

# To Brexit, or not to Brexit, that has always been the question...

Emmanuelle Inacio provides a special report on the forthcoming referendum which will decide whether or not the UK stays within the EU



EMMANUELLE INACIO  
INSOL Europe Technical Officer



## WHAT WOULD BE THE LEGAL CONSEQUENCES FOR THE BRITISH RESTRUCTURING AND INSOLVENCY PROCEEDINGS CONCERNING COMPANIES AND INDIVIDUALS?



**U**nited Kingdom Prime Minister, David Cameron, has announced a referendum on whether the UK should remain a member of the European Union, to be held on Thursday 23 June 2016. Indeed, in January 2013, David Cameron promised that, should the Conservatives win a parliamentary majority at the 2015 general election, the UK Government would renegotiate the terms of the UK's EU membership, before holding a referendum.

The renegotiations were concluded at the European Council in Brussels on 18-19 February 2016 and concern four areas: economic governance, competitiveness, sovereignty, social benefits and free movement. The agreement will become effective on the date the UK informs the Council that it has decided to remain a member of the EU.

*The UK and the EU have always had an uneasy relationship.*

If we go back to 1956, Jean-François Deniau, a French statesman, who was a young member of the French commission in charge of drawing up the Treaty establishing the European Economic Community (EEC), narrated in his memoirs several charming anecdotes on the negotiations in Val-Duchesse in 1956, especially one. Jean-François Deniau told that Russell Bretherton, a British Under-Secretary from the Department of Trade was also attending the work sessions, England being invited. This delightful English gentleman

never opened his mouth, except to smoke his pipe. Finally, one day, to everyone's surprise, he asked to speak. He wanted to deliver the following closing speech: *"Messieurs, I have followed your work with interest, and sympathetically. I have to tell you that the future Treaty which you are discussing a) has no chance of being agreed; b) if it were agreed, it would have no chance of being ratified; c) if it were ratified, it would have no chance of being applied. And please note that, if it were applied, it would be totally unacceptable to Britain. You speak of agriculture, which we don't like, of power over customs, which we take exception to, and of institutions, which horrifies us. Monsieur le president, messieurs, au revoir et bonne chance."*

### Joining the EEC

The UK finally joined the European Economic Community on 1 January 1973 after two applications for membership vetoed by French President Charles de Gaulle. A referendum was held on 5 June 1975 in the United Kingdom to gauge support for the country's continued membership of the European Economic Community. The UK voted to stay in.

### Leaving the EU

But if the UK voted to leave the EU on 23 June 2016, what would be the procedure applicable for its withdrawal?

Article 50(1) of the Treaty on European Union (TEU) provides that *"any Member State may decide to withdraw from the Union*

*in accordance with its own constitutional requirements"*.

Article 50(2) would allow the UK, after having notified the European Council of its intention to withdraw, to negotiate and conclude an agreement setting out the arrangements for its withdrawal with the Union, taking into account the framework for its future relationship with the Union. Article 50(3) establishes an optional procedure. If the negotiation succeeds, the date of the withdrawal should be the date of the entry into force of the withdrawal. If an agreement is not reached, the withdrawal should be automatically effective two years after the notification, unless the European Council, in agreement with UK, unanimously decides to extend this period.

Whichever option is adopted, the UK will certainly try to negotiate an agreement setting up the new rules of its relationship with the EU, particularly the trade relations between the two parties. More than 40 years after joining the European Economic Community, UK's and other Member States' economies are indeed highly integrated and interdependent. As EU citizens, millions of British citizens live in other Member States and millions of EU citizens originating in other Member States live in the UK. A large number of industries and companies are established, both in the UK and on the Continent. The density of the flows of goods and services is significant.

Therefore, the new relationship between the UK and the EU could be a tailor-made agreement. There are other

Share your views!





options: the UK could try to become a member of the European Free Trade Association (EFTA) or a member of European Economic Area (EEA). The UK could also make the choice of following the Swiss model or try to negotiate a free trade agreement or a customs union agreement with the EU. The UK could finally make the choice of becoming a third country.

### Legal Consequences

But if the UK voted to leave the EU on 23 June 2016, what would be the legal consequences for the British restructuring and insolvency proceedings concerning companies and individuals?

In this aspect, in case of a “Brexit”, the European Regulation on cross-border insolvency proceedings would no longer apply to the UK. Therefore, insolvency proceedings opened in the UK would no longer benefit from automatic recognition in other Member States of the EU and insolvency proceedings opened in Member States would no longer benefit from automatic recognition in the UK. Furthermore, creditors or third parties’ rights *in rem* acquired in respect of the foreign assets of UK companies would be affected. Similarly, in case of a “Brexit”, the European Regulation Recast on cross-border insolvency proceedings which will be in force from 26 June 2017, will not apply to the UK albeit the new instrument aims at increasing chances to rescue European distressed companies and ensuring that procedures for cross-border insolvencies are effective and efficient.

