

What happens after Brexit?

By the time you read this article the UK will have voted 'Leave' in the Referendum and the Westminster Parliament will be left to grapple with the consequences of the decision by the electorate.

The purpose of this article is to set out in summary the next steps to be taken and then look ahead to the potential consequences for business immigration, a subject of interest to several of us at Five Paper.

The right of a member state to withdraw from the EU was introduced by the Lisbon Treaty of 2009 and is found in Article 50 of the TFEU. That Article establishes procedural requirements rather than matters of substance. Those requirements provide for the negotiation of a withdrawal agreement between the EU and the UK which should include the latter's future relationship with the Union. The withdrawal agreement could also include provisions concerning the transitional application of EU rules in particular regarding rights of residence and work deriving from EU citizenship.

The formal withdrawal process is initiated by a 'notification' from the UK declaring its intentions. The timing is in the hands of the UK and informal discussions could take place before notification is given to the European Council. The Council then issues guidelines for the negotiations with the aim of concluding the terms of the agreement in two years. After the two year period membership automatically ends unless both Council and the UK agree to extend the period. If there is a change of mind during the withdrawal negotiations it seems unlikely that the UK could revoke its decision as Article 50 does not provide for such an eventuality.

Business immigration lawyers are often concerned with the free movement of people within the EU. The withdrawal agreement will need to address the phasing out of that provision and new legislation will need to be introduced to deal with the movement of people, services and goods. It is unclear which trading model with the EU will be approved by Westminster and how long that process will take. One can expect a fair amount of rancour to arise from debates at Westminster as although the electorate has voted 'Leave' it has not approved any particular alternative trading model.

Furthermore it is unlikely there could be a partial withdrawal and so the vote to leave will apply to all of the UK as Scotland, for example, is not an independent member of the EU.

It is unlikely that Westminster will choose to become a member of the EEA in common with Norway and Iceland. Membership of the EEA would require the UK to accept the freedoms enshrined in TFEU which is unlikely to appeal to the electorate. More likely is that the UK will seek to agree a Canadian style free trade agreement with the EU. The terms of any such agreement are speculative but would probably give limited access to the single market with some tariff barriers remaining. If an FTA is selected by the UK then implementation is likely to be a 5 year project (at least) with all remaining 27 states having to agree to its inception. Any one might, for example, hold its own referendum to decide.

So far as the free movement of people is concerned it is likely that the UK will introduce a 'Points Based System' to apply to future EU workers as it does currently for those wishing to

move to the UK to work from outside the EU. There are currently 4 tiers of the PBS; 1 for high value migrants, 2 for skilled workers, 4 for students and 5 for temporary workers. Migrant applicants under Tiers 2, 4 and 5 require sponsorship by the grant of a licence to suitable sponsors. Jobs under Tiers 2 and 5 have to comply with Codes of Practice drawn up by the Home Office. In addition a sponsor may usually only recruit a migrant worker if it has completed a Resident Labour Market Test and can show that no suitable settled worker is available to fill the job or that the job is exempt from the test. Under the PBS there will be an assessment of a worker's attributes, English language ability and maintenance.

Outside of the PBS it may also be possible for migrant workers to move to the UK as a result of satisfying the criteria for business visitors or as representatives of an overseas business or through their UK ancestry.

The Leave campaign has said that it will grant indefinite leave to remain for all those already in the UK and exercising their EU law rights. Any such policy will have to be worked out before Brexit. We foresee there are likely to be a number of difficulties in practice with this approach. Employers will need to know how best to plan to keep their key workers.

The new agreements between the UK and the EU will be interesting and controversial in equal measure as they unfold over the years to come. Familiarity with the existing provisions applying to non EU migrant workers coming to the UK will give practitioners a head start.

For several years now we have delivered seminars across the country to lawyers and others on business immigration both under and outside the PBS. The seminar lasts a day and is accompanied by detailed slides and notes. If you are interested in a presentation on this topic we would be very pleased to speak to you and your clients about the consequences of Brexit for your client's workforce and you should not hesitate to contact one of us directly or our new Senior Clerk, David Portch.

Satinder Gill
Millie Polimac
Ian Wright

24 June 2016