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Brexit Industry Insights

Technology

September 2019

With the UK's default to leave the EU without a deal, the technology sector is vulnerable to disruption. The sector is faced with simultaneously navigating the impact of new technological developments whilst mitigating the impacts of Brexit – including data flow continuity, intellectual property protection, access to talent and access to the digital single market. The winners will be those in the sector prepared for change and alive to the opportunities.

Brexit and the Technology Sector

The technology sector in the UK is diverse, covering a range of industries from scientists and programmers developing new forms of artificial intelligence through to the designers creating the latest video games. As a whole, the sector is increasing in importance to the UK economy, growing 2.6 times faster than the rest of the economy between 2016 and 2017 – to be worth over £180 billion in 2018[2]. The industry is also becoming increasingly important to employment in the UK: between 2011 and 2018 there was a 16.5% increase in the number employed in the digital sector alone[3].

While also facing the potential disruption caused by Brexit, the industry is undergoing fast-paced changes and disruption as new technologies are developed. Regulatory and tax frameworks are being adjusted to address these changes. The UK government has recently published a White Paper on how to regulate in the face of technological breakthroughs and stimulate innovation[4]. In addition, the UK government is pressing ahead with a Digital Services Tax from 1 April 2020, a tax chargeable at 2% on revenues of businesses that provide a social media platform, search engine or online marketplace to UK-based users. The impact of Brexit will vary for different players in the industry depending on market focus and the technology products and services provided.

What does this mean for business?

Some of the key implications for businesses operating in the sector:

Data Flows

The technology sector relies on the flow of information to deliver their services, some of which can fall under the category of personal data; personal data flows are regulated by the EU. The European Commission (EC) has the power to determine whether a country outside of

1. https://www.gov.uk/government/publications/geo-blocking-of-online-content-if-theres-no-brexit-deal/geo-blocking-of-online-content-if-theres-no-brexit-deal
2. Tech Nation 2018 report: https://technation.io/insights/report-2018/
3. DCMS Sector Economic Estimates 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811903/DCMS_Sectors_Economic_Estimates_2018_Employment_report.pdf
4. https://www.gov.uk/government/publications/regulation-for-the-fourth-industrial-revolution/regulation-for-the-fourth-industrial-revolution

the EU offers an adequate level of data protection and assesses this either through its domestic legislation or international commitments into which it has entered.

The EC will provide an adequacy decision it deems the non-EU country to have local data protection laws of the same or similar standard as the EU. The process of adoption of an adequacy decision involves a number of steps and can be a lengthy process. The EC is not expected to start this process in respect of the UK until after the UK leaves the EU.

The UK's Information Commissioner's Office (ICO) has indicated for a time-limited period in a no-deal scenario it will recognise EEA states as providing an adequate level of protection for personal data. However, this statement has not been matched by the EU. For business the critical data flows to assess are those personal data flows originating from the EEA. Unless the UK and the EU enter into a separate legal agreement, businesses will need to ensure appropriate legal safeguards (e.g. standard contractual clauses and for intra-group transfers, binding corporate rules) are in place to facilitate cross-border flows of personal data.

Consideration will also need to be given to the arrangements the UK has in place with third countries. The UK will also preserve the effect of existing EU adequacy decisions with third countries for a transitional period. A number of these countries have also indicated they will continue to allow data to flow to the UK. Modified arrangements will apply in relation to the EU/US Privacy Shield for UK/US personal data flows.

People

Free movement of workers will end once the UK exits the EU. Existing EU workers will be required to apply using the EU Settlement Scheme while new entrants will likely need a work permit to work and reside in the UK. The picture is mixed in the EU with not all EU member states having to date introduced legislation to safeguard existing UK nationals and to facilitate newcomers.

The demand for tech skills means it is becoming increasingly difficult to recruit – a recent report by TheCityUK[5] states companies are struggling to fill roles in coding, cloud computing, machine learning, software development, cyber, artificial intelligence and blockchain and ultimately fintech and other financial services firms must work harder to secure the skills they need.

