



Brexit

Legal aspects from an EU perspective

Brexit from a legal perspective

Legal attention points / key questions - Non exhaustive

01

Data Privacy

Whilst there may be changes to the Data Protection Regime in the United Kingdom, if the European Union is an important market for your organization the EU's data protection requirement, including the General Data Protection (GDPR) – will continue to be relevant for your organization. Complying with the GDPR is therefore recommended.

02

Corporate Structure

Establishment of legal entities, board composition, free movement of employees/expats (see also Staffing), corporate restructuring.

03

Your business relationship with the EU

Consider whether any company of your group may be benefiting from EU grants or other EU funding or aid. Also consider whether you do any business with EU or UK public tender and how that would be affected. Further, consider the impact on relationships with the relevant (EU) agencies, such as EMA.

04

Cross Border mergers

Merging legal entities between UK and rest of EU will be subject to different rules and regulatory review.

05

Contracts and incoterms

Are the contracts with suppliers and customers Brexit ready? Contracts regarding import and export of goods and the provisioning services in an EU country should be checked on territorial restrictions and clauses that need to be amended. Are the applicable Incoterms still sufficient? Brexit may result in increasing costs due to longer waiting times at the border and higher import tariffs. This should be considered when (re)negotiating contractual terms.

06

Financial Considerations

The impact of Brexit on the value of collateral or security you may be required to provide should be considered. Is your access to the UK Capital markets impacted? You could also review your financial covenants, material adverse change clauses, credit rating triggers and other break, termination, or ratchet clauses in its loan agreements, leases, banking arrangements, and other contracts.

07

Staffing

Rights (if any) that EU citizens will maintain to live and work in the United Kingdom. The procedures to obtain residency rights are yet to be determined, as well as how employers can recruit EU nationals or if work visas will be required.

08

Regulatory Law (other than Financial (supervisory) Regulatory Law

Assess whether any other licenses need to be applied for before Brexit or after Brexit to be able to continue to operate in the EU (market). Consider having the packaging and labelling amended accordingly, e.g. CE marking, different contact information, etc. Also, assess whether access to the EU market is still open in case of a UK entity is performing these regulatory obligations, including reporting. Amend work flows, and assess the disruption of (virtual) supply chains, including export controls (e.g. licensing, transfer of data and operation digital platforms. Also, consider the deviations of current and continued UK reg law aspects of the business, e.g. different UK sanctions and UK export controls requirements.

09

Financial (supervisory) Regulatory Law

Assess whether financial services can still be performed after Brexit, e.g. asset manager and bankers' compensation may change (see also Staffing), and whether these bank and other financial service providers have access to the EU capital market, including banking license and passporting.

10

Intellectual Property Law

Assess to what extent Brexit impacts the strategy, enforcement, maintenance and registration of your organization's IP portfolio. Consider any changes with European Union trademark(s) (applications) where a dual filing strategy should be followed to obtain protection in the UK, as well as in the EU.

Legal Brexit risks

Examples

Brexit risks

Examples Company Law

Legal

Company Law

Explanation:

- > EU-UK restructuring becomes more difficult after the Brexit, in particular, cross-border mergers to/from the UK are likely to be abolished
- > Liability risks for shareholders of UK companies active in EU member states (e.g. UK Limited)
- > Unclear fate of European companies (e.g. SE) based in the United Kingdom

UK-related restructuring

- > Cross-border mergers on the basis of the EU Merger Directive between companies in the UK and EU Member States will probably no longer be possible after the Brexit

Liability risks for UK Companies

- > After the Brexit, UK Limited and other limited liability companies which have their head offices in a EU member state could, by the courts of such member state, be deemed to constitute a non-limited company.
- > For example, German courts will likely regard a UK Limited with their administrative seat in Germany as a non-limited partnership.

Societas Europaea

- > It is unclear whether societies under European law, in particular Societas Europaea (SE), based in the United Kingdom can continue to exist, or whether they must move their registered offices or change their legal form following the Brexit

Brexit risks

Examples Employment Law

Legal

Employment Law

Explanation:

- › The Brexit may have implications for deployment and/or the flexibility of deployment of workers in or from the United Kingdom
- › Changes can also be expected in the area of the European Works Council and TUPE rules

Freedom of Movement for Workers

- › There is legal uncertainty as to whether, and for how long, British employees who work in a EU member state without other EU citizenship will continue to enjoy freedom of movement, and/or whether and when local residence regulations will be applied.
- › There is legal uncertainty as to whether, and for how long, employees who work in the UK without British citizenship will continue to enjoy freedom of movement, and/or whether and when UK residence regulations will be applied.
- › The freedom of movement continues until the extended Brexit date (31st October 2019), unless the Withdrawal Agreement is signed before 31st October 2019. If the Withdrawal Agreement is agreed on before 31st October 2019, that date will be the Brexit date.
- › The current Withdrawal Agreement foresees a transition period as well (until 31st December 2020), during which the freedom of movement will continue.

