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BREXIT and Consequences

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1. Introduction

On the 23rd of June 2016 the people of the United Kingdom ("UK") decided to leave the European Union ("EU") – "BREXIT".[3] A slight majority of 52% voted against remaining in the EU.[4] From a legal perspective the referendum is advisory and non-binding. Politically this decision is likely to be an expression of emotions of UK's voters driven by populist rhetoric and caused by social insecurities.[5] Never before have the two main opposing interest groups run a comparably emotional and populistic election campaign.[6] Independently thereof, social scientists ponder whether the referendum has to be interpreted as a more general phenomenon, namely certain scepticism towards deep multilateral cooperation.[7]

This article, however, does not aim at analyzing political causes for or motives behind the result of the BREXIT referendum ("Referendum") but plainly intends to elaborate on the legal requirements for and legal consequences of a withdrawal from the EU (also "Exit"), for individuals as well as for companies within the EU.[8] Of course this paper can by no means attempt to analyze all the legal consequences of the Brexit referendum in great depth. It merely aims to give a profound introduction and overview.

2. Requirements for the BREXIT under EU Law

Since the Lisbon Treaty went into force in December 2009, the Treaty on European Union (2016/C 202/01) expressly stipulates a provision regulating the withdrawal of member states from the EU.[9] Since then the possibility of member states to withdraw from the EU is at least undisputed.[10] Pursuant to Article 50 of the Treaty on European Union, any member state may decide to withdraw from the European Union in accordance with its own constitutional requirements.[11] Article 50 Treaty on European Union is the only provision regulating the

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[3] Erik Stokstad, *Uncertainty reigns in Brexit Britain*, Science Vol. 353, Issue 6298, p. 437 (29th July 2016); Graeme Reid, *Science and Brexit*, Science Vol. 353, Issue 6294, pp. 7 et seq. (1st July 2016).

[4] Anne McNaughton/Annmarie Elijah/James, *International: Key legal implications of UK withdrawal from the EU*, Law Society of NSW Journal (LSJ), Issue 25, p.70. (Aug 2016).

[5] Wolfgang Munchau, *The pact that risks more harm than good: EUROPE*, Financial Times, Comment in Business And Economics-Banking And Finance, Political Science, p. 9 (5th September 2016); J. Schot/L. Littvay/P. Turchin/S. J. Brams/S. Gächter, *Lessons from Brexit*, Nature Vol. 535, pp 487 et seq. (28th July 2016)

[6] Critical for that reason Editorial, A.L., *Brexit Referendum: Beginning of the End or Just a Turning Point?* European Papers, Vol 1, No 2 p. 377, 378 (2016): http://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2016_2_2_Editorial.pdf (4th October 2016); Graeme Reid, *Science and Brexit*, *Science* Vol. 353, Issue 6294, pp. 7 et seq. (1st July 2016).

[7] S. Gächter, Study how groups collaborate in J. Schot/L. Littvay/P. Turchin/S. J. Brams/S. Gächter, *Lessons from Brexit*, Nature Vol. 535, pp 487, 489 (28th July 2016).

[8] For an economic outlook see e.g. David Floyd, Brexit: How would withdrawal from the EU affect UK economic performance?, *Teaching Business & Economics* Vol 20, Issue 1, pp. 12 et seq. (Spring 2016).

[9] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2016/C 202/01): http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL&from=EN(4.10.2016); for an elaboration of the first draft version (proposal) see Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, International & Comparative Law Quarterly (ICLQ), Vol. 53, p. 407 (April 2004).

[10] To the discussion before the implementation of Article 50 in the Treaty on the European Union see Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, ICLQ, Vol. 53, pp. 407, 408 et seq., 423 et seq. (April 2004).

[11] For the historic development of the respective provision see Jens Budischowsky in Mayer/Stöger, *EUV/AEUV* (2011) Article 50 EUV Rz 7.

withdrawal of a member state of the EU conclusively. Other international treaties do not apply.[12]

A member state deciding to withdraw shall notify the European Council of its intention ("Notification"). The right to withdraw from the EU is a unilateral right of every member state and is subject to the sole discretion of the respective member state.[13] This entails the decision on when to trigger the negotiation procedure. Furthermore, the right to trigger Article 50 of the Treaty on European Union does not require any good reason or justification to do so. Once a member state has formally notified the European Council of its intention to leave the EU it however cannot unilaterally take back the respective decision. This step would require the approval of the Council by qualified majority as well as the consent of the European Parliament and the consent of every member state of the EU.

From a formal point of view, withdrawal from the EU requires UK's Notification. Such Notification has to comply with the national **constitutional requirements**. In the UK this might entail the requirement of a parliamentary approval.[14] This at least corresponds to the view of a group of lawyers under the leadership of the law firm Mishcon de Reya as well as prominent constitutional lawyers (e.g. Geoffrey Robertson QC).[15] Said group of lawyers has filed an action to enforce compliance with the respective constitutional principles of the UK. According to their legal view the constitutional requirements for the Notification are not (yet) met, since as of now, there is no parliamentary resolution approving the withdrawal from the EU.

