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CLIENT UPDATE

# Ready for Brexit? - What companies should expect

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At present no one is sure whether, when and in what form the proposed Brexit will take place. The current political and legal uncertainty presents a major challenge for companies. However, this does not mean that it is impossible to prepare for.

## 1. "Post-Brexit" limbo

Companies in the United Kingdom and the EU will have to brace themselves for a lengthy period of uncertainty. Although the British people voted to leave the EU by a slim majority, according to the prevailing opinion in the UK its state bodies are not bound by the referendum, i.e. they are not obliged to invoke Article 50 TEU to trigger a withdrawal from the EU. Meanwhile, there is also a broad legal (and political) consensus that the other EU Member States cannot force the British government to make a "Article 50 notification", as the decision on whether to trigger the process is one of British national law. Moreover, under British law there is a certain institutional confusion as to whether the government can even initiate the Article 50 withdrawal procedure or whether – according to some commentators – the British Parliament needs to decide on it. In addition, there are the known political uncertainties (both the government and the opposition are currently regrouping). All of this will probably not help speed up the process.

Most commentators therefore do not expect notification to be made any time soon. Pragmatically, the British government also probably has no interest in doing so. This would trigger the two-year period under Article 50 TEU, i.e. after two years at the latest EU law would automatically cease to apply in the UK (unless the Member States unanimously grant the UK an extension, which is not certain). The British government will want to avoid time pressure and will put off the Article 50 notification for as long as possible.

As a result, there will be no change to the legal situation for the time being, meaning that EU law will continue to apply in the UK, however with considerable uncertainty as to "what happens afterwards". Due to the sheer number of issues that need to be resolved no one is expecting negotiations to be wrapped up quickly, either; this limbo may well last for several years.

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## 2. What can we expect?

At present it is virtually impossible to predict what the future legal situation "post-Brexit" will be. Not only the EU and the UK, but also those within the Brexit camp, have very different views on this. Disregarding the option of the UK remaining in the EU, there are basically three conceivable models for future cooperation between the UK and the EU:

- Some Brexit proponents apparently envisage a model that would involve retaining the main "fundamental freedoms" (free movement of goods, persons, services, capital and payments, and freedom of establishment) and other core elements of the internal market, based on the EEA rules – at least for British companies. This model, which is practised in the EEA with Norway, Iceland and Liechtenstein, does not really fit the bill, however and is more the product of wishful thinking than reasoned analysis: Although the EEA Agreement grants these three Non-EU countries extensive access to the internal market, it comes at a heavy price. In exchange they must largely adopt EU law – without being able to participate in the decision-making process – and are bound by the case law of the courts of the European Union via the EEA coherency rule. This solution is clearly at odds with the whole Brexit idea of "taking back control". What's more, EEA members pay considerable sums of money to the EU to access the internal market, something that Brexit proponents are specifically not prepared to do. Above all, this model would not resolve the dominating issue of the Brexit campaign to stop "immigration from EU countries", as the EEA Agreement specifically stipulates such a free movement of persons.

- One alternative would be to agree a network of bilateral agreements, as in the case of Switzerland. However, this network comprises of more than 120 agreements, all of which have to be constantly updated. The EU would hardly be likely to accept a solution of this kind (this complicated relationship would appear to have been an accident borne of historical considerations that was not meant to set a precedent). Moreover, these agreements have to be constantly negotiated and updated (which is currently the case). It therefore offers little in the way of legal certainty to companies affected. Here, too, the agreement includes the free movement of persons, which the "Leave" supporters specifically aim to get rid of.

- This leaves the option of an agreement of the kind entered into with other third countries. Such regulations, however, generally do not contain any provisions granting access to the internal market which even vaguely resemble that currently enjoyed by the UK. The provisions of such agreements generally have no "direct effect" (i.e. companies cannot invoke them). In particular, it does not resolve the issue of passporting, i.e. recognition of the country of establishment principle for financial service providers, which is one of the central issues for the British. For instance, the (proposed) agreement with Canada, cited by the "Leave" campaign as an example does not grant market access with regard to financial services.

Negotiating such agreements usually takes many years. It seems very unlikely that the EU will be especially generous in the case of the UK and offer a tailored "special solution". This would virtually be an invitation to other countries from the EU, the EEA or other parts of the world to "renegotiate" their own position.

