

BREXIT: THE IMPLICATIONS OF THE UK WITHDRAWING FROM THE EU - CLIFFORD CHANCE

Posted on 17/06/2016



Category: [Competition & Antitrust](#)



On 23 June the British will have their say on whether or not to remain in the European Union ("EU"). In the event the referendum is won by the leave camp and the UK withdraws from the EU (what is popularly termed Brexit), it will raise several key questions for markets such as that of financial services, where Community rules and the European supervisory authorities play a vital

How and when will withdrawal take place? Article 50 of the Treaty on European Union regulates the procedure for a Member State withdrawing from the EU, which starts with the opening of a period of negotiations.

In the event of a failure to reach an agreement within two years as of notification of the decision to withdraw, the Treaties will cease to apply on that date, unless the European Council and the Member State in question have unanimously agreed to extend said term.

Therefore, in the worst-case scenario, assuming that the UK notifies the Council of its intention to withdraw immediately after the referendum and an agreement is not reached during the period of negotiations and the term of the same is not extended, the UK's withdrawal would not take place any earlier than late June 2018.

What would the consequences be? Among other things, Brexit would mean that British entities, or European entities operating in the United Kingdom, would not be able to take advantage of the "Community passport" in areas such as credit institution, investment, insurance, reinsurance and insurance intermediaries services; or in the marketing of UCITS funds or alternative funds. The "Community passport" has been one of the EU's major achievements in the financial services sector, as it allows entities from one Member State to operate on a freedom of establishment or free provision of services basis in another Member State, based on the authorisation from their home Member State, without the need to comply with the authorisation requirements in the host State. All entities have to do is go through a simple notification procedure with national regulators and comply with the mandatory rules on general interest in the host State.

In order to avoid the disadvantages that the loss of the "Community passport" would entail, and notwithstanding the possibility that the UK could try to use the third-country equivalence procedures permitted under certain Directives in limited cases, there would foreseeably be an avalanche of corporate transactions involving British entities (or groups from third countries that operate in the EU through British entities) seeking to reorganise their corporate structures and equip themselves with a company incorporated in the EU (possibly in Ireland) that would be able to benefit from the "Community passport". From a practical perspective, account should be taken of the fact that the performance of these kind of restructuring transactions has been greatly facilitated by EU rules (for example, the Cross-Border Merger Directive, or the Directive on the assessment of acquisitions of a qualifying holding in the financial sector), which said groups will no longer be able to avail of if the potential restructurings are implemented once the UK has left the EU.

What alternatives would the United Kingdom have? The different studies carried out to date have essentially centred on five alternatives for the UK: (i) form part of the European Economic Area ("EEA") following the Norwegian model; (ii) sign a series of bilateral agreements on different matters, like the Swiss model; (iii) a customs union, as in the case of Turkey; (iv) a free trade agreement with the EU, like Canada; or (v) maintain a relationship with the EU exclusively in its role as member of the World Trade Organisation.

We do not have the space here to analyse the problems raised by each of these options, but what it is important to highlight is that none of them offers full access to the internal market in the financial services sector with the present conditions.

Even under the Norwegian option, in which the UK would have access to the internal market, in the case of financial services it would be incomplete, in relation, for example, to the maladjustments derived from the fact that the agreement creating the EEA, which predates the introduction of supervision in the financial sector by the European authorities, does not take into account the central role that they play; this is a matter that has yet to be resolved, despite many years of negotiations in

the context of the agreement on the EEA.

Tony Judt concludes his seminal work 'Postwar' by recognising the history of success that the EU has represented, whilst also reminding us that "European Union' may be a response to history, but it can never be a substitute". Let us hope that history, despite its ups and downs, validates once again the need and virtue of the European ideal.

Jaime Sánchez Santiago is counsel at Clifford Chance. He can be contacted at jaime.sanchez@cliffordchance.com