

## Brexit: impact on M&A and ECM transactions

The UK's decision to leave the EU will of course have implications for corporate activity in the UK. The immediate consequence is uncertainty, which has led to some transactions being delayed or put on hold indefinitely. As we do not yet know what model (if any) the UK will follow in leaving the EU, it is too early to say with any certainty what the specific implications of Brexit will be on any area of law. However, we have put together the following high level overview of some of the potential consequences on M&A and ECM transactions.

### 1. Private M&A

The substantive laws and regulations governing the principal agreements used to effect UK private M&A transactions (i.e. UK contract law and company law) are unlikely to be materially affected by Brexit. There are, however, certain aspects of M&A transactions which are currently governed by EU law that would be impacted once the UK leaves the EU.

#### (a) Competition law

- In relation to abuse of dominance legislation, the UK Competition Act 1998 will continue to apply to business conducted in the UK. UK companies which carry out business in, or with an effect in, the EU will continue to be bound by EU rules.
- The current “one-stop-shop” for merger control will no longer apply between the UK and the EU, so if a transaction exceeds the relevant UK and EU merger thresholds, filings will potentially need to be made with both the UK and EU competition authorities. (Of course, the fact that the UK market is removed from consideration of the effect of a transaction in the EU may well mean that the EU merger thresholds are not reached.)
- EU state aid rules will no longer apply to UK government funding to UK companies (though general WTO rules in relation to state subsidies will apply).

#### (b) TUPE

The TUPE regulations are derived from the EU Acquired Rights Directive. Once the UK has left the EU, it may be that the UK government looks to amend these rules. However, the general view is that the main rules governing the rights of employees on a transfer of a business have become a well-established part of UK employment law and are unlikely to be materially changed, at least in the short term. The area that would be most likely to be revisited by the UK under TUPE would be around post-transfer harmonisation restrictions which might be watered down.

#### (c) Intellectual property

- UK national rights relating to patents, trademarks and design rights are unlikely to be affected by the UK leaving the EU.
- Licences that define the territory within which IP rights can be used by reference to the EU will need to be reviewed.
- Pan-European rights such as Community Trademarks and Community Design Rights will no longer apply in the UK. A separate UK registration of the relevant rights may therefore be needed, and a CTM or CDR which is only being used in relation to the UK may not survive.
- The proposed Unified Patent System will probably be delayed and will not include the UK unless it is re-written.

#### (d) Data protection

- The UK's data protection legislation will continue to apply unless it is repealed by the UK Parliament or replaced by the General Data Protection Regulation.
- The GDPR will come into force throughout the EU in May 2018 so will apply in the UK if it is still a member then.
- Once the UK has left the EU it is likely that the UK will make sure its data protection regime continues to satisfy EU requirements so that the UK remains an “adequate” country to transfer personal data to.

#### (e) Tax

- Corporation and income tax are imposed by UK law, and the majority of the UK's current domestic body of direct tax law will remain in place.
- Customs duties on trade with EU countries and third countries are governed largely by EU law so will be affected.
- The UK will be free to amend or abolish VAT in domestic transactions, although abolition is highly unlikely. How VAT will work in transactions between entities in the UK and entities in EU countries will be a key part of the Brexit negotiations.

#### (f) Cross-border mergers

The regime in relation to cross-border mergers between UK companies and companies in EU member states (implemented in the UK by The Companies (Cross-Border Mergers) Regulations 2007) will need to be revisited if the UK Regulations are to continue to have effect once the UK leaves the EU. In practice these transactions have largely taken place in an intra-group context so this is unlikely to be a priority in the UK's Brexit negotiations.

## 2. Public takeovers

While the UK Takeover Code implements the EU Takeovers Directive, this directive was itself based on and heavily influenced by the UK's takeover law framework. It is highly unlikely that leaving the EU will lead to any material changes to the UK Takeover Code or the way in which UK public takeovers are conducted.

## 3. Equity capital markets

- The main rules governing public offers of securities and applications for admission to trading on regulated markets (including the Main Market of the London Stock Exchange) are derived from EU law, principally the EU Prospectus Directive. This directive itself closely follows the UK rules which were in place prior to the introduction of the Prospectus Directive in 2003. Although leaving the EU might lead to an overhaul of the relevant rulebooks to remove references to EU legislation, in practice there is unlikely to be a material change in the regulatory framework and practice governing equity capital market transactions in the UK, at least in the short term. In addition, the FCA has a history of 'gold plating' many of the rules derived from EU capital markets legislation, which has led to the UK having very much its own bespoke listing regime which runs alongside the harmonised EU rules (for example, the different admission criteria and continuing obligations applicable to standard listings as opposed to those applicable to premium listings).
- One of the intended benefits of a common European framework for the approval of prospectuses is the ability for issuers to use a prospectus approved by a competent authority in one member state to market securities in another member state through the Prospectus Directive's "passport" regime. Leaving the EU will mean that a prospectus approved by the FCA will no longer be able to be passported to another EU country. However, only a minority of prospectuses approved in the UK need to be passported out as they are used to market securities only to qualified investors in other EU countries.
- The EU Market Abuse Regulation (MAR), which will apply from 3 July 2016 despite the Brexit vote, is largely derived from the UK's existing market abuse regime. It seems likely, therefore, that after leaving the EU the UK will continue to follow MAR. A divergence between the UK and the EU rules may emerge over time as guidance on the rules will be provided by the UK's institutions rather than European ones.

For more information about anything in this update, please contact:

#### KATE BALL-DODD

Partner

E: [kball-dodd@mayerbrown.com](mailto:kball-dodd@mayerbrown.com)

London

T: +44 20 3130 3611

#### RICHARD SMITH

Partner

E: [rsmith@mayerbrown.com](mailto:rsmith@mayerbrown.com)

London

T: +44 20 3130 3849

#### CONNOR CAHALANE

Partner

E: [ccahalane@mayerbrown.com](mailto:ccahalane@mayerbrown.com)

London

T: +44 20 3130 3571

#### KIRSTY PAYNE

Professional Support Lawyer

E: [kpayne@mayerbrown.com](mailto:kpayne@mayerbrown.com)

London

T: +44 20 3130 3795

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