This brief assessment in itself shows the following: Should Brexit actually happen it is rather unlikely that everything will stay the same with regard to the relationship with the UK as is sometimes suggested. The cherry picking solutions proposed by the "Leave" campaign, in particular, will hardly be popular with the other EU Member States. Instead, fundamental changes can be expected, which are outlined briefly in the following.

## 3. No more free movement of businesses (freedom of establishment, free movement of services, capital and payments)

The most dramatic change for companies will probably be the loss of free movement of businesses.

For corporate law this means that the recognition of British companies in other Member States guaranteed under the freedom of establishment principle would no longer apply. For example, following Brexit, British companies registered in Germany – in particular the quite common UK limited with COMI in Germany – would no longer be recognised as such due to the otherwise applicable rule of domicile, to which they then would be subject, and would thus be automatically converted into German partnerships with personally liable partners, due to mandatory legal form requirements. Limited companies with only one shareholder would even dissolve

due to the inadmissibility of one-person partnerships, with the partner becoming the legal successor. As a result, all British companies with COMI in Germany may have to change legal form in due time. They would have to do so in due time as cross-border transformations based on EU law (including mergers and changes in legal form pursuant to the Vale decision of the ECJ) would probably no longer be possible for British companies after the UK's withdrawal from the EU. The German "Unternehmergesellschaft" (UG), which has limited liability and was introduced by the German legislator under the Act to Modernise Limited Liability Company Law and to Combat Abuses (MoMiG) as the German counterpart to the UK limited, would not, however, be available as an option due to the ban on non-cash contributions.

Withdrawal would also sound the death knell for European company forms in the UK - first and foremost Societas Europaeas (SE) registered in the UK - that were created by directly applicable subordinate EU legislation; these would be deprived of their legal basis. Of course, all other European regulations would also cease to apply, such as the recently introduced Market Abuse Regulation with its corresponding effects on the harmonisation of capital markets regarding British issuers or European conflict of laws provisions, in particular Rome I, with potential impact on the freedom to choose applicable law or on formal requirements, for example share purchase agreements with British parties.

Brexit would have to be factored into M&A transactions with a British dimension in any case. The uncertainty is likely to make British targets less attractive, and a number of aspects would need to be considered with regard to the contractual implementation of deals, such as the scope of non-compete obligations, the wording of MAC clauses or securing long-term contracts. The framework for public takeovers in the UK may also change, making takeover of dual-listed companies more difficult. If the UK were ultimately no longer even a member of the EEA, British companies would not be able offer their shares in exchange in the case of a public takeover bid for a German company.

It is well-known that the British financial services sector would be hit particularly hard. According to the currently applicable "home regulator principle", banks, investment services undertakings, insurance companies and asset managers are monitored by the supervisory authority of the Member State where they are registered. Under this principle, companies can "passport" their UK licence across the EEA, allowing them to provide services and products throughout the entire EEA without requiring a physical presence (free movement of services, capital and payments) and establish branches in other Member States (freedom of establishment). This extensive economic freedom has contributed to the unprecedented rise of London as a financial hub. Financial firms from third countries in particular have settled in London, thus gaining access to one of the largest internal markets in the world. Post-Brexit, this would no longer apply in this form, as such "passporting" is only accepted where there is an equivalent financial supervisory authority. However, such equivalence is only given where all companies are subject to the same "single rulebook" standards (e.g. as regards capitalisation, protection of deposits and investors, risk management, settlement) created in accordance with the comprehensive and very detailed EU regulations for all banks, investment services undertakings and asset managers. With the establishment of new EU supervisory authorities such as the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), the European Securities and Markets Authority (ESMA) and the Single Resolution Board (SRB), the EU has made substantial efforts in recent years to ensure the practical enforcement of equivalent standards. As the "Brexiteers" have specifically called time and again for these detailed "Brussels-imposed regulations" to be abolished it will be difficult to further enable institutions based in the UK to benefit from such passporting rights. It will likely prove impossible for the UK to turn its back on the EU's financial supervision and regulation on the one hand, and – after having rid itself of its burdensome regulation – continue to operate freely on the European financial markets from London on the other. It is obvious that the other Member States will reject such a strategy.

