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# Brexit: Bonfire Of Laws Unlikely But Uncertainty Surrounds

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**PaymentsCompliance spoke with legal experts to discuss the ramifications of a Brexit on the payments industry, as incoming regulations add complexity to the already delicate and uncertain situation.**

The general consensus is changes ushered in by the first Payment Services Directive (PSD1) and similar legislation would not be overturned if the British voted to leave the European Union in a referendum on June 23.

However, some companies have already said they would leave should the picture become too confusing.

Sophie van Wingerden, financial regulatory associate at Kemp Little, said it was "difficult to predict" the effect of Brexit on payment laws currently in force.

"However, it seems highly unlikely that these laws would be repealed as this would be enormously disruptive to businesses that are currently operating and bring little benefit," she said.

Celyn Armstrong, financial regulation counsel at Linklaters, agreed that the UK government would have "a strong desire" to maintain the status quo for payments regulation, at least until the medium term.

"The government will have its work cut out to negotiate the terms of the exit over the two year period after giving notice to leave," he said.

"I don't expect the government will want to buy trouble by tinkering with existing rules."

## Implementation hold up?

Both lawyers claimed that an exit would jeopardise the implementing of PSD2 and fuel ambiguity about how closely British standards would match European ones in the future.

For some this may be a positive as the Financial Conduct Authority (FCA) recently argued that shifts in European payments law were cramping innovation.

Under the terms of PSD2, European governments are obliged to implement it in national laws by January 2018, a date that Armstrong said "would be likely to fall during the negotiations" of an exit in the wake of a "leave" vote.

“The UK would technically still be obliged to implement PSD2 in this period, but in reality it seems unlikely that the UK government would do this while negotiations were pending,” he said.

Van Wingerden said that the post-Brexit arrangements would influence the fate of PSD2, but noted that the UK has an incentive to keep payments rules similar to European ones.

“If the UK wants continued access to the payments market in the EU, the EU will treat the UK as a third country that must demonstrate an equivalent level of regulation to be allowed access,” she said.

“As long as the UK’s payments regulations are equivalent to those of the EU, this is not likely to present an insurmountable problem; however, over time, as the UK and the EU regulations diverge, this may become a barrier to access.”

In broader terms, she added that the notion “that the existing payments rules would be amended or not updated in line with EU rules” was “more likely” than the idea of current regulations being repealed.

This would occur “perhaps not immediately, but over time”, and mean ultimately UK rules diverged from those of its European neighbours.

Armstrong concurred that the UK might well have to keep some rules in place for the sake of accessing the single market.

“However, given a ‘leave’ vote it would probably only be politically acceptable to do this in a few key areas,” he said.

“It seems unlikely that the single market for payment services would be considered so essential as to justify staying within the European regime, especially as some aspects of PSD2 are unpopular with UK banks.”

As is the case with banks, some payments firms are concerned that a divergence between UK and European payment rules might mean they have to move out of the UK into another EU country to continue to do business.

## Passport trouble

TransferWise, a money transferal service founded by Estonians but headquartered in London, has already confirmed it would consider this in the event of a "leave" vote.

“If payments institutions cannot passport out of the UK into the EU, they will have an incentive to move to an EU country to be able to continue taking advantage of the passporting regime,” van Wingerden said.

“This however is a general issue that will face all firms that are currently taking advantage of a passport in or out of the UK, and is not specific to payments, although payments firms may have an easier time finding a new home base outside of the UK than larger more unwieldy investment and banking firms."

Even so, both lawyers emphasised that there was a great deal of uncertainty over what model would emerge in the wake of Brexit.

Allen & Overy, a law firm, speculated in a white paper that the UK could adopt a model akin to Norway, remaining in the European Economic Area (EEA) by joining the European Free Trade Association (EFTA), which consists of Iceland, Norway and Liechtenstein.

Although Switzerland is also a member of the EFTA, it no longer belongs to the EEA, preferring to cooperate with the EU through numerous bilateral treaties — another potential model for the UK.

Should the UK join the EEA it "could continue to take advantage of the passport system and would be required to maintain existing regulatory frameworks", Allen & Overy said.

It added: "Under a customs union or UK-EU free trade agreements models, the UK would have freedom to regulate its own financial services sector."

A further complicating factor is the distinction between primary and secondary EU legislation.

Under the UK's European Communities Act (ECA) 1972, Section 2(1), secondary legislation from the EU level is automatically adopted into domestic law and would be ineffective once that act was repealed.

This reflects the distinction between regulations, directives and decisions in Section 288 of the Treaty on the Functioning of the European Union, which would cease to be effective if the UK left the EU.

"The extent of the UK's freedom to carve its own regime will depend upon the approach adopted as regards the repeal of the ECA," Allen & Overy said.

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