European Works Council

- › European Works Councils under UK law may have to be re-elected as part of the Brexit, and other European Works Councils may need to be reconfigured as necessary

Transfer of Undertaking (TUPE rules)

- › Transfers of Undertaking with a UK reference could become more difficult after the Brexit (British TUPE regulations could be repealed)

Brexit risks

Examples Procurement & State Aid

Legal

Procurement & State Aid

Explanation:

- › The consequences of the Brexit on public procurement should receive close attention
- › The fate of European subsidies given out to British companies is currently unclear

Public Procurement

- › The EU Public Procurement Law remains valid for all bidders who participate in public invitations to tender in the EU's internal market
- › As such, attention should be paid to any legislative development towards a so-called "market entry instrument", which could potentially worsen the position for UK companies
- › The legal implications of the Brexit for the UK's and EU's different procurement regulations are still unclear. These depend on various parameters (e.g. WTO (GPA), EEA, bilateral agreements, etc.)

State Aid and Subsidy Law

- › It is unclear whether the UK will still be subject to EU subsidy laws after the Brexit. The decisive factor is whether the UK becomes a member of the EEA

Brexit risks

Examples Commercial & IP

Legal

Commercial
and IP

Commercial contracts, especially sales structures

Explanation:

- > The Brexit will have a significant impact on the exchange of goods between the United Kingdom and the EU, as well as corresponding sales structures
- > The question whether Intellectual Property (IP) rightsholders are immediately affected by Brexit depends very much on which IP rights are involved.

- > The sale and/or placing on the market of goods between the EU and the UK will be significantly affected by the Brexit in both directions, e.g. regarding customs, import, export control, fees and taxes, regulatory responsibilities (e.g., WEEE, RoHS, REACH, and other industry particulars such as LSHC), enforcement of claims, etc., which result in increasing costs due to e.g. longer waiting times at the border and higher import tariffs
- > For EU companies selling goods and services to customers based in the UK via e-commerce platforms and vice versa, the following applies: webshop and platform structures are largely harmonized based on EU guidelines, which will no longer be applicable after Brexit. Certain discrepancies will occur directly from the Brexit (e.g. telecommunications law). Other changes can be expected in the medium and long term, due to national modifications in the UK legislation
- > Territorial arrangements with reference to the EU could become difficult to interpret (what territory is meant by "EU"?) (applicable to all types of commercial agreements such as distribution systems, dealer and representative agreements, exclusivity agreements)

Intellectual Property (IP)

- > Given the many specific changes Brexit brings to the spectrum of IP rights that can impact strategy, enforcement, maintenance and registration of IP rights, clients are advised to check the impact on their portfolio.
- > EU trademarks and Community design rights (both registered and unregistered Community designs) for instance will no longer be valid in the UK after the transition period. Comparable UK rights will be provided for rights registered before the end of the transition period. After the transition period, owners of pending applications or those that want to make a new application and include protection in the UK, will have to apply for UK equivalents (as well).
- > Territorial agreements in IP-related contracts (licenses, research and development contracts, etc.) with reference to the EU may become difficult to interpret (see above)

Brexit risks

Examples Litigation

Legal

Litigation

Litigation, Enforcement

Explanation:

- > The enforcement of claims against UK debtors from within the EU is expected to be significantly more difficult and time-intensive
 - > EU rules on the choice of applicable law may no longer hold, so that applicable law would be determined in accordance with UK IPR rules
- > Simple debt settlement procedures against UK debtors from within the EU may no longer exist. EU creditors have access to various simplified and cost-effective procedures for cross-border debt collection (e.g. the European order for payment procedure for EU parties or the European Small Claims Procedure for civil and commercial claims under EUR 2,000.00), which will probably no longer be available against UK borrowers after the Brexit
 - > No authorization was required under the Brussels I Regulation (Regulation (EU) 1215/2012 and formerly (EC) 44/2001) and the EU Payment Regulation (Regulation (EC) No 1393/2007) to bring lawsuits in another Member State. After the Brexit, this might no longer apply to the UK, with the result that (often time-consuming) international procedures have to be applied, as is currently the case with lawsuits outside of the EU
 - > The enforcement of titles in national courts is also governed by the Brussels I Regulation, with the aim of making such enforcement a simple process. After the Brexit, this regulation will no longer be applicable to the UK, with the result that the enforceability of judgments by UK courts in EU Member States and vice versa is uncertain
 - > The Rome I and Rome II Regulations (Regulation (EC) 593/2008 and (EC) 864/2007) oblige the national courts of Member States to respect the freedom of the parties with regard to choosing applicable law. This means that party agreements which determine the applicability of UK law are in principle recognized by the courts of Member States (subject to a few exceptions). In the absence of such agreements, the conflict-of-law rules (private international law) applicable to the UK would be relevant

