Leman
SOLICITORS

SPECIAL REPORT

APRIL 2019

INTRODUCTION

Brexit is scheduled to occur by 31 October 2019.

Brexit will have a significant impact on Ireland. On 10 April 2019, the European Union and the UK agreed an extension of Article 50 notice period until that date, with the proviso that the date for Brexit can be accelerated if the UK ratifies the draft withdrawal agreement earlier than that. If the withdrawal agreement is ratified, a further transitionary period will apply up until the end of 2020 during which the UK will remain subject to full EU regulation.

Due to the political situation, a considerable amount of uncertainty exists as to the final outcome. There are some possibilities however that can be discerned from the recent pronouncements from both parties to the negotiations.

The UK Government has outlined three redline outcomes,

1. The UK leaving the single market;
2. The UK leaving the custom union;
3. The ending of the jurisdiction of the European Court of Justice in UK law;
4. The end of recognition of UK; and professional qualifications and licenses across the EEA.

If it sticks to these points then it is clear that the UK will not be able to avail of a 'Norway' model with regard to the movement of goods and services between the UK and the EEA, and therefore a bespoke free trade agreement will be required (or in the absence of such an agreement being reached, a fall back to World Trade Organisation rules). We expect that this could result in some or all of the following outcomes:

- possible raising of tariffs on goods exported from the EEA to the UK and vice versa;
- customs border check requirements between the EEA and UK (possibly technology aided);
- separate regulatory regimes applying in the UK and the EEA in a number of areas (even if similar or equivalent standards are maintained);
- the end of financial services passporting rights between the UK and the EEA;
- restrictions on the free movement of workers between the UK and the EEA. In an Irish context, a number of businesses could be impacted by Brexit, including:
  - Irish businesses who export goods or services to the UK, or who operate businesses or from the UK/Ireland;
  - UK businesses who operate businesses in Ireland or who are considering using Ireland as their EEA base following Brexit; and
  - businesses from outside the EEA and the UK who currently use the UK as their EEA base and are considering establishing in Ireland.
- any businesses who rely on a UK base to serve the EEA needs to consider a new base in the EU27 from which to serve the EEA (e.g. Ireland).

All such businesses should start planning for Brexit now, if they have not already done so.

BREXIT AND FDI

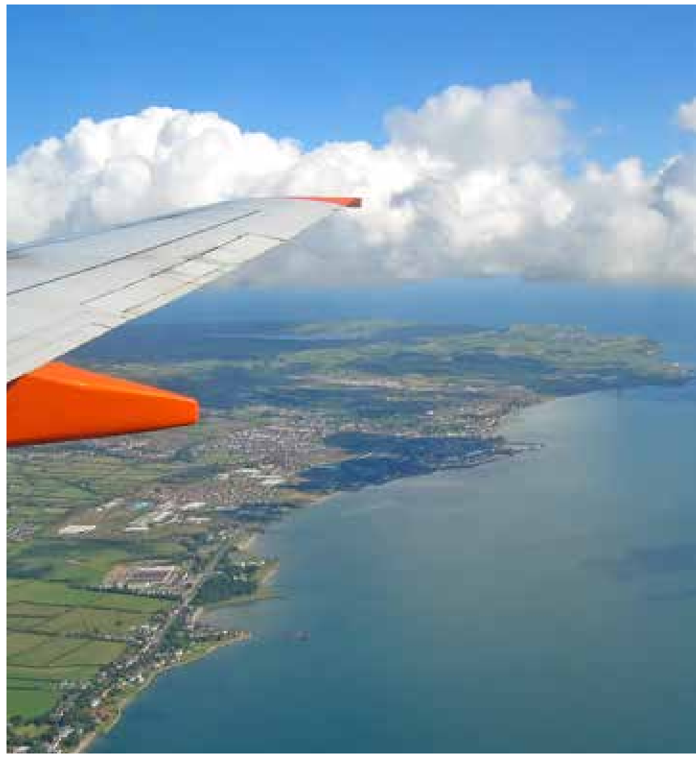
Why Ireland?

