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Ready, steady, Brexit!

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I. Introduction

On 29 March 2019 the British leave the European Union (EU). Although the EU and United Kingdom (UK) agreed on some points - there will be a transition period, for example -, the modalities of Brexit are not settled yet because it is still open whether there will be a "hard" or "soft" Brexit. Nevertheless, companies should start to prepare now.
The following article shall sensitize companies to the upcoming changes. Furthermore, it offers methods of resolution. In doing so, it makes no claim to be complete but to be an introduction to the challenge Brexit.
The article assumes there will be a hard Brexit.

II. Movement of goods and certificates

In case of a hard Brexit, trading with UK will be trading with a third state on which only the general rules of the WTO apply.
The fall of free movement of goods will also lead to the fall of the customs union. Besides the circumstance that EU customs law as well as national and European customs rules must be considered when it comes to import and export of goods, customs will incur in the future. However, UK announced to follow the EU duty rate for foreign trade, which in average amount 5%. In addition, customs declarations and licenses must be applied for.
On top of which, it is very likely that British institutes are not able to make conformity assessments which are valid in the EU anymore. In the EU, the so-called CE marking (CE stands for *Communauté Européenne*, *Comunidad Europea*, *Comunidade Europeia* and *Comunità Europea*) says that a product is conform with the safety, environmental and health requirements made by Brussels. As soon as a product bears the CE marking, it can be placed on the entire EU market. The CE marking is the "passport of the European Single Market", so to say. In general, companies themselves can provide their products with the CE marking but as a base they should establish the conformity of their products by an officially recognized testing institute (duty when it comes to medical devices). It is very likely that British institutes can't exercise this function after Brexit anymore. In that case, controls and, where appropriate, certificates must be performed in one of the remaining EU member states.
Already when entering into an agreement, it should be settled which of the parties has to pay the additional costs for check and certificate requests or rather in what proportion the parties have to bear the costs.
In addition, it must be considered that UK could create its own rules concerning product standards. This, again, could lead to additional costs because the parties to the contract face new check and certificate requests.

III. Commercial contracts

A review of new and ongoing agreements is vital.
New agreements can be adopted to the new circumstances without problems. Upcoming rates of duty can be encountered by integrating termination and contract amendment clauses.
The handling of existing agreements is a much more sensitive topic. Questions such as "Which law shall be applicable to the adaption of the treaty?", "Which party pays the additional costs?" and "How shall the agreement be adapted?"

need a clarification which reflects the interests of the parties, on the one hand, and can't already be answered and settled completely due to the uncertainties connected with Brexit, on the other hand. Nonetheless and precisely for that reason, it is essential to take any additional measures necessary to develop the best solution for each of the parties as early as possible.

IV. Freedom of establishment

In accordance with the European Court of Justice, a company which was lawfully established in one of the EU member states and has its seat, thus administrative headquarter, in one of the other EU member states, must be recognized in the state of residence. After Brexit, this duty will fall away in relation to UK. But especially British forms of companies are favored within the EU. About 9000 British Limited (*private limited company*) were registered in Germany in 2016. In Germany, the lapse of the duty of recognition leads to a reinterpretation of the Limited into a company without limitation – thus, a shareholder will be fully liable in the future.
In the event that UK and the EU don't agree on a reciprocal recognition of existing companies, those companies should already start to take measures to avoid such reinterpretation now.
In case of a hard Brexit, a firm which wants to establish a company under British law or wants to remain a British Limited, must have its actual administrative headquarter in UK. For a company which wants to sit in Germany or wants to keep its seat in Germany but wishes to avoid a reinterpretation of its company, a merger of the British Limited with a German entity such as the GmbH (*Gesellschaft mit beschränkter Haftung*) could be a solution. In that case, the rights and obligations of the Limited pass over to the GmbH. A further possible solution would be to transfer the assets of the Limited to a German company and, afterwards, liquidate the Limited. Furthermore, the Limited could be transformed into a European society, *SE*. Given that it is uncertain how the British treat the SE in the future, a SE with its seat in UK should relocate its seat to one of the remaining EU member states or transfer into a British Limited or PLC (*public limited company*). Existing SEs with their seats in Germany don't face any legal changes. Due to the *Statute for a European Company Regulation* there must be made a difference between "seat" and "administrative headquarter" of a SE. As long as a SE has its seat in one of the EU member states, the location of its headquarter doesn't influence its legal status.
However, attention should be paid to fact that the change of legal form leads to the disclosure of hidden reserves.