For companies in the financial sector domiciled in the UK, in particular, EU law was the ticket to the European financial services market. Without EU law these firms now face the question of how to alternatively access this European market. Ultimately, this will mean transferring their registered office to another EU Member State to be able to continue their previous European business model. They therefore must now carefully consider their choice of location. As Frankfurt is the most important financial hub in continental Europe and gives these companies direct access to the European banking authority (ECB) and insurance authority (EIOPA), there is much to suggest that a significant share of London-based financial services firm will relocate to Germany's financial hub in the Rhine-Main region. In this case they would not only be subject to German financial supervision, but also forced to meet substantial German legal requirements when doing business.

Of course, the impact of a loss of free movement of businesses is not only restricted to financial services providers. It could also affect the business development of "real economy" firms, such as construction companies on tenders for public contracts. In the event of the UK's withdrawal from the EU, secondary EU legislation regarding the implementation of freedom of movement and the structure of the internal market would (subject to any agreements to the contrary) no longer apply there, either. Directives governing public contracts would then cease to apply in the UK. Invitations to tender from public contracting authorities in the UK which exceed certain thresholds must be published in the Official Journal of the EU Commission across the EU (as is the case in all other Member States); these would no longer be announced in this manner. Where the prohibition of discrimination on grounds of nationality simultaneously expires, companies domiciled in the EU also lose their right to participate in public procurement procedures in the UK on equal footing with local companies, unless British national law still permits third countries to do so. In exchange, companies registered in the UK lose their right to transparent and equal access to public procurement procedures in the EU.

Brexit may also significantly affect R&D cooperations between German research institutions and British companies, where they are subsidised with public funds (be it from the EU or the German government): Under certain subsidy rules, the previously permitted exploitation of research results in the UK would then probably no longer be possible. German companies should already keep this in mind when establishing usually very long-term R&D cooperations.

## 4. Free movement of goods, customs union and foreign trade

The free movement of goods is, as is well-known, one of the cornerstones of the internal market. This includes not only the abolition of customs duties among the Member States, but also the complete dismantling of all national regulations that impede the free movement of goods, something that is brought about primarily via the harmonisation of the national legal provisions (e.g. technical standards). If this ceases to apply, the question arises for companies as to whether business operations that are currently still based in the UK can in future be run from branches in other Member States. Exporting goods to the UK could in future raise the question of whether German companies want to comply with the specific requirements of any "UK standard-setting".

German companies that export goods to the UK after a Brexit will have to adjust to the fact that these exports will have to be processed via customs procedures in the same way as imports from the UK to Germany will have to undergo customs processing and could trigger import duties. For the UK would - in the absence of an agreement with the EU, which is not currently foreseeable - no longer be a member of the EU customs territory. The same applies to the consequences of Brexit under foreign trade law: It is for instance entirely possible that certain exports to the UK will - unlike in the past - require a permit (e.g. dual-use items) or be subject to other restrictions under German and European export control law.

In the area of regulated markets, in particular, it is not only customs and direct trade restrictions that will have an adverse effect on the cross-border movement of goods and services, but also indirect barriers to trade such as the lack of reciprocal recognition of any permits, registrations and other approvals required for market access, which are necessary for placing a large number of products in a wide range of industries on the market. This would affect medical products, for example. A marketing authorisation issued in the UK could no longer be regarded as valid across the EU based on the mutual recognition procedure; it would moreover no longer be possible to carry out decentralised marketing authorisation procedures for several or all of the EU Member States including the UK. Conversely, EU-wide marketing authorisations issued by the Commission would no longer be valid in the UK. Something similar would apply to medical devices and a large number of other - especially technical - products, which require a CE marking.

When it comes to product monitoring and product safety, there is a risk of additional expense for companies, on the one hand, and a decreased level of protection for consumers, on the other. For example, after Brexit, the UK would no longer be able to participate in the "EudraVigilence" pharmacovigilence system to the full extent. This applies to other regulated markets as well. Both the general European rapid alert system "RAPEX" and the special rapid alert system for food and feed "RASFF" would suffer as a result of the reduced cooperation.

Plus there is the international dimension to consider. Since the EU also comprises a "customs union" in relation to third countries and has concluded a large number of trade agreements with the latter, Brexit would seriously hamper reciprocal market access between the UK and these third countries. British companies can currently benefit from the large number of agreements that were concluded by the EU.