On October 2nd 2016 Theresa May, British Prime Minister, has revealed that UK is to be expected to trigger Article 50 of the Treaty on European Union end of March 2017. She has not indicated whether she is seeking parliamentary approval in the meanwhile or not. Article 50 of the Treaty on European Union is poor on giving any guidance what has to happen if the EU representatives and the UK representatives should end up in a disagreement on whether the national constitutional requirements have been met in order to formally trigger the negotiation procedure. Most likely this dispute would be justiciable by the European Court of Justice ("ECJ") which would end up having to decide on national constitutional matters.[16] The insecurities resulting from these questions are one of the main shortcomings of the European "withdrawal regime" as provided for in the Treaty on European Union.

Following the Notification to the European Council, the EU shall negotiate and conclude an agreement ("Exit Agreement") with the respective withdrawing member state, setting out the arrangements for its withdrawal and taking account of the framework for its future relationship

[12] Since not all of the European member states (more precisely France, Malta and Romania) have ratified the Vienna Convention on the Law of Treaties, the respective Convention cannot be consulted.

[13] Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, ICLQ, Vol. 53, pp. 407, 425 (April 2004); Editorial, A.L., *Brexit Referendum: Beginning of the End or Just a Turning Point?* European Papers, Vol 1, No 2 p. 377, 380 et seq. (2016): http://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2016_2_2_Editorial.pdf (4th October 2016);

[14] Editorial, A.L., *Brexit Referendum: Beginning of the End or Just a Turning Point?* European Papers, Vol 1, No 2 p. 377, 380 (2016):
http://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2016_2_2_Editorial.pdf (4th October 2016).

[15] Homepage of the Law firm Mishcon de Reya: Article 50 process on Brexit faces legal challenge to ensure parliamentary involvement (3rd July 2016):
http://www.mishcon.com/news/firm_news/article_50_process_on_brexit_faces_legal_challenge_to_ensure_parliamentary_involvement_07_2016. (5th October 2016).

[16] Putting this as a fact Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, ICLQ, Vol. 53, pp. 407, 425 (April 2004).

with the EU.[17] Therefore, the specific consequences of the withdrawal can only be assessed in detail after an Exit Agreement has entered into is in final form.

On the part of the EU, the European Commission proposes to the European Council to adopt a resolution authorizing a negotiating team to enter into withdrawal negotiations. The Exit Agreement on behalf of the EU is however concluded by the Council (of Ministers) acting by a qualified majority (72% of the members of the Council provided that the member states they represent account for a minimum of 65% of the population of the member states remaining in the EU[18]) backed by an approval of the European Parliament.[19] The withdrawing member state cannot participate in the respective Council meetings (Article 50 para 3 of the Treaty on the European Union).[20] It is unclear if the same shall apply to the UK members of the European Parliament when voting on the respective resolution. The Treaty remains silent on that question.

If an Exit Agreement is concluded, it will become applicable once it takes effect. From that day on, in relation to the former member state EU law is replaced by the respective Exit Agreement(s) and does no longer apply.

If an Exit Agreement cannot be executed within a period of two years from the notification of withdrawal- European law (both, primary and secondary law) no longer applies to the former member state. Thus, the respective European legal bases cease to apply after two years from the Notification at the latest. Together with the withdrawing member state, the European Council may extend this time limit by unanimous vote. In case that no Exit Agreement can be entered into until the expiration of the (extended) period, the member state will leave the EU without establishing a regulatory framework to mitigate potential consequences. While European Directives will have already been transferred into national law, European regulations will have to be transcribed into national law in order to continue to apply. Of course directives would not have to be amended any more. In that respect Theresa May has already announced a "great repeal bill" intending to incorporate necessary EU regulations into UK law.

Against this backdrop, it is worth thinking about the legal consequences of UK's potential withdrawal from the EU. Since this is the first time a member state of the EU is seriously planning to withdraw from the EU based on Article 50 of the Treaty on European Union, there is not much experience we could rely on. The Union only once had to deal with the issue of withdrawal when the people of Greenland decided to leave the Union. Due to its specifics the case of Greenland[21] can however hardly be compared to the withdrawal of the UK from the

[17] Jens Budischowsky in Mayer/Stöger, *EUV/AEUV* (2011) Article 50 EUV Rz 5.

[18] See Article 238 Abs 3 lit b Treaty on the Functioning of the European Union; Jens Budischowsky in Mayer/Stöger, *EUV/AEUV* (2011) Article 50 EUV Rz 5.

[19] Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, ICLQ, Vol. 53, p. 407 (April 2004).

[20] Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, ICLQ, Vol. 53, pp. 407, 424 (April 2004).

[21] Greenland has been a long time colony of Denmark and became part of Denmark after an amendment of the respective constitutions in 1953. Since Greenland never wanted to join the EU its position of being part of Denmark proved controversial after Denmark voted to join the EU in 1973 and Greenland had to follow. In the aftermath Greenland regained more and more independency until it could run a referendum to leave the Union. Greenland's withdrawal from the Union was unanimously supported in the Council and found a fast majority in the European Parliament. The legal base for the withdrawal was Article 236 of the EEC regulating amendments of the European Treaties. Beside Greenland itself has never been a member state of the Union. For more details see Friedel Weiss, *Greenland's withdrawal from the European Communities*, 10 European Law Review, pp. 173 - 185 (1985).