Brexit risks

Examples Antitrust

Legal

Antitrust

Explanation:

- > Other/parallel responsibilities and thresholds for merger control applications with UK relevance may arise in the future
- > Competition compliance programs should be updated in good time

Merger Control Procedure

- > With the abolition of the European Commission's one-stop-shop solution, other/parallel responsibilities and thresholds for merger control applications may arise in future
- > Merger control applications are not mandatory in the United Kingdom. However, additional costs may result from the fact that the European Commission is no longer responsible, since relevant turnover in the UK is no longer taken into account

Competition Compliance

- > Existing competition compliance programs must be reviewed as required due to possible changes in antitrust law (EU and UK antitrust law no longer harmonized)
- > EU antitrust laws (as well as respective member states' laws) continue to apply to UK companies with business in the EU internal market, due to the effect principle in antitrust law

Brexit risks

Examples Data Protection

Legal

Data Protection

Data Protection

Explanation:

- › The Brexit creates legal uncertainty for lawfully transferring personal data to the UK
- › In the Withdrawal Agreement, the EU and the UK emphasize the importance of ensuring a high of personal data protection to facilitate such flows between them
- › Since the UK has withdrawn from the EU (1 February 2020), it has become a "third country". The Withdrawal Agreement provides for a transition period ending on 31 December 2020
- › It is not yet clear what will happen on 1 January 2021. It is still possible for a new relationship between the EU and UK to be agreed

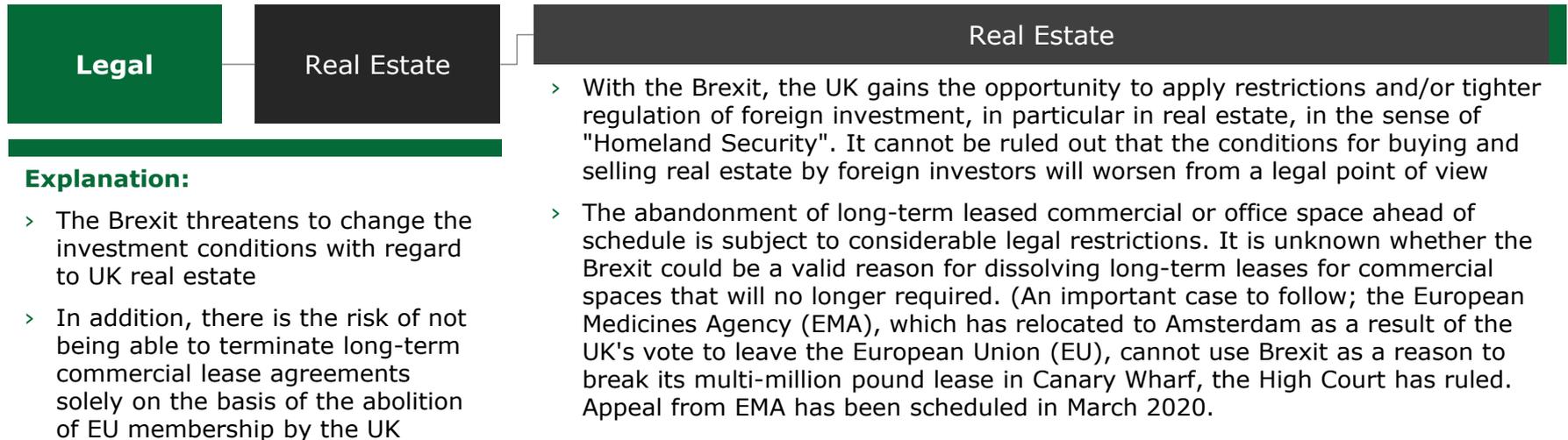
- › The requirements for international transfers of personal data to the UK depend on the outcome of the Brexit – "deal" or "no deal" scenario
- › If the EC makes an "adequacy decision" for the UK, it is likely to be the most appropriate transfer mechanism
- › From a UK perspective: until 31 December 2020, EU law in its entirety applies in the UK. As of 1 January 2021, the new "UK GDPR" together with the amended UK legislation (DPA and PECR) will comprise the personal data protection legislation in the UK

