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Infrastructure and Project Finance

What are the legal issues for Infrastructure and Project Finance following a Brexit?

Issue	Impact	Areas of law affected
Funding - Brexit might affect the availability and price of funding to infrastructure projects	New regulations may prevent / make it more difficult for the public sector and/or investors seeking to undertake infrastructure projects to access EU funds and grants. This may affect the feasibility and/or viability of infrastructure projects. Brexit will change the status of the UK and UK projects in relation to EIB funding. If the UK sits outside the EEA and EFTA, EIB funding will not be available for projects. Given that the cost of EIB funding generally lower than that provided by commercial lenders – and that the EIB also provides certain financial products and guarantees that are not available from commercial lenders – this will impact on the amount of debt available to fund infrastructure projects and the overall pricing of that debt. Depending on negotiations the UK could become a part of the EFTA, where the EIB offers loans for certain project initiatives. Any project initiatives would have to meet the same eligibility criteria, such as environmental and procurement requirements, and follow the same procedures as those within the EU and any changes to UK legislation may make it more difficult to meet the EIB's eligibility criteria.	IPF
Procurement – Brexit would allow certain flexibility in relation to UK procurement law	Brexit will allow the UK to develop and/or amend existing procurement rules to allow for additional flexibility (as existing legislation is based on EU Directives). Changes to procurement legislation could allow the implementation of different procurement approaches more suited to different types of infrastructure project. Any changes to procurement would take time and potentially introduce uncertainty and this may affect the pipeline of infrastructure projects or the timetable for implementation of infrastructure projects.	IPF Procurement

Environmental regulation – Brexit would allow flexibility in relation to UK environmental law	Brexit will allow the UK to develop and/or amend existing environmental legislation to allow for different policy objectives or flexibility (as existing legislation is based on EU Directives). A number of infrastructure projects have been instigated to reflect EU policy requirements as instigated through EU legislation (e.g. waste treatment plants or recycling initiatives). Any move by the UK away from EU environmental regulation may result in an impact on the viability of both existing and planned projects. Any changes to environmental legislation would take time and potentially introduce uncertainty and this may affect the pipeline of infrastructure projects or the timetable for implementation of infrastructure projects. Commercial lenders lending to projects that are funded by debt (rather than by the public sector) would likely still wish to implement the Equator Principles and therefore some environmental analysis would always be required for infrastructure projects.	IPF Environment
Restriction on movement of goods and services – Brexit may result in the loss of access to freedom of movement of goods and services and/or the imposition of restrictions under UK legislation	Brexit will allow the UK to develop and/or amend existing legislation in relation to control of the movement of goods and services. Any restrictions on the movement of labour, goods and services into the UK (e.g. a restriction on working permits or immigration) may result in an increase of costs of performing infrastructure projects in the UK. Any restrictions on the movement of labour, goods and services from the UK into Europe (e.g. by requiring permits or the introduction of import tariffs) may also impact on the ability of UK companies to compete for infrastructure projects in the EU.	IPF
Competition and State Aid	Brexit will allow the UK to develop and/or amend existing legislation in relation to competition and state aid. Certain deregulation of state aid or competition restrictions may provide opportunities for new or different project structures in the infrastructure sector.	IPF
Legislative and regulatory uncertainty – Brexit will raise questions about future legislation and regulation to be applied to infrastructure projects	Brexit is likely to result in a prolonged period of negotiation with the EU in relation to the future relationship between the UK and the EU member states (and potentially members of the EEA and EFTA). General legislative and regulatory uncertainty tends to impact on the ability and desire of both public sector and private sector participants in the infrastructure projects to promote new projects.	IPF

Change in Law provisions – most infrastructure projects contain contractual provisions outlining mechanics for change in the contract following changes in law	In the event that there is significant legislative change as a result of Brexit, there will be a need to address any consequences of changes in law in infrastructure contracts. The ability to obtain compensation or relief in respect of changes in law is often restricted to changes that either have a capital cost associated with them or which are discriminatory to a particular project or sector. Brexit would be ‘generally’ applicable and therefore any impact of changes in law (in particular, any which have a cost impact on the providers of infrastructure projects) is to be the risk of the infrastructure provider.	IPF
Infrastructure planning – The UK’s role in pan-European infrastructure planning (e.g. the TEN-T network)	It is unclear how Brexit will impact on the UK’s role in planning infrastructure (including energy and transport infrastructure) throughout Europe.	IPF
Balance sheet treatment of projects – application of ESA and the accounting requirements to achieve off-balance sheet treatment of projects impacts on the structure and risk allocation provisions in infrastructure contracts	Brexit will allow the UK to dis-appply the accountancy rules associated with membership of the EU (ESA). The application of ESA95 has had a significant impact on the balance sheet treatment of infrastructure projects and resulted in changes being required to the structure of infrastructure projects. Changes to accounting requirements may allow the UK to develop different contractual models for the implementation of infrastructure projects. Note that ESA rules are however based on UN SNA rules and in implementing any changes the UK may be required to consider these as part of other international commitments or as part of any negotiation of future trading arrangements.	IPF
Infrastructure funds and investors – implications of the UK no longer being an EU member	A number of infrastructure investment funds have been set up with rules limiting the scope and geographical spread of investment. If any fund has a restriction that restricts investment to projects in the EU, any consequences for existing projects in the UK or future investment strategy will need to be considered.	IPF

What action can you take now?	How can CMS help?
Existing infrastructure projects: Companies can review contracts to understand the change in law mechanics and any impact that changes in law may have on their existing contracts.	CMS can assist with review of change in law provisions in contracts or with developing change in law mechanics for contracts currently under negotiation to reflect any potential changes arising from Brexit.
Future infrastructure projects: It is difficult to assess the impact of Brexit on future infrastructure projects in the UK as this will depend on the nature and scale of any legislative changes introduced as a result of Brexit.	

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Further information, including a list of our offices, can be found at **www.cms-cmck.com**