The Cross-Border Insolvency Regulations 2006 (CBIR 2006), which implement the

UNCITRAL Model Law on Insolvency, will then apply. This instrument is indeed used for recognition of insolvency proceedings with third countries, but the recognition is not automatic: the foreign appointed insolvency practitioners who want their proceedings to be recognised in the UK have to apply for recognition under the CBIR 2006.

Currently, the European Insolvency Regulation replaces the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed in Brussels on 2 May 1934. In the event of a “Brexit”, the UK will have the possibility to negotiate similar bilateral or multilateral conventions with the EU Member States for mutual recognition of insolvency proceedings.

Schemes of arrangements do not fall within the scope of the European Insolvency Regulations as they are not insolvency procedures. The UK courts will allow a foreign company to propose a scheme to its creditors if there is a sufficient connection with England and whether the scheme will be recognised in the jurisdiction of incorporation of the company and in any countries where the scheme might need to take effect. UK courts considered that schemes of arrangements could be recognised by other Member States under the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. But in the event of a “Brexit”, the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters will cease to apply. Therefore,

recognition would be established under the private international law, or Rome I Regulation, on the law applicable to contractual obligations, if relevant. The Lugano Convention, which provides for mutual recognition of judgments between EU and EFTA countries, could also apply if it remains applicable to the UK.

Insolvency proceedings concerning insurance undertakings, credit institutions and certain investment undertakings are excluded from the scope of the European Insolvency Regulation. Insurance undertakings and credit institutions are subject to specific EU directives, whereas investment undertakings fall outside the European law. The EU directives have been implemented in the UK. Therefore, in the event of a Brexit, the UK government would have to decide whether to maintain the incorporated legislation.

If the result of the referendum is in favour of a “Brexit”, this will bring uncertainty, complexity and increased costs for the restructuring and insolvency proceedings concerning companies and individuals in the UK and the EU.

41 years after the last referendum, hopefully the results will be identical. If the UK leaves the EU, we can indeed fear a domino effect...

Source: <http://bobwessels.nl/2016/03/2016-03-doc2-brexit-european-insolvency-law/>

### Get in touch

For updates on the new technical content recently published on the INSOL Europe website, visit: [www.insol-europe.org/technical-content/introduction](http://www.insol-europe.org/technical-content/introduction) or contact Emma on: [technical@insol-europe.org](mailto:technical@insol-europe.org)



## Links

**Email:**  
[technical@insol-europe.org](mailto:technical@insol-europe.org)

**LinkedIn:** [www.linkedin.com](http://www.linkedin.com)

**Twitter:** @INSOLEurope

**Resources**  
[www.insol-europe.org/resources](http://www.insol-europe.org/resources)

**Glossaries**  
[www.insol-europe.org/technical-content/glossaries](http://www.insol-europe.org/technical-content/glossaries)

**Updated Insolvency Laws**  
[www.insol-europe.org/technical-content/updated-insolvency-laws](http://www.insol-europe.org/technical-content/updated-insolvency-laws)

**State Reports**  
[www.insol-europe.org/technical-content/state-reports](http://www.insol-europe.org/technical-content/state-reports)

**National Insolvency Statistics**  
[www.insol-europe.org/technical-content/national-insolvency-statistics](http://www.insol-europe.org/technical-content/national-insolvency-statistics)

**How to become an insolvency practitioner across Europe?**  
[www.insol-europe.org/technical-content/how-to-become-an-ip-across-europe](http://www.insol-europe.org/technical-content/how-to-become-an-ip-across-europe)

**National Case Law**  
[www.insol-europe.org/technical-content/national-case-law](http://www.insol-europe.org/technical-content/national-case-law)

**EIR Reform – Process**  
[www.insol-europe.org/technical-content/european-insolvency-regulation](http://www.insol-europe.org/technical-content/european-insolvency-regulation)

**EIR Case Register**  
[www.insolvencycases.eu](http://www.insolvencycases.eu)

**INSOL Europe Studies**  
[www.insol-europe.org/technical-content/insol-europe-studies](http://www.insol-europe.org/technical-content/insol-europe-studies)

**Working Groups**  
[www.insol-europe.org/about-us/about-our-working-groups](http://www.insol-europe.org/about-us/about-our-working-groups)