Tech firms will need to, primarily, understand where their skills shortages are and map these against what the UK government currently recognises as skills in short supply and the regulated qualifications framework that currently exists. Under a new immigration system, acquiring these skills will become markedly more difficult so firms need to be able to identify now where the skills risk lies, introduce measures to mitigate this risk in both retention and recruitment strategies, and even lobby the UK government on the risks to a firm's ability to operate without these critical skills.

Employers will need to ensure they are consistently engaging with and encouraging their existing workforce to certify their residency status while also reviewing recruitment strategy for critical roles.

In focus: Access to the Digital Single Market (DSM)

Leaving the Single Market would also mean leaving the Digital Single Market (DSM). The DSM was set up in 2015 to remove regulatory barriers and move 28 national digital markets to one single DSM. It includes regulation on geo-blocking, data portability, VAT for cross border e-commerce, copyright directive reforms, the free flow of data initiative and e-privacy regulation.

In the case of geo-blocking, the UK intends to repeal the Geo-Blocking Regulation which will allow traders from the UK, EU and third countries to discriminate between EU customers and UK customers. Conversely, UK companies wishing to continue operating in the EU must continue to treat all EU27 customers in the same way.

As the DSM develops, business should be alert and mitigate potential post Brexit divergence in regulation as well as assess growth opportunities in markets outside of Europe, including the US and Asia.

5. https://www.thecityuk.com/research/fuelling-fintech-attracting-the-uks-future-tech-talent-into-financial-services/
6. https://www.eif.org/news_centre/publications/EIF_annual_report_2018.htm

Intellectual Property

The most commonly owned type of IP, copyright, will remain largely unaffected by Brexit, aside from specific cross-border exceptions, e.g. the country-of-origin copyright clearance specific to broadcasters. However, EU trade marks (EUTMs), Registered Community Designs (RCDs) and (unregistered) Community design rights will be impacted and need to be ported across to become UK specific. Under a no-deal Brexit, businesses with EUTMs and RCDs pending on exit day will need to actively re-file for UK rights.

At present the questions remain over the UK's future participation in a system for the registration of a unitary patent (UP) covering multiple EU countries. If the Unitary Patent Court (UPC) does come into place before exit day, business will need to stay alert to government notices and potential transitional provisions.

EU Investment

The European Investment Bank has already reduced deals with UK venture capitalists and private equity groups by more than two-thirds since the UK's EU Referendum, with no equivalent funding from the UK government yet in place. According to the European Investment Fund annual report, funding from the EU's investment arm fell 91 per cent year-on-year, with UK-focused funds attracting just €61 million (£53 million). The fund backed just three UK-focused investors in 2017, compared to 20 in 2016[6].

In the research and innovation space, the UK government has announced UK organisations that currently benefit from EU funding through the Horizon 2020 initiative will continue to have the funds covered for the successful bids prior to the UK leaving the EU,[7]. Regarding future bids, some (but not all) possibilities will be open to UK organisations as Third Country bids.

Supply Chain

Whilst tech companies are typically supplying services rather than goods, there are a number of supply chain risks companies in the sector need to consider in respect of the equipment and infrastructure they use. Where a business has a central procurement or delivery centre, these issues may be more business critical. For example:

- Visibility of suppliers: tech companies need to understand the Brexit readiness of their critical suppliers.
- Border delays: friction at the border could lead to longer delivery times for equipment and spare parts.
- Tariffs on goods used in the sector are relatively low under the World Trade Organisation's Information Technology Agreement and its expansion but not all components or upstream machinery fall under this agreement.

What can businesses to do prepare?

- Continue to monitor key sources of information including:

  - Government advice from the UK government (Department for Business, Energy and Industrial Strategy, the Department for Exiting the European Union, and the Department for Culture, Media and Sport), the EU, and other countries in which your business operates in.