V. Taxes

Brexit also leads to tax effects.
As a positive aspect, it should be mentioned that UK has a low company tax rate, 19% now, 17% from 01 April 2020 on. On top of which, it has a broad network of double taxation agreements.
However, UK will be no longer part of the EU-wide harmonized VAT system. In the following, German companies in UK pay a higher VAT. Moreover, a (deductible) importation VAT must be paid in the future. In contrast, exports from Germany to UK are tax-exempt export deliveries. In addition, there won't be any cross-border tax-free distribution of profits for the time being; further (trade) tax burdens could arise. In the same way, dividends of British parent companies which hold at least 10% of a German subsidiary aren't exempt from tax at source anymore. In the following, capital gains tax has to be withheld in Germany. On top of that, when transferring assets to UK, hidden reserves are immediately taxable in the future.

VI. Commercial property rights

A further facilitation introduced by Brussels is that commercial property rights, especially European Union trademarks and Community designs, can be registered EU-wide and therefore enjoy protection across the entire EU. After Brexit, commercial property rights must be registered in the EU as well as UK to grant the same level of protection. Existing European Union trademarks and Community designs shall remain protected, but as national trademarks and designs.
On patent law, however, Brexit has no impact. Though the European patent is registered central at the *European Patent Office*, it has only effect on a national level. There is no necessity of being a member of the EU to apply for the European patent.

VII. Data security

At present, about 75% of British cross-border data traffic is with other EU member states. In Spring 2018, when the General Data Protection Regulation (*GDPR*) entered into

force, a transfer of data without any legal problems has been established within the EU. In case of a hard Brexit, UK would be a so-called "unsafe third country" in terms of data privacy laws.
As long as UK is regarded as such, personal data can only be transmitted when the requirements stipulated by the GDPR are fulfilled. That can either happen by the consent of all parties involved or by the use of EU standard contractual clauses (available under: https://eur-lex.europa.eu/legal-content/DE/ALL/?uri=celex%3A32010D0087). In addition, different regulations in the EU and UK will lead to a rise of administrative expenses as well as costs.

VIII. Loss of freedom of movement for workers

Besides cross-border trade, the "internal function of a company" is touched by Brexit.
With UK's leave, EU citizens lose their right of freedom of movement for workers in UK as well as the British lose the right in the EU. Until the end of the transition period on 31 December 2020 employees enjoy the right of freedom of movement and residence.
About 3 million EU citizens living in UK and 1.2 million British living in the EU are affected by those changes.
By 30 June 2021, EU employees must have applied for a residence and work permit in UK. Employees who are in UK for five years already by 31 December 2020, are entitled to a settled status in UK. Those who haven't been in UK for five years obtain a pre-settled status, at first, which converts into a settled status as soon as they reach the five-year mark. Moreover, EU employees can also apply for a British passport when they have already lived in UK for at least five years.
The situation of the British living in the EU is basically the same. The example of Germany shows that British employees have two possibilities to continue their work activities in Germany: They either need a residence permit for the purpose of gainful employment or they can become German citizens, thus apply for a German passport. In the latter case, they already must have stayed in Germany for three to eight years (decided on a case-by-case basis).
Since the privilege of dual citizenship – which corresponds to EU citizenship – will most likely disappear with Brexit, employees who want to apply for a German/British passport and wish to keep their British/German passport at the same time, must apply for it before the British leave the EU.

As an employer, it is recommendable to accompany employees through Brexit. Companies and their employees should visit seminars which explain the changes caused by Brexit as well as how to handle those changes. Every company's human resources department should be informed comprehensively and take part in developing a Brexit strategy for the company.
The following five steps are recommendable as appropriate Brexit strategy:

- *Review* – audit current workforce data to find out details of the companies' EU/UK workforce, just like how long have they been in the UK/EU, dependents, dual nationality etc.

- *Reassure* – presentations, Brexit surgeries and staff involvement.

- *Regularise* – assist current workforce apply for permanent residence/passport now. Have a policy to assist with the new "settled status" and "temporary residence permit" routes once rolled out later this year.

- *Research* – future staffing needs and alternative talent pools (students, non-EU etc.) that could plug any skills gaps that Brexit could create.

- *Recruit* – if required, companies should begin to recruit new staff now, so they are trained up when Brexit occurs.

IX. Summary

Following the subsequent three steps, a company is prepared for Brexit for the moment:

At first, a company should review its individual situation to estimate the degree of impact and the extent of challenge (customs, market access, employees etc.). Second, based on the outcome, it should inform on changes due to Brexit in the affected areas and always stay informed. Finally, already at this point, appropriate measures should be taken. In doing so, it is recommendable to prepare Brexit packages for several scenarios.

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