EU.[22] What can be predicted with relative certainty, however, is that the UK will – in relation to the EU - find itself in one of the following positions:

3. Possible Scenarios from a Legal Point of View: Developments of the Legal System that may occur

3.1. No BREXIT: No Immediate Effects

The Referendum is not binding. In order to comply with the constitutional requirements for withdrawing from the EU, a parliamentary resolution may be necessary. Such a resolution has not been taken yet. Therefore, it is possible that the requirements for the Notification are currently not (yet) met and will not be met in the future either. It remains questionable whether such a situation may be justifiable towards the British population. If there is no (effective) withdrawal, the legal situation will not change and there will be no legal consequences. This scenario however gets increasingly unlikely the more the British Governments reveals its time table for the *BREXIT*. Theresa May has recently announced that UK will trigger negotiation procedures based on Article 50 Treaty on European Union end of March 2017.

3.2. BREXIT and the UK remaining member of the EEA: Hardly any Immediate Effects

The UK is a member state of the European Economic Area (EEA). The EU (in form of European Communities[23]) has signed the respective Agreement based on a "mixed procedure".[24] This meant that the Agreement has been ratified on an EU and on a national level in order to avoid any disputes about matters of competence.

The EEA is an international agreement (EEA Agreement[25]) establishing and regulating the free trade area between the EU and its member states on the one hand and three out of the four EFTA (European Free Trade Area) member states on the other hand (Liechtenstein, Norway and Iceland; Switzerland is the fourth member state of EFTA not being part of the EEA). As a member state of the EU, the UK is party of the EEA Agreement as well, since the EEA Agreement has been ratified by (i) each member state of the EU, (ii) the EU itself, as well as (iii) by three of the four EFTA member states. Therefore, the UK itself is party to the EEA Agreement on the side of the EU.

Initially, the UK was member state of the EFTA. In the course of its accession to the "EU" in 1973, the UK withdrew from the EFTA. It might be questioned whether the withdrawal from the EU mandatorily requires UK's exit from the EEA. There are no explicit provisions in the

[22] "This is not the first time a people has turned its back on Brussels. In 1982, infuriated by the then European Economic Community's control of its fishing industry, Greenland voted by 52% in a referendum to leave. When they parted from the EEC in 1984, following two years' of post-referendum negotiations, the union lost roughly half its territory overnight.", see Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, ICLQ, Vol. 53, pp. 407, 409 et seq. (April 2004).

[23] See Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation (94/1/ECSC,EC), OJ No L 1/1, 3.1.1994.

[24] For further information see David Anderson/Piet Eckhout, *External Relations Law*, 2nd ed (2011) pp. 212 et seq..

[25] http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf (4th October 2016).

EEA Agreement regulating that being party of the EEA Agreement requires membership of either the EFTA or the EU. The entire EEA Agreement (in particular the institutional provisions in Article 89 et. seq. - "two-pillar structure"[26] and the territorial scope in Article 126) however presupposes that only member states of either EFTA or EU can be part of the EEA. Therefore, the withdrawal from the EU has to be considered as frustrating the condition for being party of the EEA Agreement.

This, however, does not necessarily mean that as a result of a withdrawal from the EU, the UK will practically exit the EEA as well. Such an act could be reduced to being a mere formality if UK decided to (re)join EFTA:[27]

As a former founding member of EFTA, the UK would not face many-problems rejoining EFTA. Pursuant to Article 128 of the EEA Agreement, EFTA and EU member states are entitled to apply to become a party of the EEA Agreement. The UK's application to be a future party to the Agreement on the side of EFTA is most likely to be granted, since it is already an existing party to the Agreement. The shift in sides might be seen as a sheer formality compared to the purpose of the Agreement.

It is a question of interpretation of the EEA Agreement,[28] whether such a change or adjustment of the party status (from EU to EFTA member) will in addition to negotiating and consenting on the adjustment to the contract require ratification by each member state to the EEA Agreement. In case of a need for ratification a mere act of signing of the amendment by the respective parties would not be sufficient. In most European member states some additional act of municipal endorsement in line with national constitutional laws is required.[29] Very often this entails an act of parliamentary approval on a national level.

Article 128 of the EEA Agreement would formally require either the approval or the ratification of the Agreement between the member states and the applicant state. Against this backdrop a mere approval by signing of the Agreement shall be sufficient. Any need for ratification may be reasonably doubted, since (I) all the parties of the EEA Agreement have already consented to the UK being party of the EEA Agreement. The change from being an EU member to being an EFTA member party is not relevant enough as to require ratification, since the territory of the Agreement would not change. Moreover, (II) UK remaining within the framework of the EEA (as a member of EFTA) would be a lesser change to the EEA regulatory framework, than UK withdrawing from the EEA entirely. This second scenario does not require a ratification or approval but only relatively small amendments of the EEA Agreement. In light of this it would be disproportionate if the less dramatic change would require ratification and the more dramatic change would not.

[26] Christine Kaddous, The relations between the EU and Switzerland, in Alan Dashwood/Marc Maresceau, *Law and Practice of EU External Relations* (2009) pp. 227, 264 et seq..

[27] See Editorial, A.L. , *Brexit Referendum: Beginning of the End or Just a Turning Point?* European Papers, Vol 1, No 2 p. 377, 381 (2016):
http://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2016_2_2_Editorial.pdf (4th October 2016).

[28] Francis G. Jacobs, Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice, in Alan Dashwood/Marc Maresceau, *Law and Practice of EU External Relations* (2009) pp. 11, 23 et seq..

