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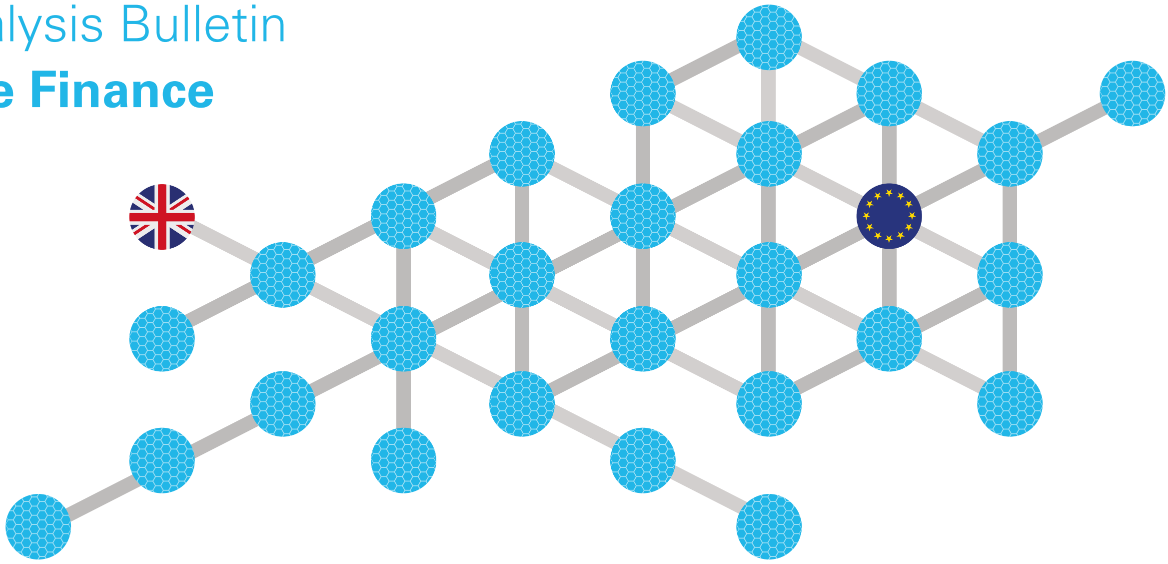
Brexit Analysis Bulletin
Corporate Finance



UK corporates, and investors and prospective investors into UK businesses, are bracing themselves for a possible Brexit from European Union membership following the referendum set for 23 June 2016.

Without knowing what legislative amendments would be made by the UK government post-Brexit, an event which would herald a period of negotiation with the EU, it is impossible to predict the exact impact on business and the economy.

Nonetheless, at least in the UK corporate law arena, it is possible to highlight areas that will be relevant to UK corporates in their day-to-day operations, steps they might consider in the event of Brexit and issues that could arise for public companies and fund managers, which would likely be affected more than private companies.

Inward investment and M&A activity

A vote to leave the EU would be followed by a period of uncertainty while negotiations between the UK and the EU take place. In order to retain some of the perceived benefits of EU membership, the UK is likely to have to comply with EU regulations to some extent, even in the event of a Brexit. The degree of compliance, and the extent to which the UK really loses its seat at the European table will depend, of course, on the outcome of those negotiations.

This uncertainty – at least in the short term – could have a negative impact on inward investment and UK M&A activity. However, several significant financial and manufacturing groups have said they will stay in the UK, and many commentators are confident that business would continue to find the UK attractive due to its language, culture and longstanding presence in the EU, not to mention the new EU trading arrangements that would doubtlessly be made. Indeed, some UK corporates have forecast that businesses would benefit from a reduction in EU red tape post-Brexit.

Impact on day-to-day UK company law matters

The guiding corporate law legislation for companies in the UK is the Companies Act 2006. No major changes are expected to this legislation as a result of Brexit, not least because only a minority of its provisions are based on EU regulations. It is therefore unlikely that privately-owned UK companies would feel a huge impact post-Brexit in terms of M&A processes or day to day administrative and company secretarial matters. More significant changes for UK companies are likely to derive from other areas, such as employment law, tax and finance.

Should Brexit be considered as part of legal due diligence for investment and M&A?

The UK's exit from the EU is unlikely, of itself, to cause contracts to terminate or to become unenforceable. That said, potential investors, counterparties and buyers will certainly consider the possible impact of any changes to laws governing employment, tax, data protection, intellectual property, competition and financial regulation in the UK in the context of new contracts, acquisitions and investments.