The UK would now have to renegotiate a host of contracts with third countries with which it is currently linked via the EU agreements. As a relatively small player, the UK will of course have much less "leverage" in these negotiations than the EU, and will therefore be less able to push through its own interests. Moreover, it would appear to be rather unrealistic to expect all these contracts to be replaced in the relatively short time available. It is therefore hard to imagine that the framework conditions for trade relations between the UK and third countries will improve in future - in fact, the opposite is more likely to be the case in the short and medium term.

## 5. Free movement of workers and employment law

It is unclear how Brexit will affect the area of "human resources". It is likely that the regulations governing the free movement of workers will no longer apply to the UK following a withdrawal from the EU. As everyone knows, this was a top priority for "Brexiteers".

Nothing is known of any plans regarding the legal status of non-British employees in the UK following Brexit. There are certain political forces in the UK that want to use this as a bargaining chip in the exit negotiations. Conversely, there is also uncertainty about the future legal status of British people who are employed in a Member State of the EU.

### Right of entry and residence

Currently, all EU citizens are entitled to enter any Member State of the EU and reside in that State, especially for the purpose of taking up (paid) employment, without a visa or any restrictions. This is also the case for the purpose of applying for jobs, as well as for a period after the end of a job in another EU country. If the UK leaves the EU, the free movement of workers will cease to apply on both sides - at least in the existing form. On this basis, employees or employers would possibly have to apply for an official work permit and/or visa under the applicable national law for the cross-border deployment of workers. This would only be different if the UK and the EU Member States were to conclude agreements on the free movement of workers.

### Options for laying down the free movement of workers

There are, generally speaking, three models under discussion that could be used to determine the free movement of workers (see 2 above):

- Model 1 - Membership of the European Economic Area (EEA): The UK could remain a member of the EEA, which currently consists of the EU, Norway, Iceland and Liechtenstein. Although one advantage of this model would be that most of the existing regulations on the free movement of workers would remain in force between the Member States, in view of the Brexit campaign, which essentially stood for "taking back control" to the greatest extent possible, it is however unlikely that Britain would more or less indirectly submit to the regulations of the EEA - but without any possibility of having a say - and therefore ultimately to those of the EU as well. This would, after all, specifically not involve the national British legislator having extensive control.

- Model 2 - Individual agreements on the free movement of workers: Like Switzerland, the UK could conclude bilateral agreements on the free movement of workers with all and/or individual European states. However, we regard this model as unlikely to be followed, either, especially given the substantial time and effort required to negotiate and conclude such agreements (see 2 above).

- Model 3 - No agreement: Should no agreement be reached with the EU in either the short or the medium term, the UK will be treated as a so-called third country. This would mean that neither British nor EU citizens would be able to pursue employment in the UK or the EU Member States, respectively, under relaxed freedom of movement provisions as they are currently able to do. This could in the most extreme case go hand in hand with an obligation for EU citizens who want to work in Britain to obtain a visa, and with the requirement for British citizens to obtain a so-called "blue card" to work in an EU Member State.

### Employment law and employment conditions

Within the EU, it is in principle the responsibility of the respective Member States to lay down their own employment laws and it is unlikely that there will be large-scale changes in this regard for the time being. The possibility cannot be excluded however that some areas currently subject to European law, such as the transfer of business, anti-discrimination or working hours regulations, will be regulated differently in future in the UK. This is because, when it comes to these areas, the legislator in the UK will be entitled - once Britain has left the EU - to lay down different regulations or to repeal existing ones. The British legislator could, for example, try to make Britain more attractive to foreign companies by

laying down less stringent regulations as compared to the strict health and safety provisions under European law.

### Effects on social security laws

From a social security point of view, posting employees from EU Member States to the UK may become problematic. When someone starts a job in a foreign country, he is as a rule subject to the respective national social security laws. However, this situation can be different if employees are posted abroad, for example in the form of a secondment, and this generally lasts longer than 12 months. At present, an EU Regulation stipulates that the social security laws of the sending state continue to apply if the period is not to exceed 24 months. If the UK leaves the EU, this Regulation will probably cease to apply, at any rate to the UK. As such, it would be necessary to apply the bilateral social security agreement between Germany and the UK from 1960 to any employees posted to the UK from Germany. According to this, if the social security provisions of the sending state are to continue to apply, only postings lasting no longer than 12 months would be possible. Companies posting employees to the UK would therefore probably have to adjust their practices in future.

