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Taking stock of Brexit – Keep calm and carry on

Introduction

This is the first in a series of articles aimed at providing legal updates to private equity portfolio companies. It is hoped that the information provided is helpful and informative to those charged with running the day-to-day operations of these businesses, including executive and non-executive directors, general counsel and others.

This article takes stock of the recent Brexit result and takes a high level look at the likely/possible short and long term implications of Brexit for areas such as Financial Services, Contracts, Dispute Resolution, Intellectual Property and Employment.

Should you have questions on any other area of your business activities, though they may come to be covered in future editions, we would be happy to answer those questions - please do get in touch.

If you would like to receive these regular updates, or know of others who would, please click on this link to add details to our distribution list.

Financial Services

The importance of the financial services industry to the UK, being the single biggest contributor to GDP and single biggest tax payer, means that we hope that the British government will be looking to support it fully in forthcoming negotiations.

On this basis from a legal perspective we may see little change in financial services legislation in the short to medium term (or even beyond).

At the very least until the UK actually leaves the EU (under the Article 50 process) the legislative situation is one of "carry on as before" and the UK's Financial Conduct Authority (FCA) has put out a statement reminding us that: "*Firms must continue to abide by their obligations under UK law, including those derived from EU law and continue with implementation plans for legislation that is still to come into effect.*"

Even after leaving the EU, on the basis that the majority of political opinion seems to be supportive at present of maintaining , to a large extent, the status quo as regards financial services, the UK is likely to keep its financial services legislation closely aligned with and similar to the EU's. If the UK joins the EEA like Norway, it will have to accept all EU law. If the UK does not join the EEA there are many reasons why legislation may not change significantly:

- the UK might be faced with a need to replicate the EU legislation for the purposes of meeting global standards. This is because a large proportion of EU legislation implements international obligations or guidelines such as those proposed by the G20;
- equivalence with EU laws can allow access to a quasi "passport" as is envisaged under EU laws like the Alternative Investment Fund Managers Directive and the Markets in Financial Instruments Directive 2. At the moment, we are not just equivalent, we are identical; and we are very well placed to gain favourable assessments from the EU and to have access to regulatory concessions and quasi passports;
- the UK's existing financial services legislation has actually been a principal source of EU legislation, so we are unlikely to want to depart from it as a matter of policy; and
- to change the financial services laws in the UK is not a simple, quick or cheap exercise – for firms or the Government.

So, in summary, subject to there being no significant change in the Government's expected approach to protecting financial services, it seems possible that whilst the UK might revoke or repeal certain discrete EU-specific obligations with which it does not agree, like bankers' bonuses, the vast majority of the corpus of financial services regulation may remain post-withdrawal.

Contracts

English contract law is relatively unaffected by EU legislation (although consideration will need to be given to how references to EU law in existing agreements should be interpreted).

Parties wishing to re-negotiate or even terminate existing contractual arrangements will no doubt be looking closely at whether there might be grounds to invoke material adverse change, force majeure or default/termination clauses, while financial covenants may be breached where post referendum uncertainty regarding the UK's formal withdrawal from the EU affects credit ratings or ability to trade.

Agreements under which your organisation receives or provides goods and services may also be affected, depending on contractual terms and existing arrangements. For example, the territorial scope of rights could be thrown into question and the import/export and tax positions could alter. This may put the spotlight on other terms of the contract, for example, change control, force majeure and dispute clauses.

Dispute Resolution after the UK's withdrawal from the EU

At present, a number of established EU rules govern certain aspects of cross-border litigation. After the UK's formal withdrawal from the EU, the remaining EU Member States will continue to be bound by the EU rules, but the UK will not unless it opts to transpose them into UK law. See Impact of Brexit on the UK's cross-border litigation rules. Insofar as those rules (or any EFTA or other equivalents which might apply) envisage interaction or reciprocity between States however, it would also be necessary for the Member States (or EFTA countries) to operate them in relation to the UK, and their doing so might depend upon the outcome of trade negotiations.

In addition to the EU rules, the UK is also a party to various other international agreements (e.g. the Hague Conventions). To the extent that the UK is a party through its membership of the EU, it may well elect to ratify them in its own right, so that they continue to operate as between the UK and the other signatory (EU and non-EU) states.

As far as arbitration is concerned, the UK will remain a member of the 1958 New York Convention, which has been acceded to by over 150 countries and obliges Courts to give effect to foreign arbitral awards.