[29] David Anderson/Piet Eckhout, *External Relations Law*, 2nd ed (2011) pp. 258 et seq..

Considering these arguments and interpretation based on the objectives of the EEA Agreement as well as the intention of its parties[30] would come to the conclusion that a formal ratification procedure would not be required. Thus, a simple approval of the agreement by the party states of the EEA Agreement as alternatively provided for in Article 128 EEA Agreement shall be enough. Following this line of argumentation an amendment/adaptation of the EEA-Agreement signed by the representatives of the party states would be sufficient.

Thus, should – by the time of its exit from the EU – the UK already be or instantly become member of the EFTA and should the necessary amendments of the EEA Agreement have already been adopted, the basic condition of the party status in the EEA-Agreement of UK may change but will practically not cease to exist. In this case, the requirements to be a party of the EEA Agreement are met, even though they are met in a different manner. The EEA Agreement would thus require some adjustments subject to the consent of all member states being party of the EEA Agreement as well as the EU. There is, however, no need for ratification in each EU member state.

The UK could follow the strategy "to jump from the EU to the EFTA side of the Agreement" without provoking any time of not being part of the EEA as a backup strategy in case it cannot reach an Agreement with the EU within the negotiation period of two years. Regardless of the outcome of the negotiation procedure, it is highly likely that the EU and all of its member states would support the UK's approach of remaining in the EEA since the single market applies almost identically in relation to parties of the EEA not being part of the EU. The wordings of the respective rules are identical to a large extent. This would of course not satisfy the long term strategy of UK, but could help to bridge the time until a satisfying agreement can be reached. Besides, according to Article 127 of the EEA Agreement every party is entitled to withdraw from the Agreement provided it gives at least twelve months' notice in writing to the other contracting parties. Therefore this would be a temporary backup strategy.

From a political point of view the strategy of (temporary) remaining in the EEA would be at least covered by the Referendum's wording and would cushion a potential hard breach after the unsuccessful expiry of the negotiation period. The UK however would still have to make payments towards the EU (about 80% of what the UK is paying as a member of the EU) but would lose its voice and influence in the EU. Furthermore, the legal provisions regarding free movement of workers will remain applicable to a large extent. Of course, it is questionable whether the political motives behind the Referendum would be satisfied on the long term by following this strategy: The British people have primarily voted against free movement of workers within the EU. The EEA Agreement in essence mirrors the European single market.[31]

[30] ECJ Case C-312/91, *Metalsa* [1993] ECR 3751, paras 12: "An international treaty must not be interpreted solely by reference to the terms in which it is worded but also in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the law of treaties stipulates in that respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (Opinion 1/91 [1991] ECR 1-6079, paragraph 14)."

[31] Pursuant to Article 102 of the EEA Agreement, the "EEA Joint Committee" may adopt EU law (provisions), into the body of EEA law by amending the protocol and annexes of the EEA Agreement. Furthermore, according to Article 107 and protocol 34 of the EEA Agreement, courts of EFTA member states are free to submit legal questions to the European Court of Justice (ECJ) for interpretation in order to ensure homogeneity with EU Law. This, however, is limited to EEA provisions that have been adopted almost identically from EU law. The Supreme Courts of the EFTA member states of the EEA are, however, not obliged to refer any questions to the ECJ.

Furthermore the adopted EU- law is constantly adapted in case of amendments of the implemented European Law.

Compared to the European single market, the single market within the EEA contains merely the following exceptions resp. restrictions:

- For agricultural and fishery products, free movement of goods does not apply resp. applies in a very limited manner
- Free movement of capital is regulated narrower in the EEA Agreement: It does not cover residents of third countries but only residents of EEA member states. The problem can, of course, easily be rectified by means of establishing a company within the EEA.
- The EEA Agreement does not standardize the VAT system within the EEA
- The EEA establishes no Customs Union
- The EEA has never established a monetary union (comparable to the euro area[32]). The UK however has never joined the Euro.
- Within the EEA, there is no harmonization of security policy and no cooperation on justice and home affairs.

3.3. BREXIT and Entering into a Bilateral Contract (e.g. Switzerland, Turkey, etc.)

The UK could enter into bilateral agreements following the example of Switzerland. Alternatively it is thinkable that the UK enters into a mere Customs Union with the EU like Turkey or a Free Trade Union like it is planned to be entered into with Canada. In the latter two cases the UK would have no excess to the Single Market. In the following the relationship between Switzerland and the EU shall be looked at in more detail:

A referendum on December 6, 1992 prevented Switzerland from joining the EEA. As a result, Switzerland did not join the EEA. Instead it merely has observer status in the committees of the EEA. Pursuant to Article 128 EEA Agreement it would however be allowed to join the EEA.