## 6. Taxes

Brexit could also cause considerable upheaval in terms of lax law. A large number of existing reliefs in cross-border business will possibly fall away. Should the UK leave the EU, it would also leave the customs union and the EU-wide harmonised system of value added tax. However, the VAT Directive has been transposed into British law and will therefore continue to apply (insofar as individual provisions do not explicitly apply to the EU area itself).

In terms of direct tax there is likely to be some upheaval caused by the fact that the Merger Directive or the Parent-Subsidiary Directive will no longer apply. The latter exempts dividend payments to EU corporations from capital gains tax under specific conditions.

The UK will also no longer be subject to the European Directive on the automatic exchange of information in tax matters (the former EU Interest Directive). What the consequences of this will be is uncertain and depends on how the exit is implemented. At any rate, during this period of uncertainty, it is likely that Britain will become less attractive as a "holding base", with companies even being swayed to move their activities to other jurisdictions. One big issue that could result from a Brexit is that a UK limited company that has moved to Germany might become subject to liquidation taxation in Germany and therefore be exposed to considerable adverse tax consequences.

Conversely, after a Brexit national British tax laws will no longer be subject to the restrictions of EU primary law. This means that Britain will, for example, have greater leeway in granting tax incentives independent of the requirements laid down in EU state aid law. Initial plans for a significant easing of the corporate tax burden in the UK are already being discussed. This could open up a whole range of new prospects for tax planning, although discussions are only in the initial stages.

## 7. IP (trademarks and designs)

The Brexit is likely to have a considerable impact in the areas of intellectual property rights ("intellectual property") as well:

### Trademarks and designs

This initially concerns the protection of trademarks. Many companies have long been relying on the EU trademark that affords protection in all 28 EU Member States (hitherto including the UK). This will not change as long as the UK remains in the European Union. This means that the protection afforded in the UK will still apply without change for the time being. The same provisions will continue to apply, too. This also applies to new EU trademarks that are applied for/registered after the referendum and up until a change in the law. Once the UK has left the EU with legal effect, however, trademark protection on the basis of EU trademarks is also very likely to end within the territory of the UK. At present, the most probable course of action is that a mechanism will be agreed allowing EU trademark proprietors to alternatively acquire protection through appropriate national trademarks (or internationally registered trademarks) having the same date of priority. At the moment, however, it is an open question what content such a provision might have. All that is certain is that companies can, at any time, apply for national trademarks in the UK and that internationally registered trade marks cover the UK as well. At the latest when the UK has left the EU with legal effect, it will likely again be necessary for protection to be acquired for new trademarks in the UK territory by applying for a national trademark or extending the scope of protection through an internationally registered trademark.

As far as the enforcement of EU trademark rights before UK courts is concerned, there is also no change in being able to sue in the UK. However, care will need to be taken in future proceedings where EU-wide claims are to be asserted that are likely to be lengthy. At the moment, it cannot be predicted whether, for how long and to what extent UK courts will keep their jurisdiction in such proceedings (particularly with respect to other EU Member States) once the UK has left the EU.

As to the question of trademark exhaustion, the principle of "EU-wide exhaustion" currently applies in the EU, according to which the first placing on the market of a good in the EEA by or with the consent of the rightholder has the effect that, in priniple, the rightholder cannot assert trademark rights against resale of the good.

Should the UK join the EEA Agreement once it has left the EU, this rule would stay in place since the EEA Agreement provides for it (Article 65(2) of the EEA Agreement in conjunction with Article 2 of Protocol 28). Should, however, the UK not belong to the EEA after leaving the EU, a different exhaustion arrangement could be made for the UK territory (for example, "worldwide exhaustion").

Registered Community designs are also not likely to have effect as such for the UK territory once the UK has left the EU. Here, too, an arrangement seems likely whereby such design rightholders will be offered the possibility of acquiring appropriate national design protection within the UK once it has left the EU. The mechanism, if any, chosen for such purpose is at present an open question, however. Nor is it clear whether holders of non-registered designs will still be offered similar protection when the UK has left the EU.

## Patents

At the moment, it is also unclear what will happen to the start of the European patent with unitary effect (unitary patent) and of the related Unified Patent Court. The start of the new unitary patent system depends on the UK also ratifying the Agreement on which the Unified Patent Court is based. Practically all that needs to be done is to deposit the instrument of ratification. Whether or not this will still be done is an open question, however.

