



1 July 2016

The UK's Referendum on Membership of the European Union – An Update

This is an update to our Alert published on 24 June 2016 on the result of the UK's Referendum on membership in the European Union ("EU"). We consider in this Alert some of the immediate and longer-term consequences of the Referendum result.

The outcome of the Referendum on 24 June has no immediate impact on the UK's membership in the EU. The UK's legal basis for the Referendum – the EU Referendum Act 2015 – does not compel the UK government to initiate the exit procedure set out in Article 50 of the Treaty on European Union, although it is generally assumed that the government will give effect in some way to the result. There are a large number of options on how, post-exit, the UK might structure its relations with the EU, primarily to ensure continued free trade with the EU. At this stage, there is no indication of which parts of EU-derived UK law might be repealed (if at all).

The presidents of the institutions of the EU stated on 24 June that exit negotiations should start as soon as possible,¹ although there now appears to be wider acceptance that exit negotiations cannot begin until a new UK government is in place. It is unknown whether exit negotiations will precede or follow formal notification by the UK – it is a given that exit negotiations will be complex and time-consuming.

Immediately following the outcome of the Referendum, the British Prime Minister, David Cameron, announced that he would resign as leader of the Conservative Party (and hence, Prime Minister) following election of a new leader, which is expected to take place at some point before the Conservative Party conference in October this year. Given Mr. Cameron's statement that a new Prime Minister should take the decision about when to trigger Article 50, it is accepted that any formal procedure to withdraw will not start until later this year, at the earliest. There is also a considerable amount of debate amongst constitutional experts as to whether formal withdrawal from the EU and the trigger of Article 50 requires further parliamentary approval. In any event, it is likely that any UK government wishing to give parliamentary approval (and hence binding legal effect) to the Referendum will need the support of a majority of all members of parliament (MPs) to do so – which may be challenging given the current understanding that about three-quarters of MPs were in favour of remaining in the EU at the time of the referendum held in June. In addition, political leaders in Scotland and Northern Ireland are weighing their options, further complicating likely political moves. Looking further into the future, some commentators reflect that a general election or second referendum may be held in the UK to approve the terms of any exit negotiations with the EU.

However, at this stage, the possibility of either a general election or a second referendum is pure conjecture, and therefore it is the case that firms must begin the process of analyzing the potential implications of a Brexit to their business. This is clearly not an easy task given that there is no current definitive plan setting out what a potential renegotiation of the UK and the EU would be based upon, and most crucially there remains an open question of whether the UK would continue to have access to the EU's single market.

¹ Statement by EU leaders and Netherlands Presidency on the outcome of the UK referendum on 24 June 2016.



Factors to consider for ongoing transactions or fund-raising

Bearing the above in mind, firms are beginning to grapple with and start to either dust-off previous analysis or formulate new plans gearing up for a potential “Brexit”. Many of you are also continuing to be plugged into discussions with relevant trade organisations in the UK and the EU that are likely to provide assistance and guidance to their members on changes recommended to standard form contracts. However, in the meantime, firms clearly have to press ahead with business as usual whilst having an eye out to developments as they unfold as part of any potential Brexit.

With this in mind, we set out below some key considerations that firms will need to think about in relation to any current or ongoing transactions or fund-raising activity either in the UK, EU or outside of the EU, including the legal, regulatory and contractual implications of such an event.

- Contracts should be drafted now to take into account the potential withdrawal of the UK from the EU. This may include the potential of the repeal of EU law, which is now part of English law (though, in reality and in the short-term, we are of the view that it is unlikely to be the case that swathes of English law would be amended, given the amount of resources and political will required to do so). EU law has effect in the UK either through “direct effect” EU Regulations or UK implementation of EU Directives into English law. Parties must assess the risk in their contracts of relying on any particular benefit of EU law (such as the “passporting” rights for financial services) and possible means to address the risk in contracts under negotiation. Similarly, parties must assess the risk of any particular contractual obligation being at odds with or in breach of EU law, and consider how any obligation framed by reference to EU law is interpreted. How references to the European Union in contracts (in terms of the contract’s territorial scope, such as the territory of a licensing agreement) will be read following exit must also be considered.
- Governing law clauses in contracts (currently subject to the EU Rome Regulations) may need to be re-drafted to take account of withdrawal. It is likely that the government will legislate to address the position in existing contracts as part of any exit arrangements.
- Parties should address the risk of force majeure or material adverse change provisions in contracts being invoked – in good or bad faith – in the short and long term.
- In the longer term, UK courts may no longer be obliged to apply EU jurisprudence, such as judgments of the EU Court of Justice. In terms of enforcement of judgments, relevant EU treaties will for the time being remain in place.
- Fund-raising in the EU relies on the Alternative Investment Fund Managers Directive (“AIFMD”) (for alternative investment funds), the UCITS Directive (for EU retail funds) and the Prospectus Directive (for offers to the public of debt or equity securities or listing of such securities on EU-regulated markets). In each case, the “passport” allows EU firms to market in the EU, subject to compliance with the prospectus requirements and other conditions in the Directives. Any settlement between the UK and the EU will need to look at the possibility of allowing continued access to EU markets on the passport basis under these Directives. What is clear is that access to the EU single market is one of the key factors of any negotiation between the UK and the EU; however, at present, there is no clarity yet as to which way this debate will fall. Firms currently planning to fund-raise on the basis of these Directives should consider the impact of the Referendum result on timing, the contents of any disclosures and possible contingency plans if the passport is not available in its current form.
- Whilst there is no immediate impact on the ability of EU citizens to work in the UK (or UK citizens to work in the EU), this again will be one of the key factors to be negotiated as part of any settlement between the UK and the EU.



There are clearly wider legal issues in many areas, including tax (and deal structuring), competition law, financial services, employment, public procurement and insolvency. We will continue to update and advise clients on current risks and future steps as the outcome of the Referendum plays out.

If you have any questions on Brexit, then please do reach out to your usual Ropes & Gray contact.

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