Switzerland entered into bilateral agreements with the EU covering different fields of external relations modelling in essence the European single market.[33] Different to the EEA Agreement the bilateral agreements with Switzerland have no dynamic character. Furthermore, compared to the EEA Agreement those bilateral agreements do not allow for an unlimited free movement of services (limited to 90 days per calendar year) and do not cover any rules on competition law (with the exception of air transport), consumer protection law, environmental law, intellectual property law and social policy law.[34] Furthermore, the bilateral agreements have not implemented the "passport system" with regard to bank licenses. Thus, the passport system with regard to bank licenses does not apply between the EU and Switzerland. This would especially, hit London's financial sector. Therefore, a Swiss bank cannot benefit from the freedom of establishment or to provide services because a bank license issued by a Swiss authority does not automatically meet the supervisory requirements in the EU. This would be especially dissatisfactory for London's financial sector. E.g. Goldman Sachs has already announced to

[32] http://ec.europa.eu/economy_finance/euro/adoption/euro_area/index_en.htm (4th October 2016).
[33] See further Christine Kaddous, The relations between the EU and Switzerland, in Alan Dashwood/Marc Maresceau, *Law and Practice of EU External Relations* (2009) pp. 227, 263 et seq..
[34] Christine Kaddous, The relations between the EU and Switzerland, in Alan Dashwood/Marc Maresceau, *Law and Practice of EU External Relations* (2009) pp. 227, 264.

relocate some of its employees from London if the withdrawal from the EU results in the termination of the passport system (co-CEO of Goldman Sachs Europe and Investment Banking, Richard Gnodde[35]).

Switzerland makes payments to the EU without having a voice in the EU. Thus, even the UK would end up in a bilateral regime of Agreements with the EU it would have to make payments to the EU at the cost of any voice.

3.4. BREXIT after a Period of two years without Entering into an Exit Agreement

The UK intends to remain part of the European single market as a trading area without customs, tariffs or trade barriers. Anyhow it intends to limit EU citizens' access to its national labour market. The free movement of workers played an essential role for the outcome of the Referendum. The EU however has clearly expressed that it will not consent to any form of cherry picking and that the UK shall either participate in the European single market as a whole or not at all.

Should – against this backdrop – the Negotiations prove to be difficult and cannot result in an Exit Agreement, the UK will anyhow leave the EU. European Law will no longer apply to the UK – provided that the UK has not implemented Europen Law into national law and provided that the UK has also left the EEA. In this case, the UK would have no more access to the European single market. Instead it would trade with the member states of the EU based on the legal framework of the WTO. In this scenario the UK would face considerable economic and legal changes.

4. Impact of the Four Alternative Scenarios on Existing Contractual Relationships with a UK Connection

4.1. Impact on Labour Law

4.1.1. Residence and Work Permit

UK's withdrawal from the EU would affect free movement of workers provided that the UK also withdraws from the EEA and provided that no or very restrictive bilateral agreements can be entered into. Affected persons could be UK employees working in continental Europe and especially continental European employees working in the UK or looking for a job in the UK.[36] The same applies for companies employing these employees since not only residence permits but also work permits could be subject to restrictions. The restrictions to be expected will most likely provide for exceptions for persons already employed in the UK. At least the new prime minister, Theresa May, has given hints into that direction. Otherwise, affected companies and employees would have to meet the requirements for residence or work permits. Therefore, this topic deserves increased attention.

Some institutions with an essential part of staff being citizen of other European member states have already undertaken steps to inform their staff on how to apply for residency and

[35] Interview with Swiss magazine "Finanz und Wirtschaft" (Finance and Economy), 6 July 2016.

[36] In the future, it can be expected to be particularly hard for continental European lawyers to settle down on the UK market.

citizenship. E.g. at "Imperial College London (ICL), where 25% of staff and 20% of students hail from other countries in the European Union, the human resources department has set up 10 sessions from now [July] until September with a law firm to explain how to apply for residency and citizenship."[37]

4.1.2. Social Security Contributions

The labour law perspective must not forget that a European regulation[38] is coordinating social security regimes within the EU. As a consequence of this regulation, employees working in an EU member state other than their home member state are only liable to pay social security contributions in the member state they are working. In the case of a withdrawal from not only the EU but also the EEA (the EEA Agreement has adopted the respective legal provisions), the benefits of the regulation could be omitted. Therefore, it cannot be excluded for sure that respective employees might end up having to pay social security contributions twice resp. that companies employing such employees might have to pay social security contributions for them twice.

4.1.3. Mutual Recognition of Qualifications

Throughout the EU, as well as in the EEA (the EEA Agreement has adopted the respective legal provisions) professional education and certificates of qualification are recognized mutually and treated equally. After UK's withdrawal (from the EU as well as the EEA), it cannot be guaranteed that the principle of mutual recognition is still applied.

4.1.4. Outlook

At the moment no accurate prognosis relating to the consequences of the Brexit on employment law can be given. On the one hand, Theresa May has frequently repeated that UK does not want any form of a free movement of workers with the EU after the Brexit.[39] On the other hand, Jean Claude Juncker, president of the European Commission, backed by the European parliament has made quite clear that the EU is not willing to grant UK selected access to the European single market.[40] UK could either be part of the European single market as a whole or not at all. Thus, a stalemate cannot be excluded.

Practical tip:

Until the UK submits a request for withdrawal, no premature steps should be taken with respect to the impacts of a potential withdrawal on labor law matters. After that – most likely end of March 2017- it is recommendable to define those employment relationships which could be affected by a withdrawal of the UK from the EU. Affected companies and employees are then well advised to deal with the requirements to obtain a residence or work permit for employees

[37] Erik Stokstad, *Uncertainty reigns in Brexit Britain*, Science Vol. 353, Issue 6298, p. 437 (29th July 2016).

[38] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (2004) OJ L 166, p.1; this regulation is of relevance for the EEA and for Switzerland.