No deal scenario

- › The GDPR will continue to apply to an EEA sender of personal data. Transfers of personal data are only permitted to countries within the EEA
- › Transfers of personal data to countries outside the EEA ("third countries") – including the UK after Brexit – are only permitted if the country offers an adequate level of protection or a legal exemption of the GDPR applies
- › It is not yet clear if the transfer of personal data to the UK may be based on an "adequacy decision" by the European Commission
- › Until such an adequacy decision had been adopted by the EC, the transfer of personal data to the UK must be based on one of the following appropriate data transfer instruments: 1) Standard or ad-hoc Data Protection Clauses 2) Binding Corporate Rules 3) Codes of Conduct and Certification Mechanisms 4) Derogations
- › If transfer to the UK based on an adequacy decision and appropriate safeguards is undesirable or impossible, then one of the exemptions may apply, including: explicit consent of data subject, contractual necessity and public interest. This means that transferring personal data to the UK is permitted without further conditions

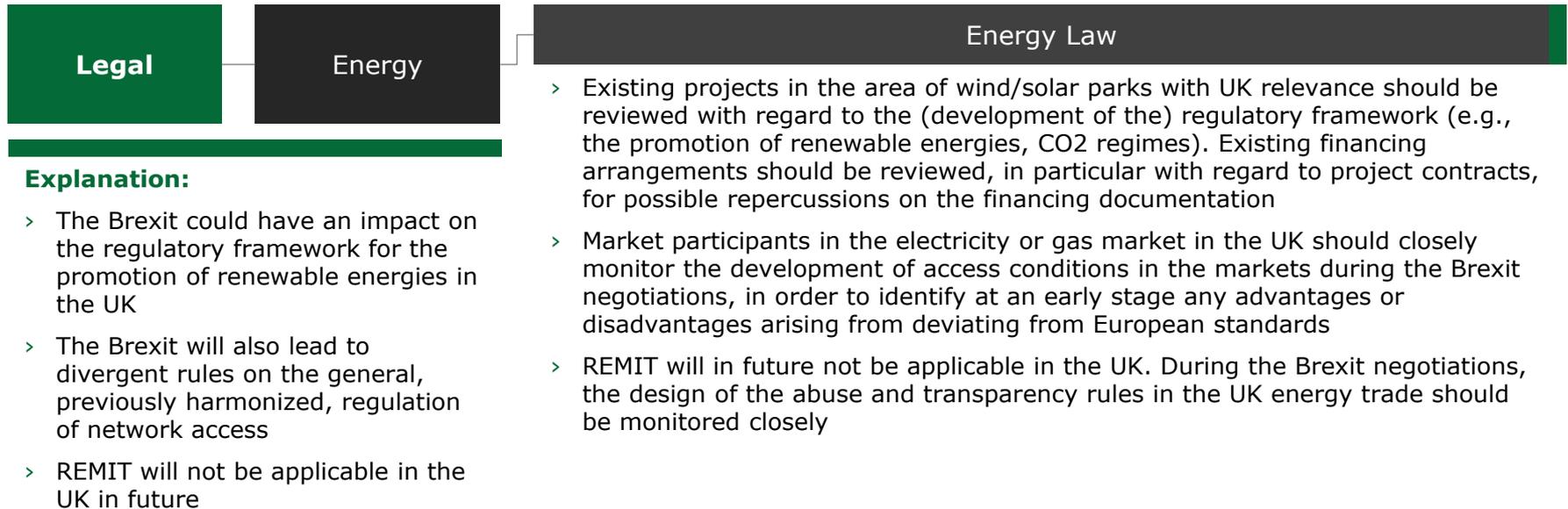
Brexit risks

Examples Real Estate



Brexit risks

Examples Energy



Brexit risks

Examples FSI

Legal

FSI

Financial Services Industry

Explanation:

- The United Kingdom's exit from EU membership creates regulatory risks related to European passports regarding MiFID II, PSD II, AIFMD, UCITS, Solvency II, CRD IV, etc.
- The abolition of options under the European passports would severely limit the possibility of providing financial services domiciled in the UK to the EEA, since services from third countries to Member States are subject to respective national restrictions. The same applies to the reverse situation, in which services from firms domiciled in Member States are provided to the United Kingdom. Such services would no longer be governed by the laws of the Member State (domicile country), but rather by UK law as the receiving country. As a consequence, providing such services will no longer be permitted from the Member state (domicile country) point of view.
- With respect to the abovementioned, third countries are entitled, if applicable, to ask for the so-called "equivalence" treatment by the EU, which allows non-EEA firms to provide services into the EEA if their home country regulatory regime is "equivalent" to EU standards. Regarding the access to the single market for third-country financial services providers, please find below a brief summary:
 - In general CRD IV/CRR does not provide any passport-like rights for third countries. CRD IV/CRR equivalence is only limited to the prudential treatment of certain types of exposures to entities located in non-EU countries.
 - UCITS does not provide for any possibility of access to the Single Market for third country funds. UCITS funds, which are marketed for retail clients, should be domiciled in the EU.
 - MiFID II, AIFMD and Solvency II provide for a limited access to the Single Market for third-country financial services providers, however, under strict conditions.



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