Public companies and funds

Extensive EU directives and regulations govern many UK businesses operating in the funds and financial services sector. While some UK businesses have seen this red tape as burdensome, the UK has historically driven much of the EU financial regulation – for example on market abuse – and has at times gone beyond EU requirements to boost investor confidence in the UK, indicating that the impact of any Brexit in this regard might be broadly neutral. Nevertheless, some are concerned that Brexit could have a negative impact on access to European markets and the financial dominance of the United Kingdom as a whole, and of London in particular if some of the rights afforded to the UK by these EU regimes are lost.

Key areas of relevance include:

Public company takeovers

Acquisitions of UK public companies are subject to the UK Takeover Code, designed to protect EU shareholders in public takeover bids. We consider it unlikely that Brexit would prompt a dramatic overhaul of the UK takeover rules.

Prospectus passporting

EU arrangements allow EU-based issuers of equity or debt securities to the public to issue a prospectus in terms of the Prospective Directive to prospective investors throughout the EU once the prospectus has been approved by a single member state. This EU-wide automatic approval would cease to apply to the UK following a Brexit, which could make it less straightforward and more expensive for UK issuers to offer securities elsewhere in Europe.

Again, the practical impact that this will have is largely dependent on the evolution of UK legislation regarding prospectus requirements over time, as well as the arrangements made between the UK and the EU following a Brexit. Broadly, if the UK prospectus regime were to remain consistent with EU regulation, there may be less of an issue (since, among other things, the European Commission has the power to approve a non-EU prospective if it meets certain EU requirements).

Fund managers' access to European markets

At present, UK based fund managers must comply with the Markets in Financial Instruments Directive (MIFID) and the Alternative Investment Fund Managers Directive (AIFMD). Neither Directive would automatically apply to UK fund managers following a Brexit, but nor would fund managers' authorisations under either Directive continue (subject to the terms of any post-Brexit arrangements).

In the case of AIFMD, the effect of UK fund managers' de-registration would be that UK alternative investment fund managers would be treated as non-EEA fund managers and would thus only be able to market alternative investment funds to EEA investors under private placement arrangements where the member states where the investors are based permit such marketing.

Retaining rights equivalent to those afforded by MIFID could be achieved if the UK adopted an equivalent regulatory regime to the EU (since the third country regime under MIFID allows non-EU entities to access the EU market where such equivalence exists (and provided the non-EU entity also allows reciprocal access to EU entities)). However, this regime is not immediately effective and is currently untested, such that there is no guarantee that the UK would be granted such third country status post-Brexit.

Another issue which could be of significance post-Brexit is the potential loss of UCITS (undertakings for collective investments in transferable securities) passporting, which broadly allows UK fund managers to market and sell certain EU-regulated funds dedicated to the investment of assets raised from retail investors in the EU (albeit, again, it may be that equivalent benefits would ultimately be available to UK fund managers following a Brexit vote and the outcome of the follow-on negotiations). If it transpired that equivalent benefits were not going to be available, it is not inconceivable that some funds would move out of the UK and into a EU member state in order to retain these rights. Indeed, some UK fund managers are considering establishing a subsidiary in another EU member state at this stage, with a view to ensuring business continuity.

To conclude

If the UK votes to leave the EU, the disentanglement process will be very lengthy (the Lisbon treaty envisages a two year timetable for exit negotiations), and a leave vote would herald a significant period of uncertainty. The effect on day-to-day corporate law matters and public company and funds regulation is dependent on many unknowns, including any deals the UK and the EU reach going forward.

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JOINING THE DOTS OF THE EU REFERENDUM

What If?
Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

With the EU referendum now only months away, our dedicated Brexit Advisers will continue to interrogate the 'what if' questions, relating to specific sectors, that will emerge when the UK decides whether to remain in or leave the EU.

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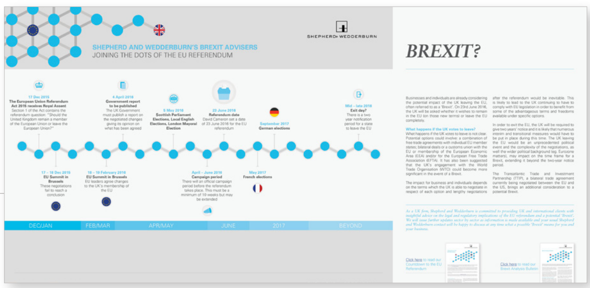

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