[39] See e.g. Andre Tauber, *Junckers kluge Brexit-Provokation*, Welt online (27th July 2016): https://www.welt.de/politik/ausland/article157332638/Junckers-kluge-Brexit-Provokation.html (4th October 2016).

[40] Peter Müller/Christian Reiermann, *Juncker stellt Großbritannien harte Bedingungen - EU-Kommissionschef Jean-Claude Juncker will Großbritannien den Zugang zum Binnenmarkt nur gestatten, wenn das Land seine Grenzen für EU-Bürger offen lässt. Das EU-Parlament hat er dabei auf seiner Seite*, Spiegel online (3rd September 2016): http://www.spiegel.de/wirtschaft/soziales/jean-claude-juncker-zeigt-grossbritannien-nach-dem-brexit-grenzen-auf-a-1110672.html (5th October 2016).

originating from third countries. To the extent possible, the fulfillment of the respective requirements shall be pursued in order to be prepared for an exit without reaching an agreement on that matter.

4.2. *Impact on Trade Secrets*

In June 2016 (EU) 2016/943[41] was adopted. It aims to standardize the national laws in EU countries against the unlawful acquisition, disclosure and use of trade secrets. It has to be implemented into national law latest at the 8th of June 2018. After the BREXIT, the protection of trade secrets in the UK might be changed. This should be considered in the course of the location analysis of potential subsidiaries as well as contract negotiations with individual employees.

Practical tip:

Provisions to protect trade secrets have to be included into individual employment contracts with employees installed in the UK.

4.3. *Impact on Intellectual Property Rights*

4.3.1. Community Trade Marks

A trade mark registered in the EU establishes protection in each member state of the EU.[42] In case of withdrawal of the UK (thus according to all four of the scenarios as set forth above in 3.1 to 3.4) the question of how to deal with Community Trade Marks ("CTM") arises. Protection of EU trade marks will – in case of a withdrawal – no longer automatically extend to the UK. Of course the protection could also be extended to the UK as a non-member state or the UK could accord the same protection regime for EU trade marks as for national trade marks pursuant to the UK system.

Furthermore, one of the requirements for continuous protection of an EU trade mark (Article 51 of EU 2015/2424) and for securing protection of such trademarks is „genuine use" on EU territory. This requirement can also be met by proving "genuine use" of the trade mark in only one of the member states. A non UK trade mark owner of a trademark already registered as a CTM may lose protection if the UK was the only member state with "genuine use" of the trademark. Prior to the BREXIT the requirements for the CTM were met. After the BREXIT the trademark could end up no longer complying with the requirements of a CTM.

Practical tip:

In any case, it would be recommendable to keep an eye on the protection of CTM's in the UK and to register a national trade mark in the UK if such cases are not provided for in an Exit or any other separate bilateral agreement.

[41] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Text with EEA relevance).

[42] Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs), OJ L 341, 24.12.2015, p. 21 (Text with EEA relevance).

4.3.2. Patents

Legal protection of patents is provided irrespective of a possible BREXIT. It is regulated by the European Patent Convention (Munich Convention). The UK has signed the Patent Convention, regardless of its membership in the EU. There are also some third countries who are members of the European Patent Convention[43]. The withdrawal from the EU will therefore not change patent protection regulations. The BREXIT might, however affect the "Unitary Patent" project on European level. The unitary patent is the first step into the direction of an EU patent package. Legally it will be established by two regulations which entered into force on 20th January 2013 and which will be applicable from the date of the entry into force of the Agreement on a Unified Patent Court. This is the case as soon as thirteen Member States will have ratified the Agreement on a Unified Patent Court, including Germany, France and UK. Thus the UK is of particular importance for the realization of that project.

4.4. Impact on Business Contracts / Distribution Agreements

Should the UK withdraw from the EU and continue to be member of the EEA (on part of EFTA), there would be hardly any changes with regards to Business Contracts. This is not entirely true for agricultural and fishery products. Within a certain range customs could be imposed on said products[44]. However generally, there would be no need to make big adjustments to agreements on commercial and industrial products. The BREXIT would most likely not trigger any force majeure clauses or the extraordinary right to terminate an agreement. It might, however, be necessary to comply with different turnover tax provisions (see below for further details).

Even the bilateral replication of the European single market based on the Swiss model would, most likely, not have much of an impact on business contracts, in particular on distribution agreements.

In case UK and EU will not enter into an Exit or other bilateral agreement within two years from initiating the Negotiation procedure, the UK will leave the European single market without any "cushioning" of the consequences of the BREXIT. In this scenario it cannot be excluded that customs, tariffs, as well as trade barriers are introduced. By means of introducing customs, import restrictions and similar restrictions, realization of business contracts might become impossible or economically unattractive. In such a case the parties to the agreements might be entitled to raise force majeure clauses or an extraordinary right to terminate an agreement.

Practical tip:

It will be necessary to examine business contracts in terms of economic efficiency and enforceability in case UK leaves the EU without an Exit Agreement. Should the business contract either prove to be inefficient or unenforceable, it is recommendable to consult a lawyer. Due to the currently strong currency fluctuations it may be necessary to re-negotiate specific existing business contracts. In any case it is advisable to evaluate contractual relationships having a connection to the UK once the UK has formally triggered the negotiation procedure.