  - Trade associations and industry bodies, including Tech UK.

- Continue to engage with and encourage your existing workforce to certify their residency status while also reviewing recruitment strategy for critical roles. Concurrently, monitor information from countries in which you operate to ensure you understand local visa and work permit requirements.

- **Determine which of your employees will be regularly travelling into the EU to provide services.** This should be an essential part of your people Brexit planning around settled status and other immigration elements.

- Make sure you know how to complete and submit the necessary customs declaration procedures and forms for imports and exports. Register for an Economic Operators Registration and Identification (EORI) number and assess International Commercial Terms (INCOTERMS) for who bears the impact of losing beneficial trade terms.

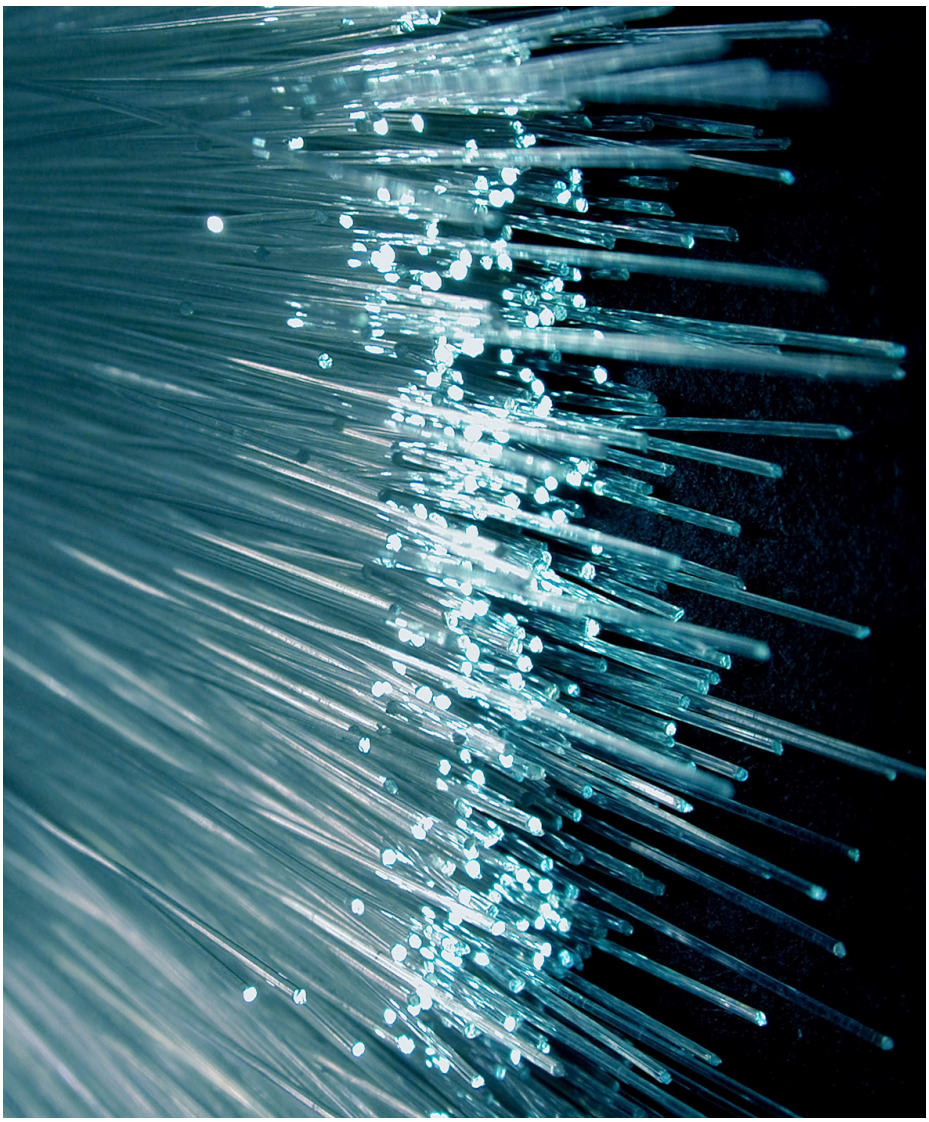
- Undertake **a regulatory review** to understand what changes to the standards or regulatory regime could mean for your products and services where they are delivered, produced and sold. In particular with regards to the transfer of personal data and the GDPR.

