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Brexit check list
A very essential to-do-list for companies among Brexit uncertainties

1. Introduction

The United Kingdom is going to withdraw from the European Union on January 1, 2021. Negotiations aimed to reach a withdrawal deal are still ongoing and the legal framework ahead seems to be, at this stage, very unclear. Among such uncertainties, this checklist provides considerations on some legal issues relating to Brexit in case of no-deal scenario together with an essential to-do-list for companies.

2. End of free movement of workers and new immigration system in the UK

The free movement of people from the EU to the UK and vice versa will end on December 31, 2020. This means that immigration rules will change for both EU nationals in the UK and British nationals in the EU.

The UK's new points-based immigration system will be equal for foreign nationals, including EU citizens, representing a significant change for UK employers. This will not apply to EU nationals already living in the UK before December 31, 2020, if they registered for settled or pre-settled status by June 30, 2021.

Under the new rules, EU nationals will be able to travel in the UK for holidays or short trips without visa. However, those who seek to work in the UK will need to apply for visa under the points-based immigration system. This will apply differently depending on the type of worker:

- highly skilled workers will be able to enter the UK without a job offer if they are endorsed by a relevant and competent body;
- skilled workers will require a job offer from an approved UK employer in order to be granted the appropriate visa. The job offer will also need to confirm that their role is at the required skill level and meets the applicable minimum salary.

In addition, employers will need to apply for a sponsor license in order to secure an "approved" status. Such license will remain valid for 4 years and can be used to sponsor any non-UK employees who meets the criteria for each individual sponsorship.

The new system might have a significant impact on companies' projects. In particular, single-management-structured multi-national businesses with a presence in the UK and the EU will need to plan carefully to avoid significant delays in moving managers and executives in the UK.

- ***Preparing sponsor license application***
- ***Planning your workforce and internal policies***
- ***Making sure eligible EU employees applied for pre-settled or settled status***

3. End of free movement of goods

Brexit will put an end on free movement of goods.

At this stage, the UK does not have any special rights of access to the EU single market. In case of no deal, customs formalities will be the same between each of the EU member states and the UK as between third countries. This might also mean that the role of companies in supply chain, together with all the regulatory requirements, will change. EU businesses trading with UK companies, in fact, will become importers and exporters.

Products imported into the EU will have to comply with each of the EU member state regulation and products exported to the UK will have to comply with UK legislation. In this respect, marketability of products will depend on who makes the product available on the EU single market for the first time (i.e. manufacturer or importer) assuming certain legal obligations. The same applies to imports into the UK market.

Customs declarations will be required in respect of both imports from the EU and exports to the EU, and customs duties will be payable on imports from the EU under the new UK Global Tariff. For this purpose, importers will need to determine and state the origin, classification and customs value of the goods. However, as regards imports from the EU, it will be possible to defer customs declarations on standard goods by up to six months and defer payment of customs duties on such imports until the declarations are made. Companies without any supply relationship to third countries would need EORI number (Economic Operator Registration and Identification).

Companies will also need to make safety and security declarations on exports and imports of goods between the UK and the EU. This will be required for exports to the EU starting from January 1, 2021 and for imports to the UK starting from July 1, 2021.

- ***Apply for an EORI number***
- ***Consider to appoint a customs intermediary to carry out customs declarations and other formalities***
- ***Check whether marketability of your products is affected by Brexit***

4. Major impacts on contracts, corporate law

The UK is planning to integrate EU law (at least in part) into national law. However, at this phase, it is unclear to what extent this may take place.

a. Modifications on existing contracts

Contracts in force should be therefore assessed in order to identify possible legal issues arising out from Brexit and, at best, be renegotiated.

In fact, the end of transitional period might have relevant implications for existing contractual relationships as it may considerably change essential conditions for initial costs and expenses calculations such as, for example, customs duties.

In each single case, therefore, it must be verified if contracts may be terminated or modified.

Review and, if necessary, modify existing contracts with respect to:

- ***custom duties;***
- ***material adverse changes, force majeure and hardship;***
- ***reference to the territory of the EU, which will not include the UK;***
- ***merchantability of products;***
- ***arbitration and jurisdiction clauses.***

Pay attention to the following aspects in view of future contracts:

- ***Incoterms, accurately defined clauses specifying material adverse changes, force majeure or hardship;***
- ***arbitration clauses;***
- ***making English law choice of law since it will no longer include the EU law.***

b. Corporate law

The freedom of establishment for UK entities in the European Union will not apply. The same will apply in turn EU legal forms in the UK.

UK companies operating in the EU will be subject to the laws of different EU member states follow two varying approaches to determining a company's domicile:

- the "incorporation regime", which applies in the UK, where companies are regarded as subject to the company law of the jurisdiction in which they were incorporated, irrespective of where the company's business is conducted; and

- the "seat regime", which applies in states, where companies are bound by the legal regime of the jurisdiction from which they are actually directed.

For instance, pursuant to section 2509 of the Italian Civil Code, companies incorporated abroad are subject to laws applicable to Italian stock joint companies ("*società per azioni*") relating to corporate filing requirements and directors' liabilities.