[43] https://www.epo.org/about-us/organisation/member-states/date.html (Belgium, Germany, France, etc.) (5th October 2016).

[44] For details see protocols 3 and 9 to the EEA Agreement: http://www.efta.int/legal-texts/eea/protocols-to-the-agreement (5th October 2016).

4.5. Dispute Resolution / Litigation

4.5.1. Service of Process, Jurisdiction and Enforcement

As a result of the BREXIT, the UK will no longer be subject to

- the regulation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters[45] (service of documents), and repealing Council Regulation (EC) No 1348/2000 ("Service Regulation") and
- the Brussels I Regulation[46] on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001, L 12, p. 1) ("Brussel I").

As a third country, the UK will no longer be subject to the scope of application of these Regulations (Article 1 of the Service Regulation and Article 36 of Brussel I). This fact could significantly weaken the influence of British courts and law firms. Expedited service of process by simple and standardized forms will be substituted by antic and complicated diplomatic procedures (e.g. under the 14. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Concluded 15 November 1965))[47] as far as there are no bilateral treaties with each member state of the EU in place already providing for a more efficient manner of service of process.

Practical Tip:

After the UK has triggered Article 50 of the Treaty on European Union, it might be necessary to amend agreements incorporating a (new) choice of law clause and a clause stipulating jurisdiction. Should, in the course of the Negotiations, turn out that no equivalent to the Brussels I Regulation can be negotiated, consideration should be given to change of jurisdiction from the UK to a member state of the EU (to reconsider forum selection clauses).

4.5.2. European Payment Procedure

The member states of the EU have been negotiating not only enforcement and jurisdiction for a long time. Expedited procedures to obtain decision on payment claims (without any restriction on the amount of the claim) by a court decision had been on the EU agenda for a long time as well. The negotiations among the EU member states resulted in the European order for payment procedure, Regulation (EC) No 1896/2006 ("Payment Regulation")[48] — creating a European order for payment procedure.

Upon a BREXIT this procedure will no longer be applicable between the EU and the UK. Thus, obtaining an immediate enforceable decision (by a court), if there is no objection by the defendant, will not be an option for creditors seeking fast recovery of their claim.

[45] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007.
[46] Brussels I Regulation 1215/2012 Council Regulation (EC) No 44/2001 of 22 December 2000.
[47] www.hcch.net, under "Conventions" or under the "Service Section". For the full history of the Convention, see Hague Conference on Private International Law, Actes et documents de la Dixième session(1964), Tome III, Notification (391 pp.).
[48] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

Practical Tip:

Find an EU member state still having an enforcement treaty with UK. Agree with the other party on the Forum in this EU member state. The Payment Regulation will be applicable and the decision may be enforced in the UK

4.6. *Impact on the Financial Services Sector (Passport)*

A prognosis regarding the consequences for the financial services sector largely depends on the question whether the UK sustains a level of legal provisions comparable to the EEA Agreement. In this case, the free movement of capital might be slightly restricted compared to the status prior to the BREXIT. UK financial institutions would however still be covered by the freedom to provide services and the freedom of establishment without any restrictions (see Article 36 of the EEA Agreement).[49] Accordingly the principle of single authorization (or passport system) would continue to apply. Thus, the authorization of a financial institution in the home member state would still continue to be valid throughout the EEA and the financial institution would continue to be free to provide the services for which it has been authorized, throughout the EEA - either through the establishment of a branch or the free provision of services.

Should the UK not be able to sustain a level of regulation compared to the provisions in the EEA Agreement, any authorization of national financial institutions would most likely not entail the right to perform the respective financial services throughout the EEA without applying for an authorization from a competent authority within the EU. This might be especially burdensome for international financial institutions that are using the UK as entry point to the EEA.

Therefore, UK financial institutions would be obliged to establish a subsidiary or a branch[50] within the EU in order to obtain a license covered by the passport system. Only in this case a financial institution would be self-evidently entitled to access the benefits of the freedom to provide services and the freedom of establishment. Establishing subsidiaries or branches in the EU could also require a certain relocation of employees to EU member states. It will then be necessary to conclude the respective employment contracts on the basis of a different set of rules.

If a UK financial institution enters into contractual relationships as a European financial institution such a financial institution may no longer be able to meet the requirements of the respective contract after the BREXIT. As a result, it could be forced to amend the financial contract (e.g. loan agreement, syndicated or not) or to transfer the respective contract to a subsidiary or branch.

[49] http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf (5th October 2016).

[50] See Article 39 of Mifid II, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173 12.6.2014, p. 349 (Text with EEA relevance).

Practical tip:

As soon as the UK triggers the negotiation procedure according to Article 50 Treaty on European Union, financial institutions should start preparing for establishing subsidiaries or branches within the EU. Such subsidiaries or branches should try to seek authorization form the competent authority of a member state. It might also be advisable to transfer certain contracts and tasks that have to be performed by an EU financial institution to the established subsidiaries or branches.

4.7. Impact on Tax law

4.7.1. Value Added Tax (VAT)

As a result of the BREXIT, VAT will be subject to amendments even if the UK would remain a member of the EEA. Intra-community sales transactions (intra-community acquisitions, intra-community supply) with the UK would become sales transactions with a third country.

While intra-community sales are tax-neutral, sales transactions with third countries are not necessarily tax neutral: Intra-community supplies are not subject to tax and intra-community acquisitions are subject to VAT and entitled to reclaim VAT (directive 77/388/EEC[51]).