7. https://www.gov.uk/government/publications/horizon-2020-funding-if-theres-no-brexit-deal/horizon-2020-funding-if-theres-no-brexit-deal--2

• Export controls may apply to some items which can be used for both civil and military purposes. Licences will be required for exports from the UK to the EU and vice versa, and an export licence issued by one of the 27 EU countries will no longer be valid for export from the UK.

Commercial Contracts

Contracts may need updating to manage some of the potential risks arising from Brexit or in response to Brexit-related restructuring. Areas of focus include: reviewing risk allocation between parties such as which counterparty bears the risk of border delays and tariff costs; definitions of key terms; changes to pricing structure or frequency of pricing reviews and changes to payment terms and contract enforcement.



• **Conduct a trade continuity and market access review** to understand your exposure into the EU and through the rolling over of the EU's existing trade agreements
for the UK.

• If you export dual-use items from the UK to the EU, **analyse the new European dual-use licence processes requirements and apply for new licences.**

• **Manage all key stakeholders to understand commitments and expectations.** Engage with audit committees and liaise with trade bodies and regulators on preparations.

• **Develop a strategy for government engagement** on the issues that matter most to the business in order to influence future policy.

• **Intellectual Property:**

- **Review re-filing requirements** with the UK Intellectual Property Office for pending IP applications. Establish a process for parallel registrations going forward including pending applications.

- **Consider** usage, cost and need for duplicate filings of EUTMs and UK trade marks. Decide which European patents and patent applications should be opted out from the jurisdiction of the UPC if it comes into effect before exit day.

- **Ensure** that your legal representatives will remain entitled to appear before the EU Intellectual Property Office after Brexit.

- **Review** the territory provided for in licence agreements and future assignments of rights; any references to the EEA and the EU will need to be considered.

- **Data Flows:**

- **Review what personal data you hold**, who you share data with, and whether you are sharing personal data cross-border (and in particular, personal data of EEA nationals to the UK) including with any third party service providers.
- **Ensure appropriate legal safeguards** and mechanisms to allow personal data transfers to continue to flow from the EEA to the UK are in place.
- **Ramp up any review** of existing third party contracts to assess if impacted by prohibitions on data transfers outside the EU.
- Where the ICO is your lead supervisory authority **consider** whether an alternative EU lead supervisory authority can be identified.
- **Review** whether updates to Privacy Shield certification and related privacy notices are required.

How can Deloitte help?

Deloitte has been supporting multiple businesses across a range of industries to understand the implications of, and prepare for, the UK's withdrawal from the EU. We have supported many clients with their Brexit planning. Our teams combine Brexit insights, industry knowledge and technical expertise to support our clients with their Brexit readiness planning – from risk assessment to applying the lessons learned to optimise for the future trading environment.

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Further reading

Official no-deal guidance for automotive

UK No-deal Technical Note:

Meeting business regulations

Personal data and consumer rights

Using personal data in your business or organisation if there's no Brexit deal

Consumer rights and business: changes after Brexit

UK Business Preparation Tool:

Prepare your business or organisation for Brexit

European Commission Brexit Preparedness:

Communications Networks, Content and Technology

Information Commissioner's Office

Data protection and Brexi

Leaving the EU - six steps to take

Industry Associations and Regulators

TechUK - Brexit Hub

This no-deal guidance is not exhaustive. Companies should routinely review the latest official updates and technical guidance as and when they are published by the UK, EU, and individual EU member states.

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