Following Brexit Ireland will be the leading English-speaking jurisdiction in the EEA. It also operates a common law legal system which will be familiar to those businesses used to dealing with English law. It is also a natural geographical gateway to Europe from the United States and Canada.

Ireland is consistently identified as one of the top three locations for U.S. foreign direct investment (FDI) in annual reports commissioned by the American Chamber of Commerce.

The Irish economy is enjoying a period of renewed growth and Ireland is already home to:

- The world's top 10 pharmaceutical companies;[1]
- 7 of the world's top 10 global software companies;[2]
- 14 of the world's top 15 medical technology companies;[3]
- Over 75 percent of the world's top financial services companies;[4]
- Management of 65 percent of the world's fleet of leased aircraft;[5] and
- Fourteen of the world's top 15 aircraft lessors are based in Ireland[6]



[1] https://www.idaireland.com/invest-in-ireland > accessed 16 April 2019

[2] https://www.idaireland.com/invest-in-ireland> accessed 16 April 2019

[3] https://www.idaireland.com/invest-in-ireland > accessed 16 April 2019

[4] https://www.idaireland.com/invest-in-ireland > accessed 16 April 2019

[5] https://www.idaireland.com/doing-business-here/industry-sectors/financial-services > accessed 16 April 2019

[6] https://www.idaireland.com/doing-business-here/industry-sectors/financial-services > accessed 16 April 2019

Leman SOLICITORS

So, what makes Ireland so attractive?

1. **European Market Access:** Pending the UK's departure, Ireland will be the only English-speaking, common law, EEA member state, giving it access to a market of over 500 million consumers and reducing the exchange rate within the Eurozone;

2. **Track record:** Ireland has strong and long-standing trade links to the U.K. and the U.S., in addition to recent developments with China and Canada;

3. **Corporate Tax Rates:** This has been a core component of the favourable enterprise environment in Ireland for over three decades. The Irish tax regime is open and transparent and complies fully with OECD guidelines and EEA competition law.

   Ireland's 12.5% corporate tax rate on trading income is one of the lowest onshore statutory corporate tax rates in Western Europe. In addition, Ireland has signed comprehensive Double Taxation Agreements with 73 countries, of which 72 are in effect. The Knowledge Development Box, which took effect on the 1st January 2016, is one of a suite of measures designed to incentivize companies to develop innovative technology in Ireland. It provides for a 6.25% corporate tax rate for income generated from commercializing certain intellectual property.

4. **Holding company regime:** Ireland offers an attractive regime for holding companies locating here, and for their shareholders. Many leading global companies, and private equity/wealth funds, have chosen to relocate their headquarters to Ireland. Holding company drivers include:
   (i) exemptions for Irish tax resident holding companies from Irish tax on capital gains realized on disposals of qualifying subsidiaries; and on dividends received from other Irish-resident companies;
   (ii) favourable treatment of foreign dividend income;
   (iii) generous exemptions from Irish withholding tax on dividends and interest payments made to non-Irish residents;
   (iv) no thin capitalization rules, which allows an Irish holding company to be debt financed;
   (v) no "controlled foreign company", or "sub part F" rules, so the profits of a foreign subsidiary of an Irish holding company are not taxed in Ireland unless they are repatriated to Ireland; and
   (vi) generous reliefs for costs of acquiring IP and other intangibles.

5. **Skilled labour force:** Ireland has a skilled, multi-disciplined and English-speaking workforce.

6. **Ease of doing business:** A company can be incorporated within five business days. Business tax registration can be arranged by submitting one form to the revenue commissioner, and there are many different financing options available.

7. **Stability:** Ireland has a strong legal regulatory framework that supports business. Ireland is a common law jurisdiction. Its legal concepts will be recognised and understood by most foreign investors, including UK and U.S. multinationals (as well as Canadian, Australian and other Commonwealth countries). Ireland's court system is efficient and pro-business. The Irish Commercial Court, a specialist division of the High Court, deals quickly with commercial disputes over €1 million and disputes involving intellectual property.