Services performed outside the EU, are subject to taxation in the respective third country. In order to be subject to e.g. Austrian tax exemption, an export certificate is required. Due to the fact that the UK has implemented the VAT directive into national law, it is unlikely that the legal provisions regulating tax rates change immediately after the BREXIT. Surely it cannot be excluded that the UK would decide to regulate tax rates differently.

In the case of imports from third countries (outside of the EU), e.g. Austria is entitled to impose import taxes. After BREXIT, the UK is likely to qualify as a third country. Should the UK not remain part of the European single market (EEA), customs could be imposed as well.

4.7.2. Group Taxation

In Europe, EU directive 2011/96/EU[52] assures that no taxes are imposed on distributions by subsidiaries to their parent companies. Parent companies, in this context, are companies holding 10% of a subsidiary (if they are incorporated in Switzerland 25%). Should the UK withdraw from the EU, it is not clear whether distributions from subsidiaries being incorporated in the UK to parent companies being incorporated somewhere in the EU (as well as the other way round) remain tax neutral.

Practical tip:

Companies with a subsidiary or parent company in the UK are well advised to closely monitor the respective developments.

[51] Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (77/388/EEC), OJ L 145, 13.6.1977, p.1.

[52] Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345, 29.12.2011, p.8.

4.7.3. Tax Neutrality of Reorganizations

Directive 2009/133/EC[53] provides for tax neutrality of reorganizations within the EU (e.g. merger/division). Pursuant to Article 4 of the respective directive, a merger, division or partial division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes. Companies intending to engage in a merger or division shall thus watch out if any of the involved companies has any connection to the UK. Here again it is important to monitor the respective development.

4.7.4. Corporate Tax

As a consequence of directive 2008/7/EC[54] taxes on contributions to companies have been reduced substantially. Thus, said taxes have more or less been abolished in almost all of the member states of the EU. The respective directive prohibits reintroduction of taxes on contributions to companies. In the case of a BREXIT, the UK could reintroduce such a tax or comparable taxes.

Practical tip:

No steps should be taken until the UK has formally triggered negotiation procedures. Thereafter, it is advisable to identify contracts relating to the UK and to consult a lawyer or a tax consultant as soon as first signs of changes become apparent.

4.8. Impact on Data Protection Law

The EU data protection regulation (EU) 2016/679[55] is going to enter into force on 24th May 2018 ("General Data Protection Regulation"). It protects natural persons in relation to the processing of personal data relating to the free movement of personal data. Thereby, it tries to allow for and safeguard data transfer within the EU. It applies to private companies and public authorities processing personal information. The Regulation also covers companies from non EU member states addressing EU citizens with its marketing activities.

In case of BREXIT the General Data Protection Regulation would no longer automatically apply in relation to companies and authorities in the UK. UK might however implement the respective regulation into national law.

4.9. Impact on Company Law

As a result of UK's withdrawal from the EU and the EEA, the scope of application of regulation (EC) 2157/2001[56] with respect to Societas Europaea ("SE") no longer extends to the UK. It is

[53] Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ L 310, 25.11.2009, p.34.

[54] Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capita, OJ L 46 of 21.2.2008, p.11.

[55] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1 of 4.5.2016, p. 1 (Text with EEA relevance).

[56] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p.1.

questionable what will happen to SE established in the UK prior to the BREXIT. It is highly likely that the UK will take precautions. The UK will either acknowledge the SE as a national legal entity or will provide for possibilities to convert SE into a UK company.

Limited Liability Companies ("LLC") based on the UK model, established in the UK having their headquarters in another member state, might face difficulties to be legally accepted if this other member state follows the real seat theory. According to ECJ[57], the incorporation theory applies within the EU. Pursuant to e.g. Austria's private international law the real seat theory applies whenever a company is not registered within another member state of the EU. Since UK LLCs do not meet the requirements for establishing a company (*Kapitalgesellschaft*) in Austria, LLCs would probably be considered as registered business partnerships after UK's BREXIT. For shareholders this would mean that they are personally liable without limitation for the company's liabilities.

Practical tip:

Should there be no signs that legal precautions are being taken with regards to companies being incorporated in the UK, it is recommendable to initiate a cross border conversion (*Umwandlung*) of the LLC into an equivalent company of a member state of the EU.

5. Summary

In theory, four different scenarios of the legal relationship between the EU and the UK are possible:

1. No change at all
2. EEA member state
3. Bilateral agreement(s)
4. BREXIT without any regulatory or "treaty cushion" (UK will remain party to bilateral and international treaties entered into by UK without a connex to the EU, e.g. WTO).

The scenario most likely to be chosen is difficult to be predicted at this stage. The legal consequences will largely depend on the progress of the Negotiations.

As for now, hasty legal steps must be advised against. Until the UK has formally triggered Article 50 of the Treaty on European Union, in fact, it is not advisable to take any specific steps (except for adjusting clauses due to currency fluctuations). Subsequently, it is recommendable to identify contracts that could be affected by the BREXIT (UK-related contracts) and to analyze whether amendments could be necessary. Prior to predicting the outcome of the Negotiations or such outcome is known at least to some extent, it will be difficult to take specific actions.

[57] E.g. EJC Case C-167/01, *Inspire Art* [2003] I-10155.