

Client Alert

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For further information please contact

London

Timothy Gee
+44 207 919 1855
tim.gee@bakermckenzie.com

Nick O'Donnell
+44 207 919 1994
nicholas.o'donnell@bakermckenzie.com

Chicago

Michael F DeFranco
+1 312 861 8230
michael.defranco@bakermckenzie.com

Brexit - Implications for M&A Transactions

The ramifications of the Brexit vote will continue to be felt in the global markets for some time but, at least in the short to medium term, the vote is unlikely to have a material impact on the legal aspects of M&A transactions.

Sale and purchase agreements that were signed pre-vote

The same law that governed any SPA before the referendum continues to govern it now. The UK's regulatory and legal landscape may shift as it prepares to leave the EU but all existing laws continue to have full legal effect, whether their origin was domestic or EU. Unless there is a Brexit-specific provision in your SPA, the occurrence of the vote is almost certainly not going to provide an "out" for seller or buyer. Any regulatory clearance (e.g. merger control) would certainly have been concluded before any new regime that may emerge is brought into force. So, for most of those who signed an SPA before the vote, which is due to complete some time in the future, the vote will have no impact on the legal process for consummation of the deal.

New SPAs signed post-vote

In the longer term, as key issues are addressed, for example in relation to trade, tax and mobility, the commercial impact on businesses of Brexit may become significant. The new trade arrangements between the UK and the rest of the EU, and between the UK and the rest of the world, will have a material impact on the way business opportunities are assessed and valued (and not all of these may be negative).

In addition, when transactions are to be reliant on third party debt or equity financing, we can expect increased focus on termination and market flex rights, in the event of volatility in the markets.

As for the legal aspects of M&A transactions to be entered into during the run up to Brexit, our guidance is as follows:

- **English law and jurisdiction will remain a perfectly sensible choice**
 - For commercial entities conducting international transactions, the bulk of applicable English contract law is derived from English common law and not EU law. English common law promotes the principle of 'freedom of contract' between businesses and is known for being commercially orientated. It aims to give effect to the bargain agreed between the parties, with minimal judicial interference for public policy or other reasons. EU regulations require EU courts to respect parties' choice of law in a commercial relationship and apply whether or not a party is located in the EU.

- EU regulation currently determines jurisdiction issues and the parties' choice of jurisdiction is again generally respected. It also provides for the judgments of one member state to be enforced in another. The UK and the EU may agree to continue the application of these principles to avoid the risk of parallel proceedings and potential enforcement issues for both parties. Even without such an agreement, there are various possible treaty-based options for the UK to pursue, the overall aim of which is the same.
- Arbitration is essentially unaffected by Brexit. English arbitration law (i.e. governing the conduct of arbitrations) does not derive from EU law. The recognition and enforcement of English arbitral awards in EU countries (or vice versa) is also not the subject of EU law; such cross border enforcement is governed by the New York Convention, the application of which would be unaffected by Brexit.
- **If you want to make Brexit itself a termination event, provide specifically for it**

The ability to invoke a MAC clause turns on the particular wording used and interpretation in accordance with the governing law of the contract. Whilst there are differences in market practice and the construction of MAC clauses across jurisdictions, in the absence of carefully drafted Brexit-specific parameters, it is unlikely that Brexit itself will enable a MAC provision to be triggered.

Force majeure clauses are similarly unlikely to be triggered by Brexit. Force majeure clauses are not generally prevalent in M&A transactions. Where they are used, as with MACs, in the absence of carefully drafted Brexit-specific provisions, it is unlikely that Brexit itself will enable a force majeure provision to be triggered.

- **Regulatory CPs**

It is likely that some regulatory approval processes, such as the merger control regime, will change on Brexit. Prior to the settlement of any such new arrangements, CPs may need to be more broadly drawn. It is not anticipated, however, that there will be any change to the certainty profile for transactions (at least outside those areas where "national interest" is at stake), as Brexit itself is not anticipated to lead to any fundamental changes in policy underlying most current regulation.

- **Takeovers**

Takeovers currently regulated solely by the UK's Takeover Code will continue to be so regulated and this will not change post-Brexit. Accordingly, those transactions which straddle the date of Brexit will be unaffected as to the mechanics and timetable of the process. Occasionally, the UK shares jurisdiction over a takeover with another EU regulator (this is where the target has its registered office in one EEA state but is listed in another). The potential implications of Brexit in these cases of 'shared jurisdiction' are not yet known.

The biggest impact for businesses will be the terms of trade between the UK and the EU-27, as well as between the UK and the rest of the world, which will determine how businesses access different markets when exporting and importing goods and services. We will continue to keep you updated as the legal and regulatory landscape alters. In the meantime, English common law and existing legislation in the UK will continue to provide a commercial, predictable and respected framework for ongoing M&A activity. For a fuller description of the potential models and possible outcomes of the UK vote to leave the EU, see Baker & McKenzie's Brexit website.

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