

BREXIT: THE POTENTIAL IMPACT ON PAYMENTS BUSINESSES

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Following the UK's vote to leave the European Union (EU) on 23 June 2016, there are many questions which will need to be addressed in the coming months, including how the referendum result might affect the current framework for payments. Roger Tym and Virginia Montgomery, Hogan Lovells International LLP, write

Background

The cross-border payments structure which supports cross-border European trade and the single market is comprised of a number of EU Directives and Regulations for payments, such as the Payment Services Directives - PSD1 (2007/64/EC) and PSD2 ((EU) 2015/2366), the Money Laundering Directives (now up to the Fourth Money Laundering Directive ((EU) 2015/849) (4MLD), with a further amending Directive), the Payment Accounts Directive (2014/92/EU), the Single Euro Payments Area (SEPA) Regulation (EC 260/2012) and the Interchange Fee Regulation ((EU) 2015/751) (IFR).

Some of these instruments are already in force, while others are due to be implemented in the coming months and years. The exit process for the UK's withdrawal from the EU has not yet started but, given the two-year withdrawal period under Article 50 of the Treaty on the European Union, we could potentially leave the EU in early 2019. Which laws will apply after we leave and what choices will the UK have?

Effect on EU-based legislation and passporting

EU Directives have to be implemented by Member States at national level. On Brexit, the implementing instruments for Directives (e.g. regulations under statutory instruments) will remain in place (unless they, or the primary legislation from which they derive their legal basis in UK law, are repealed and/or replaced/amended).

European Regulations, such as SEPA and IFR, are directly applicable in UK law and will therefore fall away on Brexit unless they are directly transposed into UK law by domestic legislation. Will this be put in place instrument by instrument, or by some form of umbrella agreement allowing for automatic application of existing EU-based legislation?

What of EU laws currently in the pipeline, notably PSD2? Our relatively new regulator, the Payment Systems Regulator (PSR), published its draft strategy for consultation on 13 July 2016. The strategy document makes specific reference to the industry's commitment to delivering the PSD2 requirements "despite the UK's vote to leave the European Union" and to the fact that the Payments Strategy Forum "will take into account any developments during the course of the consultation period." At the strategy launch event on the same day, a senior HM Treasury official confirmed that the UK will be going ahead with PSD implementation by Q1 2018.

While Brexit presents challenges, it could allow the UK to take payments regulation in a new direction and/or revisit aspects of existing or pending legislation, for example the provisions regulating card payments and acquiring under PSD2. However, in reality, the UK is likely to want to retain passporting rights (i.e. the ability for businesses to provide services cross-border and establish branches in multiple states without needing to be licensed in more than one state), for example, by remaining within the European Economic Area or under alternative arrangements (e.g. via a bilateral agreement with the EU or under a third country regime).

If it were to do so, it is unlikely that UK regulations could materially diverge from the EU as we would need to keep/implement relevant EU laws fully, or at least maintain equivalent standards in order to retain our access to the single market. In addition, key aspects of the European regulatory framework for payments already reflect UK policy in any event. For example, on speed of payments processing, the move to Faster Payments was in line with requirements of the Office of Fair Trading (as was) and of the UK Government even before PSD1.

Importance of effective EU lobbying and engagement

Our ability to influence EU financial services legislative developments is already on the wane, accelerated by the resignation of Lord Hill immediately post-Referendum vote as the Commissioner for Financial Stability, Financial Services and Capital Markets Union. The payments sector therefore needs to find new ways of lobbying and engaging at EU level.

The UK is unlikely to have the same degree of direct access to the decision-makers in the Commission, Parliament or Council following Brexit. The Government might have limited consultation status, but it is more likely that alternative access routes would have to be developed, for example through European trade bodies such as the European Banking Federation, authorized local subsidiaries in EU Member States, or law firms with pan-European offices.

The size of the review and planning task should not be underestimated, which is why proper lobbying and engagement arrangements will be very important as we move towards Brexit and embrace the many possibilities it presents.