

# THE LEGAL IMPLICATIONS OF BREXIT

On 23 June 2016 a majority of 51.9% voted in the UK EU Referendum in favour of “Leave the European Union” whereas 48.1% voted in favour of “Remain a member of the European Union”. At the time of writing this article the UK had not yet given a notice to the European Council pursuant to Article 50 (2) of the Treaty on European Union (“TEU”) of its intention to withdraw from the European Union (“EU”) and accordingly the withdrawal process has not yet started.

Leaving aside all legal issues which have arisen already in the “pre-withdrawal” phase the legal implications of a Brexit, once the Article 50 (2) TEU notice has been given, would be myriad and need to be considered in each industry and for each market participant from all relevant legal perspectives.

Brexit will affect any kind of industry and will have consequences for all companies and professionals situated within the UK and the remaining Member States (“MS”) of the EU (“EU 27”) and will also affect market participants situated in other countries around the world holding interests in the EU or in EU based entities. Brexit will have consequences for all products and services produced within or distributed through the UK into EU 27.

Brexit will also have consequences for the international treaties entered into by the EU, like, for example, more than 100 Association Agreements, Free Trade Agreements, Partnership and Cooperation Agreements and other International Agreements (the most prominent other International Agreement being the Open Sky Agreements, for example the one between the EU and the US), because usually the UK is involved in such International Agreements only in its capacity as a MS of the EU and accordingly such International Agreements cease to apply to the UK once Brexit becomes effective and the UK ceases to be a MS of the EU.

## (I) ARTICLE 50 OF THE TREATY ON EU (TEU)

Article 50 TEU provides that each MS of the EU can, in accordance with its own constitutional rules, decide to cease to be a MS of the EU and can notify such intention to the European Council.

Upon receipt of such notification the EU will negotiate with such MS “the arrangements for its withdrawal” on the one hand, „taking account of the framework for its future relationship” on the other hand. The withdrawal agreement (“Withdrawal Agreement”) between the EU and the UK is to be adopted with a qualified majority within the Council. The agreement on the details of the future relationship (“Future Relationship Agreement”) is to be adopted separately in accordance with the relevant procedures and majorities, e.g. unanimity pursuant to Art. 218 (8) of the Treaty on the Functioning of the EU (“TFEU”) in case of a future Association Agreement. In principle such (at least) two different agreements to be entered into between the UK and

the EU need to be negotiated separately but could be negotiated in parallel, if the UK and the EU do wish and agree so.

Article 50 (3) TEU provides that in case that no such Withdrawal Agreement between the UK and the EU is entered into, then 2 years after the receipt by the European Council of the termination declaration from the UK (“Sunset Period”) the TEU and TFEU will no longer apply to the UK and accordingly the UK is no longer a “Member State of the EU” and persons and companies domiciled in the UK and products and services originating from or being distributed through the UK no longer have the status of being domiciled in or originating from or being distributed through the EU.

This automatic termination rule after the lapse of 2 years after receipt of the termination declaration (unless extended by unanimity) provides for a clear cut for the legal consequences in case that no other rules are adopted (“Unregulated Status”).

## (II) FREEDOM OF MOVEMENT TERMINATED

Membership in the EU in principle means that persons, entities, companies, products and services from MS of the EU benefit from the principles of free movement of goods, services, capital, establishment and persons within the entire EU.

Such rights of free movement within the EU mean, that there are not only no customs borders, procedures and duties but that there is in principle mutual recognition and that MS are prohibited from directly or indirectly restricting the sale or distribution of goods and services and the movement of capital or persons or the establishing of subsidiaries, branches and other establishments by persons and companies domiciled in another MS within their territory, unless this is justified by important reasons which apply without discrimination to everybody and unless the relevant area is not harmonized through EU law.

For example, as long as Brexit is not effective, a banking institution or an insurance company which is established and licensed in the UK in accordance with the harmonized rules adopted on the basis of EU legislation, cannot be barred from providing its services in all the other MS of the EU and cannot be barred from establishing branches or other establishments or subsidiaries in the other MS of the EU. This will change once Brexit becomes effective.

## (III) RULES OF GENERAL APPLICATION NOT DIRECTLY RELATING TO PRODUCTS AND PRODUCERS

There is also an abundance of EU rules which do not directly relate to the mutual recognition of products and producers, but which are nevertheless of high relevance in the legal sphere.



Such rules are, for example, the EU Jurisdiction and Enforcement Regulation 1215/2012. Such regulation would cease to be applicable in the UK as EU law in case that the UK ceases to be a MS of the EU and the consequence thereof would be that judgements rendered by English courts would no longer be enforceable in the remaining MS of the EU in accordance with the rules set out therein. The beneficiaries of court judgements rendered by English courts would have to go through the various domestic recognition proceedings provided in the domestic laws of the EU27.

Further, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings and Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (which applies from 26 June 2017), would no longer apply in and with respect to the UK. This would mean that the mutual recognition of insolvency proceedings, the barring of wide jurisdiction for secondary proceedings and the mutual recognition of acquired in rem rights would no longer be applicable with respect to the UK.

#### (IV) TRADE

In the event of a total break of the UK from the EU Single Market, the erection of trade barriers (whether by way of direct tariffs, re-establishment of customs processes, or non-membership of EU trade facilitation schemes) will be likely. In terms of customs duties, and unless agreed otherwise with the EU, the UK would lose the benefit of the duty rates afforded by being an EU Member State under the existing EU trade agreements with third countries. This would be likely to result in an increase in the cost of many goods imported to the UK from the EU and from the UK to the EU. From an exporter's/importer's perspective, those considerations should be considered at contractual negotiations stage.

#### (V) CONTRACTS PRE-BREXIT AND POST-BREXIT

Termination clauses in English law governed contracts are unlikely to be triggered by the Brexit vote. Even if a contract allows for termination if the obligations under it become more difficult to perform, Brexit is unlikely to mean that goods cannot be delivered or services provided, so it is unlikely that automatic ter-

mination will occur. Whether this applies to contracts governed by a law other than English law needs to be reviewed in each individual case.

Force majeure clauses in English law governed contracts are equally unlikely to be triggered immediately – the Leave vote is hardly an Act of God, even if it may have been beyond the reasonable control of the parties. Governing law clauses are trickier to predict in terms of their effect but again, nothing will change immediately or automatically. Insofar as contracts are concerned which are not governed by English law but by, for example, German law or any other law of the EU27 or other laws of Third Countries, an analysis of the legal situation needs to be done on an individual basis. For longer-term contracts being signed now, protection against Brexit consequences such as trade tariffs, exchange rate swings, capital movements and tax changes need to be considered.

In particular, the following should be considered: Would the potential new legal rules and regulations to be adopted under a Withdrawal Agreement or Future Relationship Agreements – which are unknown as of today - give rise to termination rights; or would an Unregulated Status give rise to termination rights; or should termination rights be expressly excluded; or should all the parties live with the uncertainty? Would the potential new legal rules and regulations be adopted under a Withdrawal Agreement or Future Relationship Agreements or would an Unregulated Status give rise to rights to, for example, payment of duties and taxes, increased costs demands, changes in required margins and interest, additional fees, rights to demand collateral, right to demand bail in provisions in any English law governed contracts, right to change the flow of personal data and modified confidentiality requirements, rights to demand the obtaining of licenses, approvals, modifications or consents for products or services, or any other contract specific rights; or should any such rights be expressly excluded; or should all the parties live with the uncertainty?

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