Following Brexit, therefore, UK companies will become "third country companies" for the purposes of EU law, meaning that they can only establish themselves within the framework of the national regime of each member state.

By contrast, no issues should arise for EU companies operating in the UK as a result of their originating in seat jurisdictions. As an incorporation regime jurisdiction, the UK will continue to respect these companies' adherence to the regimes of their state of incorporation.

However, EU Companies with branches in the UK will become subject to the same filing requirements as any other third country's companies. For example, an EU company, with a UK branch, that is required to prepare, have audited and disclose accounts in its home country will be required to file documentation in the UK which includes its accounts, any annual report and/or auditor's report.

Mergers involving UK entities will not benefit from the EU cross-border mergers regime, since this only applies to companies which are governed by the EU law. EU companies' ability to use English schemes of arrangement for re-organisations may also be impacted, although the extent of this impact remains uncertain.

Societas Europaea will cease to be a valid form of UK-incorporated entity. Pre-existing Societas Europaea will have the option to convert to a UK public company subject to their having:

- been registered as Societas Europaea for at least 2 years; or
- had two sets of annual accounts approved.

Check if your company:

- ***may be subject to access conditions***
- ***do not have the protections provided by the EU legislation, exposing to additional obligations and, theoretically at least, discriminatory treatment***
- ***may expose its shareholders to unlimited liability where they develop their activities in a "seat" jurisdiction host state and fail to "requalify"***
- ***may expose its senior managers/directors to face restrictions on ability to taking such office***

5. Impact on financial services

Brexit will have consequences for those financial institutions based in the UK who rely on the European Economic Area ("EEA") "passport" to access the single European market for financial services. In fact, if arrangements are not in place by January 1, 2021, passporting rights for financial services firms out of, and into, the UK will end.

More in detail, currently financial institutions authorised by a European competent authority under an EU single market directive can provide services on a cross border basis throughout the EEA on the basis of their home state licence without having to be separately licensed in the target jurisdiction where the clients are base. This applies to banks, investment firms, insurance undertakings, fund managers, electronic money institutions, payment institutions and debt capital markers. After December 31, 2020, unless a deal is reached, regulated entities will lose their passporting rights to provide services either into the EU from the UK or into the UK from the EU.

In case of no deal, therefore, UK financial institutions might be required to establish a base within the EU in order to continue to provide services within the EU. This will involve UK financial institutions relocating to another jurisdiction within the EU from which to passport their financial services.

Conversely, with reference to EU firms passporting their services into the UK, the UK Government has introduced a temporary permissions regime for certain EU firms passporting their services into the UK. This regime allows for certain EU firms to operate for a limited period of three years and thereby continue to provide services on a cross border basis into the UK while they seek authorisation from the relevant UK regulatory authority. Firms are required to notify the Financial Conduct Authority ("FCA") if they wish to utilise the temporary permissions regime by December 30, 2020.

In case of loss of EU passporting rights, another option to be considered is the so-called "third country" provisions provided for in certain directives, such as MiFID, AIFMD and the Solvency II Directive. These provisions permit third country firms, such as firms that are not located in the EEA, to provide some cross-border services in the EEA without requiring the third country firm to be licenced within the EU, provided the jurisdiction of the third country has laws that are deemed to be "equivalent" to those of the EEA. However, it should be noted that equivalence is only provided for in certain directives. Key regimes such as banking (CRD) and payments (PSD2) do not provide for equivalence regimes and the equivalency regime provided for in Solvency II only extends to certain areas such as reinsurance and group supervision.

- ***Notify the FCA to utilize the temporary permission regime if necessary;***
- ***Check if your industry is eligible for the equivalence regime;***
- ***Check if your firm is required to establish a base within the EU.***

6. Data protection

The GDPR will no longer apply directly in the UK at the end of the transition period.

In the event the UK leaves the EU with a withdrawal agreement, it will be considered a "third country" within the meaning of the General Data Protection Regulation (GDPR), at the latest, after the end of the transition period on December 31, 2020. This means that a data transfer to the UK will only be permissible on additional conditions in accordance with article 44 of the GDPR.

In addition, the UK data protection law (DPA 2018) must also be observed if applicable. This is modelled on the GDPR. The UK, in fact, passed its own version of the GDPR into law, known as the UK GDPR. International data processing may be subject to both the GDPR and the DPA 2018.

In this respect, it should be noted that a transfer of personal data to a third country may take place pursuant to article 45 of the GDPR where the Commission has decided that the relevant third country ensures an adequate level of protection. Therefore, in the absence of a deal, a data transfer to a third country pursuant to article 46 of the GDPR may take place if appropriate safeguards have been provided for the protection of personal data.

Furthermore, according to article 27 of the UK GDPR, all companies without an establishment in the UK, which offer goods or services on the ground or observe the behavior of persons, must appoint a representative. In this respect, also the mere offering of a website aimed at UK citizens may trigger the obligation to install a representative.

- ***Data protection concepts have to be revised to take account of the fact that transfers to the UK after Brexit will constitute third- country transfers;;***
- ***If necessary, appoint a UK representative.***

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