.



## Planning

Many have argued that the EU's 'incremental regulatory creep' in this area is hopelessly misconceived and is threatening our economic recovery: the EU should stick to cross-border activities and not interfere in purely national matters. On the other hand, there is an important silver lining – especially for individuals and the communities in which we live: at least the EIA Directive puts a break on those politicians eager to concrete over our green and pleasant land. Does the Directive really pose a threat to democracy or accountability? The decision on any development proposal will always be in the hands of locally elected representatives: the rules simply ensure that developers cannot ignore the impact on the environment. Arguably, that benefits us all.



### **Hands off our jobs/ benefits/NHS...**

Every citizen of the EU has the right to move, reside and work freely within the territory of all Member States of the EU. In 2014, restrictions on the movements of Bulgarians and Romanians, adopted by the UK and eight other Member States when Bulgaria and Romania acceded to the EU in 2007, will be lifted. The restrictions on Croatians will remain in force until 2020. MigrationWatch UK recently claimed that 50,000 immigrants could arrive in the UK from Bulgaria and Romania in the five years after 2013 and so there has been much debate in the UK about the impact. The British Government has announced it is looking at the rules governing social security claims and access to the NHS as a consequence of this and future EU enlargements. But what can the Government do when the EU promotes free movement and prohibits discrimination based on nationality? Does it make a difference if those immigrants are doctors, nurses, entrepreneurs, plumbers, electricians or builders, for example, as opposed to the unemployed, unqualified or those otherwise without means to support themselves? Is such immigration only fair given the amount of British people living and working in or retiring to France, Spain and Italy, for example? A recent survey for Channel 5 revealed that 47% of British people believe that Bulgarians and Romanians have no right to live, work or claim benefits in the UK...but that is not what EU law says.



### **Too expensive, no choice, awful junk! Is that what we want to risk?**

Business might not like the red tape and the countless restrictions that EU competition laws arguably impose on businesses (EU-based or from elsewhere) selling goods or services in the UK but EU competition law is designed to protect consumers from being unfairly exploited by business. If we didn't have harmonised trading rules across the EU, many argue that it could be far harder for UK consumers (and businesses) to protest about cartel activity happening elsewhere within the EU but which affects conditions of trading within the UK and which leads, for example, to consumers paying higher prices, getting less choice of goods (because markets and/or customer groupings have been carved up between competitors) or being faced with lower quality propositions. Ensuring that the single market stays dynamic and that artificial protections are not tolerated in any EU Member State means that businesses from all over the EU have access to each other's markets and can properly compete with each other for share of consumer footfall: that means they stay focused on offering us the best prices and quality propositions to persuade us to pick them and not one of their peers. It also means newcomers to existing markets and innovators introducing entirely new markets have the best chance to establish themselves and improve the consumer experience even further.



### **VAT – unavoidable whether we stay or go?**

Opinions on VAT are consistently divided – not least because none of us like having to pay it. To the extent that we accept having to have it at all, shouldn't it be a simple concept of taxing consumers on an end product or service rather than an-EU-wide tax on consumption of goods and services which has generated (and continues to generate) a huge amount of complex domestic and EU law, case law and guidance, making the burden of compliance potentially very difficult and expensive, particularly for those setting up business in the EU from elsewhere in the world? In the UK, VAT is the Government's third largest revenue-raiser (after income tax and NICs). So whether we stay or we go out of the EU, the chances are that whichever government has power, we would end up with something similar.



# Where do we go from here?

At a time when the EU is facing considerable challenges, discussions on the UK's place within it are intensifying and we believe that it is important that everyone affected by the debate has the opportunity to access relevant information and to have their say. There is a range of crucial questions that need to be considered if our relationship with the EU is to be renegotiated, not least of which are what changes could or should be made and how can they be effected. An exit from the EU would affect every aspect of your business, from employment laws to building standards, and tax planning to financial supervision. It would affect us all as individuals and as consumers.

And if we left the EU, what would happen then? Could we, or would we want to, adopt a Norwegian or Swiss model and find ourselves bound by – and paying for – EU legislation but without a seat at the negotiating table? What would happen to our existing body of law, much of which is founded upon European legislation? Is the grass greener in a world outside the EU or should we better focus time, money and effort on improving the status quo?

The UK's Balance of Competences review is the most extensive analysis of the impact of EU membership on the UK ever undertaken. It is likely that the results of this review will help to shape the UK's future in Europe as will, most certainly, the result of any referendum held in the near future.

Mayer Brown International LLP invites you to join the debate on the UK's relationship with the EU, to find out more about the many different and divergent views, facts and challenges and importantly, to have your say. In one form or another, one thing is certain: change is going to happen. Don't miss the opportunity to help shape the form it takes.



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