The Opinion 1/09 of the court of justice of the European Union is largely understood to mean that only EU Member States may take part in the new patent system. The UK's departure from the EU would therefore exclude it from the new patent system. The central chamber of the Unified Patent Court (pharmaceuticals and biotechnology) envisaged for London would then need to be relocated. Italy and the Netherlands are in the running, but also Germany.

Even though the new patent system would be less attractive with the UK, the start of the new system will definitely not be prevented by the UK's departure but at most delayed. For that reason, the Preparatory Committee responsible for implementing the Unified Patent Court has not stopped its work, for example for the already commenced process of selecting judges for the Unified Patent Court, and found in a communication of 30 June 2016: „At this stage it is too early to assess what the impact of this vote on the Unified Patent Court and the Unitary Patent Protection eventually could be."

The approach most favoured by practitioners (particularly those from the UK) provides that the UK should first ratify and the question of the UK remaining in or leaving the new patent system would then be arranged in connection with the negotiated departure. Some take the view that it might be legally possible for the UK to remain in the new patent system.

Should, contrary to this approach, the UK not ratify the Agreement and commence the proceedings to leave the EU, then the start of the new patent system will be delayed by at least two years, i.e. for the duration of the UK departure negotiations.

Ultimately, the Brexit will also impact on existing and future contracts of IP relevance. This applies to licensing agreements on intellectual property rights, for example. Insofar as the definition of the licensing area refers to the EU, the UK currently still belongs to the EU. In future – particularly following the UK's departure from the EU – the question to be answered by interpretation in the individual case with existing agreements is whether the reference to the EU is understood to be dynamic, that is it refers to the territory of the EU of the respective geographical area it covers, or static (referring to the territory of the EU on the date of conclusion of contract). Should there be doubts in that regard, it may be advisable in the individual case to contact the other contracting party as soon as possible to clarify such points. In the case of all new contracts as from now the parties need to make it explicitly clear whether a contractual territory defined as the EU is to include the UK or not once the UK has left the EU.

## 8. Data protection

As far as data protection is concerned, the main point will be whether after leaving the EU the UK will be able to acquire the status of a safe third country in which EU companies may transmit personal data without being required to meet additional requirements. For the EU Member States the new Basic Regulation on Data Protection will apply in future; it was adopted by the European Parliament on 14 April 2016 and its stipulations will be applicable as from 25 May 2018. Should the UK really join the EEA (which seems unlikely), there would be no changes in practice since the Basic Regulation on Data Protection has binding effect on the EEA states as well. Should the UK not join the EEA, it would either need to keep the strict EU data protection laws or create equivalent national data protection regulations. It remains to be seen whether there will be a political will to do so. If not, it would greatly impede data exchange between the EU and the UK in the event that the Commission does not classify the UK as a safe third country. It would affect all companies reliant on transmitting employee or customer data to UK group companies or business partners.

## 9. Competition law

Brexit also makes the application of the competition rules more complicated. Since the Brussels one-stop-shop will no longer apply in the area of merger control, companies will probably be required to make numerous additional merger control notifications in the UK. This will entail additional costs and effort for companies in the UK, the EU and third countries.

It will be similar in the area of antitrust because the UK Competition & Markets Authority (CMA) will then no longer be a member of the European Competition Network (ECN). This means that the rules governing the division of work in the ECN will no longer apply; most notably, there is a possibility of parallel proceedings before the CMA (under UK antitrust law) and the Commission and/or ECN authorities. The worst-case scenario here would be multiple fines because the double jeopardy rule ("ne bis in idem") does not apply in relation to third countries.

There are many specific issues beyond that. Lawyers who are admitted to practise law in the UK will then also be treated like other lawyers from third countries. They will no longer enjoy a "legal privilege" in antitrust proceedings, i.e. the correspondence between lawyer and client is in this case not to be treated as attorney-client privileged and can be used against the companies.

State aid control, which along with Article 101 et seq. TEU and merger control forms the third pillar of competition law, will be difficult. If the UK wants to retain reciprocal access to the internal market, a situation in which UK or EU companies have state aid at their disposal that might distort competition must be prevented. In order to achieve a level playing field, a system of cooperation would need to be introduced – as in the EEA or in many association agreements – in which aid is jointly approved by the European Commission and the UK in a codecision procedure. However, from the point of view of the proponents of leaving the EU, it hardly makes sense to submit to a verdict from Brussels when the aim is to support national champions.