IP, IT and Data Protection

Brexit raises a number of issues relating to intellectual property ("IP"), technology and data privacy and we have produced a detailed legal briefing, which is available here. With respect to IP and technology, EU-wide IP rights (such as EU trade marks) will most likely not remain effective in the UK. Organisations will need to ensure that the "UK portion" of these rights remain protected. The UK will not be able to participate in the Unified Patent system and the Unified Patent Court, unless the current arrangements are amended. If the UK does not participate, organisations protecting new technologies in Europe will lose some of the efficiencies that the Unified system is anticipated to deliver.

With respect to data privacy, current UK law (based on the corresponding EU Data Protection Directive) will remain in force in the UK. This will continue to be the case unless it is repealed by the UK or replaced by the new General Data Protection Regulation ("GDPR"), which is an EU Regulation due to come into effect in May 2018. The GDPR will apply in the UK if the UK is still a member of the EU as at May 2018 or if it joins the EEA. However, if the UK leaves the EEA, then the Regulation will cease to be in force and the UK will need to adopt legislation to replace it. Because European data protection legislation prohibits the transfer of personal data to countries outside of the EEA unless certain conditions are met (such as the country in question having laws which offer adequate data protection in comparison to European requirements), it seems unlikely that the UK will pass legislation that significantly diverges from European data protection requirements so that it can remain an "adequate" country. International businesses located in the UK that process personal data should continue making their preparations for complying with the GDPR and should monitor the development of future UK data protection laws and how this may affect the legality of any transfers of personal data those businesses currently conduct between the UK and the EEA.

Employment and immigration

In the run up to the referendum, the 'Leave' campaign predicted that Brexit would have a very negative effect on laws protecting employees (Jeremy Corbyn said it would be a "bonfire of workers' rights"). So perhaps the first and most obvious step for employers is to reassure their workforce that, for the time being at least, nothing is changing and that management is actively monitoring the impact and timing of any changes that might arise.

In terms of what might change in due course, it is true that a significant proportion of our UK employment law is derived from EU labour law. For example: family leave, working time law, discrimination law, collective consultation obligations, laws relating to business transfers and agency worker regulations. It is unlikely, however, that such laws will simply disappear. First of all, it could be that the terms of the withdrawal agreement that the UK enters into may include a requirement that we continue to abide by EU labour laws (e.g. if we adopt the Norwegian model and become a member of the EEA). Secondly, many of these laws have been part of the employment law landscape in the UK for a long time and are viewed as "good" laws. It is unlikely any UK Government would want to be seen to be scrapping fundamental employee protections such as discrimination rights, family leave or working time rules.

What is more likely is that, if the UK has the chance to do so, it will remove or amend some of the less popular aspects of these laws. For example, in relation to working time and holidays, the fact that holiday continues to accrue while an employee is off sick is generally unpopular with business. Equally, the cap on maximum weekly working hours, which is currently set at 48, could be revisited or even removed, and the agency worker law introduced not long ago is generally unpopular due to its complexity, and so might be one to be dropped altogether.

Perhaps a more obvious impact on workers is the question of immigration. For now, the free movement of workers around the EU remains, allowing British employers to hire workers from anywhere in the EU and, conversely, to have British citizens working in any other EU country. There is no requirement for work permits. Again, depending on the model that we end up with as a result of our withdrawal negotiations, it may be that free movement of workers remains the case. But, if free movement does disappear, what will replace it remains to be seen. The Leave campaign indicated that it favoured a points based work permit system similar to the one currently applied for non-EU nationals looking to come and work in the UK. For the time being, a sensible step for employers is to map out the demographic of the workforce, to understand how many British citizens they have working elsewhere in Europe or EU nationals working in the UK. They can then consider, for example, whether any of these individuals might be able to apply for permanent residency - if they have been working in the country in question for five years or more. For others, where that is not likely to be an option, employers can start to formulate a plan for what they will do if and when those individuals become subject to work permit requirements, or ultimately are required to return to their home countries.

Antitrust/Competition

If, as anticipated and hoped by many, the UK secures continuing access to the EU single market post Brexit, it seems likely that the UK will continue to adopt and comply with EU competition laws, since access to the single market would require a single set of rules ensuring "fair play". Further, continued compliance with EU competition laws may be an easy and necessary "give" in the context of the wider Brexit negotiations, which will inevitably encounter some more serious and contentious obstacles such as the free movement of persons.

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