8. **Investment incentives:** The Industrial Development Authority Ireland ("the IDA") is the Irish government agency responsible for stimulating, supporting and developing export-led business and enterprise in Ireland. The IDA offers various incentives to international companies choosing Ireland as their European base. To date it has partnered with over 1,800 entities in establishing and expanding their Irish presence. Some of these incentives include:
   (i) exemptions for certain start-up companies from tax in each of their first three years;
   (ii) R&D tax credits;
   (iii) 100% allowance on capital expenditure incurred on scientific research; and
   (iv) The Special Assignee Relief Programme (SARP) which offers a reduction in income tax to qualifying employees who relocate to Ireland.

So, 2017 marked a third year of successful and continued FDI in Ireland. IDA client employment reach its peak at almost 210,000.[7] And the IDA continues to operate under the lofty targets under it's 2015 – 2019 strategy including the creation of 80,000 new jobs, 900 investments, and €3 billion R&D investments. There has never been a better time to invest in Ireland.[8]

[7] https://www.idaireland.com/newsroom/end-year-results-2017 > accessed 16 April 2019

[8] http://www.idaireland.com/about-ida/winning-fdi/ > accessed 16 April 2019

FDI & Real Estate

The real estate laws of England (and Wales) and Ireland are very similar, indeed much of Irish property law finds its historic origins in English common law and statute law prior to 1922. Even now, English case law remains persuasive in Ireland. The parallels between the two legal systems enables UK businesses to acquire real estate in Ireland with ease as the processes and documentation are similar.

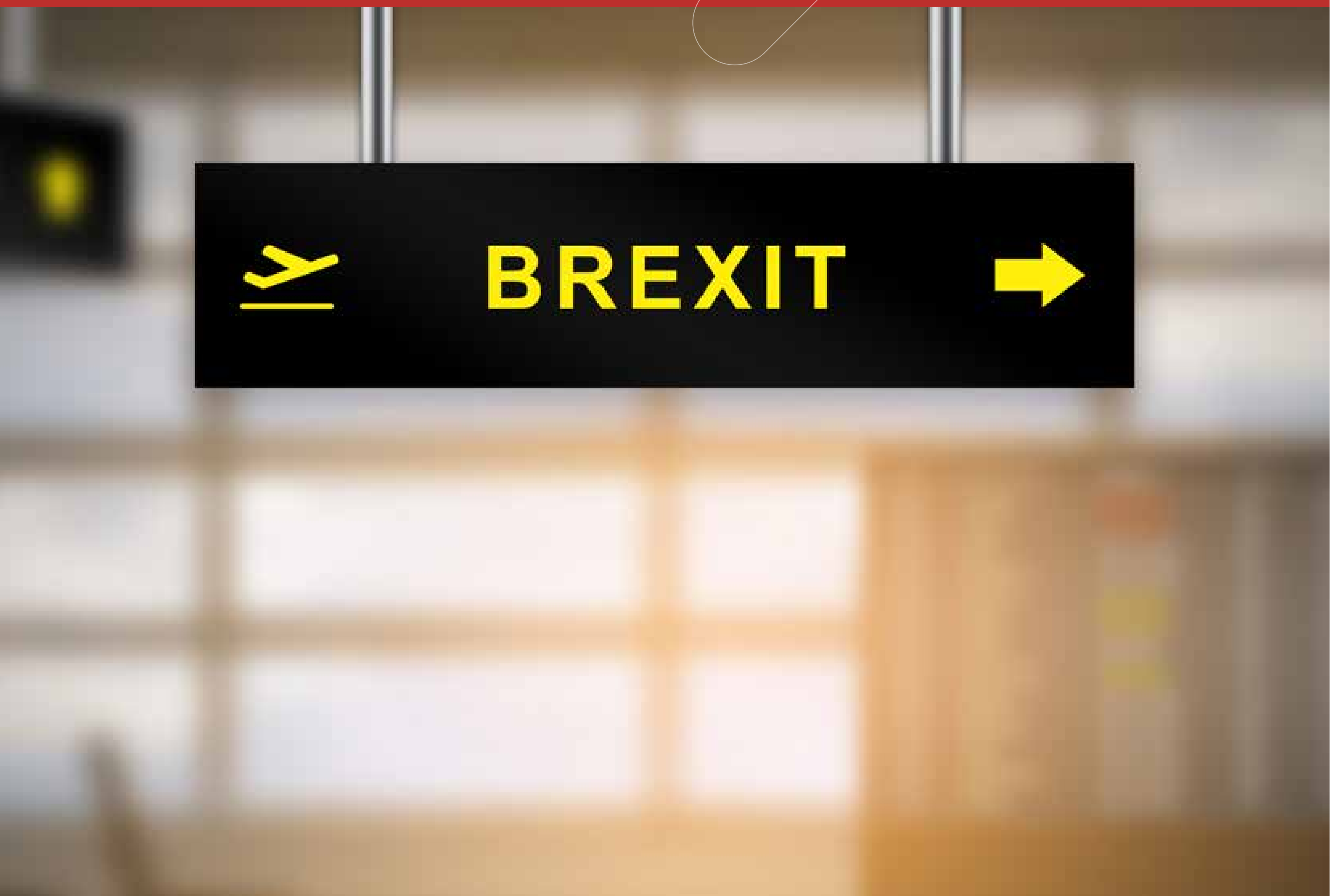
For **commercial leasehold transactions,** there are a few noteworthy differences which should be considered including;