## 10. Civil procedure and insolvency law

The uniform system of jurisdiction pursuant to the Brussels I Regulation will likewise no longer apply in relation to the UK. In addition, the enforcement of British judgments in the EU will no longer be as straightforward as it currently is. As a result, potential plaintiffs will have far less incentive to opt for a forum in London if an enforcement in the EU comes into consideration. This can certainly be an advantage for the defendant companies, since proceedings in London tend to be plaintiff-friendly, time-consuming and very expensive.

Against this background, companies will need to reconsider whether opting for a forum in the UK still makes sense. Insofar as plaintiffs can subsequently choose between forums in different EU States, it will as a rule no longer be advisable to bring an action in the UK if enforcement comes into consideration in the EU outside the UK. This is likely to apply particularly in the case of follow-on actions where it is mostly possible to choose between several places of jurisdiction. At least from the defendant's point of view, a loss in importance of the UK as a provider of judicial services is certainly not a disadvantage for the reasons explained.

That does not apply to international arbitration proceedings since the relevant legal bases are to be found in national law and international agreements, but not in EU law. The uncertainties described regarding the future mutual recognition of court judgments in legal relations with the UK may be another argument for having recourse to arbitral jurisdiction.

Since the recognition regime under the Brussels I Regulation will no longer apply, the recognition of insolvency- and restructuring-related decisions of a UK court, relating to a UK scheme of arrangement, for example, will be hampered.

It may also become more difficult to obtain recognition of UK insolvency proceedings in Germany (e.g. administration proceedings) that has hitherto been regulated under the European Insolvency Regulations (EIR). Pursuant to the EIR, decisions of a Member State court on the opening of insolvency proceedings are generally automatically recognised in the other Member States. This means that at present there is no subsequent review as to whether a UK court would have jurisdiction for such opening decision at all. Should international insolvency law again apply in the future, recognition in Germany would require the UK courts to have jurisdiction in accordance with German law as well. In the past, there have been cases where German and UK courts had differing opinions on the jurisdiction of UK courts, meaning that departure from the EU may well have a negative effect on recognition in that regard.

German companies were hitherto prepared, on a case-by-case basis, to conduct or at least consider restructuring measures in insolvency-related situations in accordance with UK law. It therefore remains to be seen whether this tendency is likely to decline once the Brussels I Regulation and the European Insolvency Regulations no longer apply.

## 11. What else can be expected?

Apart from the areas mentioned, a UK departure from the EU will involve countless other issues that cannot even be touched on in this context. This includes (more or less strongly harmonised or regulated) legal areas such as consumer protection, telecommunications, environmental protection, energy, transport, payment transactions/SEPA, nationality-related issues/Union citizenship, electoral law, fundamental rights issues (ECHR, EU Charter of Fundamental Rights), border controls, Europol, civil protection, anti-discrimination, health policy, agriculture and fisheries, EU aid programmes and co-operation in the areas of justice and home affairs (civil and criminal law). All this will have a considerable impact on the everyday concerns of companies and their staff. The sheer number of issues, some of which are of considerable political significance to the UK (the fisheries policy, for example), show that a fast, clear-cut departure of the UK from the EU will hardly be likely.

## 12. What can be done?

The good news: Even if Brexit actually goes through there will probably be some time to prepare for it. Exit negotiations are likely to last several years.

After that, however, things may start moving very fast. Many companies are currently hoping that the EU and the UK will agree on generous transitional provisions that allow for a slow phasing out of EU law in the UK. However, cautious businessmen shouldn't bank on it. Experience with transitional provisions in the opposite case of accession agreements shows that such provisions are often introduced in the hectic final stages of negotiation and are therefore often poorly drafted (inevitably leading to legal disputes). Moreover, one should not underestimate that the UK might be interested in a speedy departure during the final stages of negotiation and may not want to be bound by EU law for decades to come. One should therefore not place too much faith in the judgement of the negotiators.

Companies should carefully examine the worst case scenario – no deal on withdrawal is achieved triggering loss of membership and expiry of EU law in the UK after the two-year period under Article 50 TEU. We are happy to assist you in this regard.

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