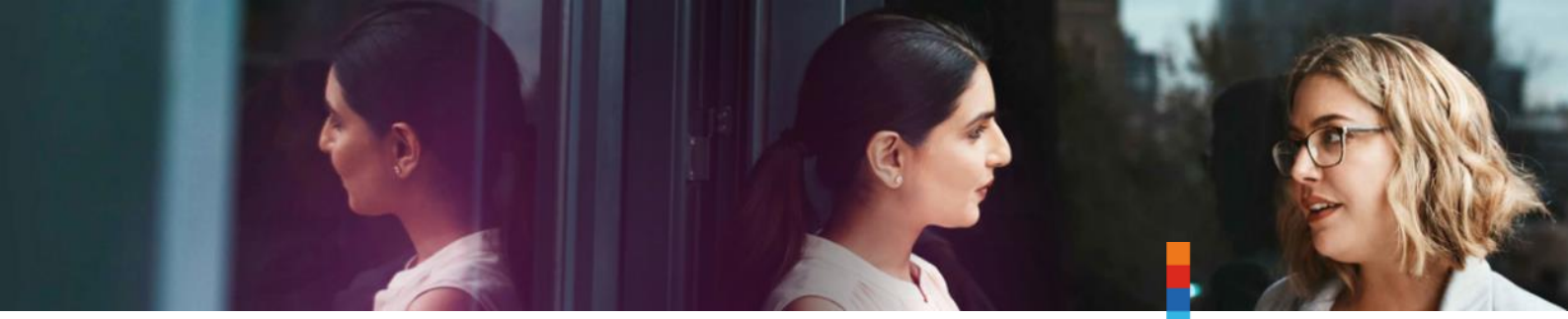

SCWP SCHINDHELM

“BREXIT” IS APPROACHING: CONSEQUENCES FROM A LEGAL PERSPECTIVE

In a referendum in June 2016, the United Kingdom (UK) voted to leave the European Union. Article 50 of the Treaty on European Union (TEU) regulates the withdrawal of a Member State and stipulates that a Member State that wishes to withdraw must notify the European Council of this. From the date of the entry into force of the notification of withdrawal, the treaties and therefore EU law continued to apply. In December 2019, the Withdrawal Agreement was finally adopted and ratified by Parliament in London, which subsequently meant that the United Kingdom’s withdrawal from the EU took effect on 31.01.2020.

Following the Withdrawal Agreement, the UK will be granted access to the internal market and customs union until the transition phase ending on 31.12.2020. As of 01.01.2021, the EU legal provisions will then definitively no longer apply in the UK.

At the time of publication of this article, there is no specific agreement on future relations between the EU and the UK, which brings the risk of a “hard Brexit”. Only a few points were agreed in the Withdrawal Agreement for the time afterwards. However, there is still uncertainty on most issues.

What follows is an overview of selected legal issues and the effects that may be expected after 01.01.2021, on the one hand for the UK and on the other hand also for the Member States of the EU.

I. GENERAL – FUNDAMENTAL FREEDOMS

The most far-reaching and decisive change in Brexit is the removal of the four EU fundamental freedoms (free movement of goods, people, services and capital). For EU citizens, there is still no change when entering the UK for holidays or short trips until 30.09.2021, meaning that until that time, only a valid ID card will be required. As of 01.10.2021, a valid passport will then be required to enter the country. Conversely, however, it will be mandatory to bring a passport with you from 01.01.2021. Serious changes also affect the EU freedom of establishment, according to which legal/natural persons, among others, are entitled to exercise and take up self-employed activities.

II. CORPORATE LAW

Currently, companies (in particular limited companies) from the UK are recognised as a UK company throughout the EU. Following the prevailing case law of the ECJ, the Member States are obliged to recognise a company established in a Member State in accordance with the law of the state in which it was established; otherwise they are in breach of the EU freedom of establishment mentioned above.

Without an agreement, after 31.12.2020, companies under UK law can no longer rely on the freedom of establishment in the EU and are

therefore without a legal basis and should be treated as partnerships. This would have significant consequences in terms of legal liability for companies and their shareholders.

For the corporate forms "Societas Europaea" (SE) and "European Economic Interest Grouping" (EEIG) it means that SE and EEIG may only be founded in one Member State and have their administrative headquarters there. This has not yet been regulated between the EU and the UK. After the transition phase, the SE and EEIG should in principle lose their validity and no longer be founded there.

A company law transaction of Community importance must be registered with the European Commission in accordance with the European Merger Regulation (EMR; "one-stop-shop principle"). After the transition phase, the EC remains responsible for ongoing merger control proceedings if the application was made before the end of the transition phase. After the transition phase, a simultaneous registration with the Competition and Markets Authority or the European Commission for the British part of the transaction would be conceivable.