1. **Rent review** – here in Ireland, upward only rent reviews are now prohibited. Businesses however need to be aware, if they take an assignment of an "old" lease i.e. one dated before 27 February 2010, they will inherit rent reviews which are still upward only;
2. **Security of tenure** – Irish business tenants only acquire statutory rights of renewal after 5 years of occupation. Like England, this right can be waived;
3. **Registration of leases** – only leases of 21 years are registrable in Ireland's Land Registry. This means there is less transparency in the market of the lease terms negotiated and unlike the English registry this is not an open register;
4. **Taxes** – stamp duty is 1% calculated on the annual rent, not on the sum of rent plus VAT. In both counties the VAT election processes are similar but in Ireland the landlord can disapply a vat election during the term; and
5. **Alienation** – here in Ireland, on an assignment with landlord's consent, the tenant is automatically released from all liability. However, it is common for landlords to seek guarantee arrangements as a condition of assignment. In England the assignee is automatically on the hook with authorised guarantee agreements.

For **freehold purchases** the conveyancing system in Ireland mirrors the English system however some notable differences should be considered including;

1. **Title investigation** – in England more searches of utility and local authorities are available which is helpful when acquiring land for development;
2. **Requisitions** – in England, these are raised and answered earlier, before contracts are exchanged, and therefore simultaneous exchange and completions are common;
3. **Tax** – stamp duty in ireland is 6% on the purchase price (excluding VAT);
4. **Registration** – particularly in urban areas large amounts of land in Ireland remains unregistered. Since June 2011 all transactions are compulsorily registrable at the Land Registry. In Ireland title is recorded in two registers. Unregistered land remains recorded in the registry of deeds. The registered land systems are very similar though in England access to documents are more freely available; and
5. **Seals** – when buying with an Irish registered company, all deeds are still executed under the company seal in the presence of two directors.

BREXIT AND CROSS BORDER BUSINESS



The fact that UK professional qualifications and licences will no longer be recognised across the EEA and the fact that trade deals with third countries don't usually cover services, some commercial services contracts may no longer be lawful or otherwise enforceable. There are currently no technical notices from the UK government on how to prepare to trade in services with EU after Brexit[9].

There are a number of legal issues arising out Brexit for parties conducting cross-border trade between Ireland and the UK to consider. Relevant areas include the following:

Commercial Contracts

Brexit may result in cross-border commercial trading arrangements being significantly impacted, for example, if additional tariffs or customs arrangements are imposed on goods being imported from or exported to the UK which make the arrangements uneconomic, or if Brexit results in a change of regulatory regime applicable to the arrangements.

