What could Brexit mean for M&A?

The only certainty following the Brexit vote on 23 June is the lack of certainty. We have already started to see the impact of this reflected in the M&A market. Activity value in the U.K. dropped 51% percent on-quarter in the April - June period to $19.3 billion from $38.9 billion, reflecting lower worldwide M&A levels and appetite, but also as a result of the vote. As it currently stands, companies are postponing deals while they take stock and consider their next move, but there are questions about the impact of Brexit on M&A activity in the longer-term.

For now, from a legal position, nothing has changed. The UK remains a full member of the EU and the status quo is likely to be in place for some time yet. M&A may be impacted in terms of valuations and transactions being re-valued and overseas companies seeking to establish a European presence may consider other jurisdictions in which to base their hub.

Until a decision is made on the Brexit model, we will not know the extent to which existing law can and will need to be replaced or amended. For those undertaking M&A activity, the following areas should be kept in mind:

- The structure and execution of UK private M&A transactions ought not to be materially impacted as EU-derived legislation plays little part in the laws governing such transactions.
- For public company acquisitions there are unlikely to be substantial changes to the UK Takeover Code. The Code is a universally accepted and respected regime which pre-dates the EU Takeover Directive and influenced the approach taken in the Directive.
- The nature of intellectual property rights will be affected along with the ability to enforce them. National rights will remain unaffected, but Community Trade Marks and Community Design Rights may cease to apply to the UK.
The UK data protection laws are derived from the EU regime. If the UK Government elects to stay out of the EEA it has the option to amend the current legislation. However, the UK will want to ensure that it has a regime which is regarded as acceptable by the remaining EU countries.

The impact of certain EU-derived employment regulations on labour relations, for example the Working Time Regulations, may be affected over time if the UK adopts a more laissez faire approach to the employment relationship.

Much of the uncertainty and ambiguity regarding the impact of Brexit on domestic law will be resolved when the exact nature of the UK’s future relationship with the EU is known. It should be remembered though that each of the most commonly discussed models for the UK’s post-Brexit relationship with the EU could have some effect on M&A:

- ‘Norwegian model’ – the UK leaves the EU and joins the European Economic Area (EEA) and European Free Trade Association (EFTA), accepting the principles of free movement of goods, services, capital and people in exchange for single market access. This is possibly the lightest touch in terms of change and so the impact will be minimal. For example, the EU Takeover Directive and the EU Merger Regulations, which provide a single competition clearance process across the EU, will both continue to apply.

- ‘Swiss model’ – the UK leaves the EU and joins EFTA, but not the EEA. Consequently the UK Government would need to negotiate a series of bilateral agreements with the EU to secure access to the single market. The UK will have greater flexibility to change its laws and move away from the EU regulations. As such, this model presents greater uncertainty and so companies contemplating or engaged in M&A activity will need to be nimble to react to the changing regulatory framework around M&A and also those areas of law which impact on the running of UK businesses, such as tax, employment, intellectual property and data protection.

- Total exit from the EU and the single market – the UK would either rely on the rules of the World Trade Organisation to continue trading with the EU, or would seek to negotiate a new free trade agreement. The issues facing the UK M&A market in a total exit scenario are very similar to that under a Swiss model and acquisitive companies must be vigilant to the changes that would follow.

In determining the way forward, the UK Government will of course consider the likely impact on the UK market. If the UK leaves the EU and does not join the EEA the temptation to cut red tape must be weighed against the potential impacts on UK businesses trading or operating in the EU.

For now, it is a “wait and see” situation as the next steps are very much out of the hands of those at the coal-face of the M&A market. We are assured the Conservative Party is working hard to expedite the leadership election process and restore some direction for the country. We would also assume that the UK Government will not wish to make the UK unattractive for businesses to operate and to trade with the EU, and therefore maintain the UK’s strong position as an investible jurisdiction.

*Sam Pearse is a partner in Pillsbury Law’s Corporate & Securities practice and can be contacted on +44 (0)20 7847 9597 or at samuel.pearse@pillsburylaw.com*