III. EMPLOYMENT LAW

It was decided in the Withdrawal Agreement that during the transition phase, as was also the case before, nationals from the UK or the EU may continue to work in the respective other territory. After the end of the transition phase, citizens from the UK who were already working in an EU Member State before and then continue to live there, will continue to have unrestricted access to the labour market. The same also applies to employees from the EU who are already working in the UK on 31.12.2020. However, on the basis of the Withdrawal Agreement, people must apply for a residence permit within 6 months.

A problem could also arise without further agreement for managing directors sent from the UK to the EU.

At this stage, there is also no agreement that provides for the future leasing of workers. It would therefore mean that for future leasing, a permit for the leased employees would have to be applied for in a Member State or the UK.

IV. GOODS TRAFFIC, CUSTOMS LAW

The general provisions for the intra-Community trade in goods and services are also in force in the transition phase in the UK. The free movement of goods guarantees customs clearance (ban on import and export duties) and unlimited quantities. The latter ensures that service providers can also provide their services in other Member States. At the end of the transition phase, and without a free trade agreement, the UK would, in principle, be treated like a third country from a customs law perspective. This would entail extensive customs law obstacles and delays.

V. CHOICE OF LAW, ENFORCEMENT OF LAW

In connection with the recognition and enforcement of judgments, automatic recognition and enforcement will continue to apply to the Member States and the UK as previously, including in the transition phase. For the period after the transition phase, unless a special regulation is found, this will no longer apply. The regulations that apply to third countries would apply. This would mean that legal titles must be declared enforceable if they are enforceable under the provisions of the state in which they are established, and reciprocity is guaranteed by international treaties or regulations.

Currently, that right - even in the absence of a choice of law - is determined based on the facts

between Member States according to the Rome I Regulation (for contractual obligations) and the Rome II Regulation (for non-contractual obligations). These two regulations will also continue to apply in the transition phase and beyond (i.e. January 2021), according to which contracts that were concluded before 31.12.2020, and events giving rise to damage that occurred before this date are to be dealt with according to Rome I or Rome II. The provisions of the respective international private law of the individual countries concerned apply to the applicable law with regard to (non-)contractual obligations that occur after 01.01.2021 unless a separate regulation is agreed.

According to the Withdrawal Agreement, the EU order for payment procedure will continue to apply to proceedings initiated before the end of the transition period. This procedure is only applicable in Member States, but after the transition period it will accordingly no longer apply in the UK.
Furthermore, the UK is only bound de facto by the ECJ case law until the end of the transition period.

VI. CAPITAL MARKETS LAW

Before securities are publicly offered or admitted to a regulated market within the EU, a prospectus must be issued (EU Prospectus Regulation). Prior to publication, this must be checked by a competent authority based in a Member State. A checked prospectus becomes an "EU passport" and can be used throughout the Union.

There are no provisions on prospectus law in the Withdrawal Agreement. If there is no regulation, the general third country provisions will apply after the end of the transition period, according to which a prospectus approved in the EU or UK may no longer be used in the respective other territory without additional approval (no "EU passport" any more).

In connection with the trading of financial products, market participants from the EU or UK will continue to have access to the other respective trading venues during the transition period.

However, the Withdrawal Agreement fundamentally makes no provisions for this either. Without a final regulation, trading participants in the above-mentioned products from the UK would no longer be able to participate in the EU markets and vice versa. These financial products from the UK would have to rely on regulatory approval from an EU state and vice versa.

For clearing systems, even in the transition period, providers from both the UK and the EU are still allowed to process mutual trading transactions as before. There is nothing about this in the Withdrawal Agreement. Without further agreements between the UK and EU, the clearing systems based in these territories could not conduct trading transactions or would require respective approval in the other state.

VII. DATA PROTECTION, IP

Accompanying data protection laws also apply in the transition period (primarily GDPR). Until this expires, the UK is not a third country. If no agreement were to be reached, it would become such an (insecure) third country. As a result, the EU would have to guarantee an appropriate level of data protection for data transfer to the UK.

There is already clarity in the area of IP. If a company owns a registered EUTM at the end of the transition period, it will become the owner of a UK-equivalent national trademark.

VIII. CONCLUSION

In the short time until 31.12.2020 and in view of the numerous challenges and tasks that companies will face with Brexit, there are significant areas that remain unregulated. The Withdrawal Agreement only covers a few provisions; special regulations have largely not been concluded up to now.

The experts at Schindhelm Alliance are always available to answer any questions you may have about Brexit.

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