Commercial contracts (both existing agreements and those negotiated between now and Brexit, particularly with UK suppliers and customers) should be reviewed for certain Brexit-related risks:

- **Force Majeure, termination rights –** review the Force Majeure clause (the one that talks about war, flooding and acts of God) to see if it is broad enough to potentially include Brexit. Broad Force Majeure clauses with language like "any event beyond a party's reasonable control" may allow a party to stop performing under the contract after Brexit in certain circumstances.
- For new contracts being negotiated, consider including clauses explaining how the parties' arrangement will change if a certain type of Brexit occurs, i.e. the UK leaves the EEA single market and/or customs union without a free trade agreement that covers the goods or services in the contract. In some cases you may simply want the right to terminate the contract in the event of a Brexit scenario which results in additional tariffs or regulatory requirements being imposed.

[9] https://www.gov.uk/government/publications/trading-with-the-eu-if-theres-no-brexit-deal/trading-with-the-eu-if-theres-no-brexit-deal#what-businesses-trading-with-the-eu-need-to-know

- **Taxes clause -** Review the taxes clause of your contracts. In the event the UK leaves the EEA customs union and/or the single market, new tariffs and VAT charges may apply to goods and services imported from the UK into Ireland and from Ireland into the UK. You should seek to understand how these tax changes will affect your business, and who is liable in your contracts for increased tax costs.

- **Choice of law / jurisdiction** – review the choice of law and jurisdiction clauses. Many commercial contracts (even those between non-UK parties) list English law as the law of the contract, and give English courts exclusive jurisdiction over contract disputes. Going forward, parties that want to apply the law of a common law, EEA, English-speaking country will need to choose the law of Ireland. In addition, you should think carefully before giving exclusive jurisdiction to English courts, because it is unclear how judgments of UK courts will be enforced outside the UK after Brexit. Ideally reciprocal judgment recognition arrangements will be agreed in the Brexit negotiations. If that is not the case however enforcement of UK judgments in Ireland (or vice versa) might become more difficult. In other words you might win a case against a defendant in an English court, but if all the defendant's assets are outside the UK that award could be difficult to collect.

Financial Services Regulation

Brexit poses a great risk to financial service providers who are licensed with the UK Financial Conduct Authority (FCA) and offer services across the EEA based on that license, as well as those who offer services in the UK based on a license from another EEA country's regulator. This type of "passporting" is a benefit of the EEA single market. The UK is adamant that it will negotiate continued EEA passporting rights for UK financial services firms, but it is unclear how this will work if the UK leaves the single market. The UK's most likely option is to negotiate continued passporting rights as part of a trade agreement with the EEA, but typically trade agreements cover trade in goods rather than services.

To ensure continued access to the EEA market, UK financial services firms should take steps to become licensed with the regulator in another EEA jurisdiction, such as the Central Bank in Ireland. One key requirement for gaining a license from the Central Bank is that the firm have a "substantive presence" in Ireland, which generally means that the firm is managed and controlled from Ireland. This is why many UK firms have begun moving operations to Ireland and other EEA jurisdictions, to qualify for a license which will allow them to continue passporting across the EEA.

Irish and other EEA financial services firms which offer services in the UK should equally begin discussions with the UK FCA to potentially become licensed there, to ensure your ability to continue offering services in the UK post-Brexit.

Intellectual Property

As part of its membership of the EEA, the UK's intellectual property regime has, to a large extent, been governed by European Law. This is particularly applicable in trade marks, where the EEA Intellectual Property Office provides for a centralised application and granting system of trade marks, which have effect across the whole of the EEA, including the UK.

A huge concern for businesses and brand owners is whether their EEA registered trademarks will continue to have effect in the UK in a post-Brexit world. Practitioners have largely been quite confident that this would have to be the case, with many feeling some sort of 'grandfathering' regime converting existing EEA Trademarks into UK registered trademarks at some point down the line is a likely outcome.

The EEA moved to reduce uncertainty on 28 February, 2018 in the first draft agreement governing the UK's withdrawal. It sets out that *"the protection enjoyed in the United Kingdom on the basis of Union law by both UK and EEA 27 holders of intellectual property rights having unitary character within the Union before the withdrawal date is not undermined by the withdrawal of the United Kingdom from the European Union".* This would apply to the unitary IP rights (EEA trade marks, registered community designs, plant varieties).

