

MOFO BREXIT BRIEFING

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By Paul Friedman and Alistair Maughan

In a referendum held on 23 June 2016, the United Kingdom voted by a narrow majority to leave the European Union (“Brexit”). For the time being, the UK remains a member of the EU, and all existing EU-derived laws and regulations continue to apply in the UK. However the uncertainty as to the timing and nature of the UK’s exit and future relationship with the EU has already caused market and currency volatility, and there are potentially major implications for businesses.

The process of Brexit will take time and the implications for our clients’ business will unfold over time. Our MoFo Brexit Task Force is coordinating across all our offices and working with clients on your key concerns and issues, now and in the coming weeks and months. We will also be providing MoFo Brexit Briefings on a range of key issues. We are here to support you in any and every way that we can.

IMMEDIATE CONSEQUENCES

The result of the referendum has no automatic effect. For the time being, the UK remains a member of the EU and subject to the EU treaties. All existing EU-derived laws and regulations continue to apply in the UK. The UK government has indicated its intention to give effect to the result of the referendum. However, that is likely to be a complex and protracted process. David Cameron has announced his intention to stand down as Prime Minister of the UK within the next three months, and to leave it to his successor to start the formal legal process of leaving the EU. At this time, it is impossible to say how long it will take for the Brexit to take effect, and what the UK’s relationship with the EU will be following Brexit.

PROCESS FOR EXITING THE EU

The EU Treaty sets out a framework for a member state to leave the EU.

- The UK would commence the exit process by serving a notice of its intention to leave the EU under Article 50 of the EU Treaty (“Article 50 Notice”).
- Once the Article 50 Notice is served, the UK would have two years to negotiate and agree the terms of its exit. The terms would need to be approved by a qualified majority of the European Council (excluding the UK), and the consent of the European Parliament.
- If no agreement is reached within the two year period referred to above, or any extended period agreed by all member states, the UK would automatically cease to be a member of the EU.

There is no prescribed timescale for the UK to submit its Article 50 Notice. It is currently expected that the UK will seek to enter into pre-negotiations as to the terms of its exit before serving the Article 50 Notice and triggering the official two year negotiation period, although EU leaders have said they will not enter into any such informal talks. It remains to be seen how this will play out.

Although there is a framework, it is effectively uncharted territory, as no member state has previously left the EU.

FUTURE RELATIONSHIP WITH THE EU

The central issue for the UK in negotiating the terms of its exit will be its relationship with the EU going forward. Set out below are some alternative models of that future relationship.

As a member of the EU, the UK has automatic access to the EU single market, and it is likely that the UK government will be pushing for the UK to have comparable access to the single market as part of its exit negotiations. However, there is no precedent for a country having access to the EU single market without being bound by the rules of the single market – including the free movement of people which was a central issue for Brexit supporters – and it remains to be seen whether such a balancing act can be achieved.

The principal options are as follows:

- **Norwegian model:** Being a member of the European Economic Area (“EEA”) and the European Free Trade Area (“EFTA”). This would continue to give the UK access to the EU single market, but it would also require the UK to make financial contributions towards the EU without having any right to participate in EU rule-making. However this option, at least in the form that applies to Norway, would require the UK to be bound by many of the rules of the EU which

have been unpopular with Brexit supporters, including the free movement of people.

- **Swiss model:** Entering into various bilateral agreements with the EU, and possibly being a member of the EFTA. However this option, at least in the form that applies to Switzerland, would also require the UK to be bound by EU rules which have been unpopular with Brexit supporters, including the free movement of people.
- **Turkish model:** Joining the EU's customs union. This would continue to give the UK access to the EU single market in goods but not its single market in services. This option is unlikely to be pursued by the UK government in the form adopted by Turkey, given its omission of services, as the supply of services represents over three-quarters of the UK's gross domestic product. Membership of the EU's customs union would also restrict the UK's ability to enter into separate free trade agreements.
- **Free trade agreement model:** Negotiating a comprehensive free trade agreement with the EU, along the lines of the free trade agreements between the EU and South Korea, and the EU and Canada. The central issue will be timing: the free trade agreement with South Korea took four years to conclude, and the agreement with Canada took five years.
- **WTO model:** A complete exit from the EU without any negotiated agreement, and defaulting to the World Trade Organization's rules. The UK government would then be free to negotiate its own bilateral agreements, with the EU and other countries with which the EU has free trade agreements. However this would be a hugely burdensome and lengthy process. It seems unlikely that this would be the preferred option of the UK government going into negotiations.

It may be that what is eventually agreed is a bespoke arrangement between the UK and EU, which borrows from several of the models mentioned above, possibly involving some form of "associate" membership status for the UK.

UK LEGISLATION FOLLOWING BREXIT

As part of its exit strategy, the UK government will need to decide how to deal with the vast amount of EU-derived law that currently forms part of UK law. EU laws have been implemented into UK law in a piecemeal fashion, with the principal methods as follows:

- **EU Directives:** Directives are not directly applicable in the UK, and have generally been enacted through UK primary or secondary legislation. Those directives implemented by way of primary legislation will continue to apply post-Brexit unless specifically amended or repealed by the UK Parliament. Assuming

that the European Communities Act 1972 is repealed, those directives implemented by way of secondary legislation under that Act will fall away post-Brexit, unless the repeal of that Act provides otherwise.

- **EU Regulations:** Regulations are directly applicable in the UK, and would fall away post-Brexit, unless they are “grandfathered” into UK law.

Accordingly, a huge task for the UK government will be to review all such legislation and decide on whether it should be repealed or retained post-Brexit. That exercise will be influenced in part by the form of relationship going forward.

IMPLICATIONS OF BREXIT FOR BUSINESSES

It is difficult to say what the implications for businesses will be until more is known about the UK’s future relationship with the EU agreed as part of the exit negotiations. However, a Brexit has the potential to impact laws relating to public mergers and acquisitions, provision of financial services, offerings of financial securities, data privacy, state aid, anti-trust, insolvency and restructuring, regulation and compliance, tax, employment and intellectual property.

It would be prudent to consider whether there are any relevant provisions under existing transactions which may be triggered, as a result of the referendum, the associated market and currency volatility, or as a result of the UK’s eventual exit from the EU. Issuers of public securities should also consider the impact of the referendum result and the associated market and currency volatility on their businesses, and whether any additional disclosures are necessary. Businesses entering into new transactions should also now consider whether any specific Brexit-related termination or acceleration provisions should be included in transactions.

Whilst it is possible that the UK will reach agreement with the EU on access to the single market on comparable terms, it is possible that no such agreement will be reached, or that there are substantial gaps in the UK’s access to the single market under any agreement with the EU, compared with the position today. Accordingly, businesses should assess which areas of their business are reliant on the EU single market and EU-derived law, and develop contingency plans in case access to the EU single market is disrupted and EU-derived law on which they are reliant ceases to apply.

Morrison & Foerster’s Brexit Task Force will be publishing issue specific briefings outlining legal implications in more detail in the coming days and weeks.

MOFO CONTACTS

Please do not hesitate to call with any questions or concerns you may have. We're here to help.

Contact:

Paul T. Friedman	Alistair Maughan
44 (20) 79204006	44 (20) 79204066
pfriedman@mofocom	amaughan@mofocom

or

brexit@mofocom

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