One final concern which has attracted a lot of headlines is what will happen to goods which have 'geographic indication' protection under EEA law, such as the Cornish Pastie and Scottish Whiskey. What will happen to these remains to be seen, though again, most industry experts believe those rights will be preserved through bilateral or other agreements.

GDPR/Data Protection

Businesses that transfer personal data between the UK and other EEA countries must review whether those transfers will be legal after Brexit. This includes transfers between your own group companies as well as transfers with other organisations. Once the UK leaves the EEA, all transfers of personal data from the EEA to the UK will need to be justified in the same way as transfers to other non-EEA countries. The UK may be able to secure an adequacy decision from the EEA Commission, which would deem UK data protection equivalent to EEA data protection and allow transfers to the UK. Short of that, the UK may be able to negotiate a special arrangement similar to the EEA's Safe Harbour arrangement with the US, allowing data transfers so long as certain conditions are met. However, the UK is likely to face significant political hurdles to achieving either of these outcomes, and even then either outcome would likely be challenged in the courts by data protection advocates. For those reasons, you should plan to treat personal data transfers from the EEA to the UK as transfers to a third country with no special arrangement, using other legal bases for transfers where available under GDPR (ie. explicit consent of the data subject, standard contractual clauses, binding corporate rules). In some cases it may make sense to move data processing activities from the UK to an EEA jurisdiction, to avoid GDPR compliance concerns.

Life Sciences

Ireland is already a leading location for pharmaceutical and medical technology companies, and is therefore a natural hub for businesses in this area who wish to expand their presence in the EEA-27 remaining member states in preparation for Brexit. Regulatory authorisations will also need to be reviewed.

On 10 January 2018 the European Commission published an important notice warning concerning CE marking on industrial products, which will be relevant for companies in the medical devices sector. The notice advises CE mark holders to take steps to ensure that post-Brexit, where applicable conformity assessment procedures require the intervention of a Notified Body, they will hold certificates issues by an EEA-27 Notified Body. Where economic operators hold certificates issued by a UK Notified Body prior to the Brexit withdrawal date and plan to continue placing the product concerned on the EEA-27 market, the notice advises that they consider either applying for a new certificate issued by an EEA-27 Notified Body or arranging for a transfer of the file and corresponding certificate from the UK Notified Body to an EEA-27 Notified Body.

With regard to pharmaceutical products, the European Commission has published a Notice (latest version dated 29 January 2018) and practical guidance for Marketing Authorisation Holders (MAHs) on procedures related to Brexit, including procedures for transfer of marketing authorisations from UK based MAHs to MAHs based in the EEA-27.

OUR BREXIT TEAM

Dominic Conlon
Partner
Head of Corporate
Tel: +353 1 232 1075
Email: dconlon@leman.ie

Dominic is head of our Corporate Department. He advises on FDI, mergers and acquisitions, joint ventures, corporate finance, venture capital and private equity, corporate restructuring, corporate governance, IT contracts, outsourcings and general commercial matters. He has advised many of Irelands largest financial institutions, corporates and technology companies setting up in Ireland.
Dominic has a particular interest and expertise advising clients in the FinTech and Payments space, working on some of the most interesting payments deals which have taken place in Ireland over the last 18 years.

Mark Roberts
Partner
Corporate
Tel: +353 1 669 7075
Email: mroberts@leman.ie

Mark qualified as a solicitor in England in 2003 before moving to Ireland in 2004. He has significant experience in advising on cross border corporate transactions both within and outside the European Union and also advising Irish entities trading on a multi-jurisdictional basis.

Simon Deane-Johns
Senior Consultant
Corporate
Tel: +353 1 639 3000
Email: sdeane-johns@leman.ie

Simon will consult to Leman in Ireland before and beyond Brexit. With 20 years as a financial technology lawyer, Simon has worked in the UK and the US with global players Reuters, GE, Amazon and WorldPay, and co-founded several start-ups, before returning to private practice in 2011.
Simon specialises in the regulatory and commercial aspects of retail financial services, e-commerce and IT. Clients include peer-to-peer lending platforms, consumer lenders, e-money and payment service providers and retailers and e-marketplaces.

Leman
SOLICITORS