



## THE BREXIT-DEAL: CONSEQUENCES FROM A LEGAL PERSPECTIVE

Brexit has now finally been in effect since 01.01.2021. The United Kingdom ("UK") has left the European Union ("EU") – and thus the internal market, the customs union and the harmonised VAT territory. After lengthy negotiations and the possibility of a "no deal", the trade and cooperation agreement was concluded on Christmas Eve to regulate the future, new relationship between the UK and EU. This will also be used temporarily until the formal ratification process is completed. A feared "no-deal Brexit" was virtually prevented at the last second.

With the exit of the UK, the transitional phase is also history, whereby the entire EU legal regulations were still applicable in the UK until 31.12.2020.

In the following, you will find an overview of selected legal topics and the expected effects for both sides of the English Channel starting from 01.01.2021. These can be found in the trade and cooperation agreement concluded between the EU and the UK.

The most far-reaching and decisive change in Brexit is the removal of the four EU fundamental freedoms (free movement of goods, people, services and capital).

### I. FREE MOVEMENT OF PERSONS, EMPLOYMENT LAW

The free movement of persons between the EU and the UK ended on 31.12.2020. Those who wish to work or live as an EU citizen in the UK after Brexit must apply for a visa for the first time. This should be regulated by a point-based system, for example, the amount of income and the respective industry is to be taken into account. Conversely, the provisions for third-country nationals also apply to UK citizens who want to enter and work in the EU for the first time.

There will be no visa requirement for shorter trips for tourism purposes. EU citizens must only have a valid identity card when entering the UK (holidays or short trips) until 30.09.2021. As of 01.10.2021, a valid passport will then be required to enter the country. Conversely, however, it will be mandatory to bring a passport with you starting from 01.01.2021.

EU citizens who were already resident in the UK on 31.12.2020 will be given the opportunity to register by 30.06.2021 in order to continue to be able to live in the UK. For a further stay in the UK, it is necessary that a residence there already existed on 31.12.2020.



British citizens who were already working in a member state of the EU before 31.12.2020 continue to have unlimited access to the labour market there. However, a residence permit must be applied for according to the provisions of the Treaty on the European Union by 31.12.2021 in order to ensure unlimited access to work beyond this date.

## II. CORPORATE LAW

Companies from the UK, in particular "Limited" companies with an administrative seat in the EU, have so far been recognised on the basis of the case law of the ECJ (European Court of Justice) and the previously applicable freedom of establishment. This case law also continued to apply for the period of the transitional period. For example, "Limited" companies registered in the territory of the EU were able to incorporate their business into another legal form or carry out a cross-border merger. On 01.01.2021, the recognition ended for "Limited" companies with an administrative office within the EU. The shareholders thus face the possibility of being personally liable for the liabilities of the company.

## III. GOODS TRAFFIC, CUSTOMS LAW

In the area of goods traffic and customs law, the new agreement provides for a free trade zone without customs duties and without proportional restrictions for the trade of goods. However, the general customs regulations then apply in the movement of goods with the UK as they also apply with other non-EU countries. Consequently, all imports and exports are subject to customs formalities through which the VAT and excise taxes are also processed. In addition, all imports into the EU must meet all EU standards, including regulatory reviews and controls for safety, health and other public purposes.

## IV. CHOICE OF LAW, ENFORCEMENT OF LAW

No provisions and regulations in the agreement were agreed in connection with the recognition and enforcement of judgements. In the future, the regulations that have already been applied to third countries will apply. This would mean that legal titles must be declared enforceable if they are enforceable under the provisions of the State in which they are established, and reciprocity is guaranteed by international treaties or regulations.

The Rome I Regulation continues to apply even after 01.01.2021, but only for contracts concluded before 31.12.2020. When the damage-causing event occurred is irrelevant and may also be later than 31.12.2020. For the applicable law in the case of (extra-) contractual obligations, i.e. according to the Rome II Regulation, the provisions of international private law of the respective countries concerned shall apply to all damaging events that take place from 01.01.2021.

Although the EU dunning procedure was still applied until 31.12.2020, ongoing proceedings are still to be completed according to the previously valid rules. This mechanism ceases to exist on 01.01.2021, as is the case with the European enforcement order. Since 01.01.2021, the UK has also no longer been bound by the previous and future ECJ jurisdiction.

## V. CAPITAL MARKETS LAW

Until 31.12.2020, the free movement of capital within the EU meant that market participants had unlimited access to the other intra-European trading platforms. An approval of an individual member state was therefore also valid in the rest of the EU (referred to as "EU passport"). Since 01.01.2021, these British approvals no longer apply in the member states of the EU and are therefore no longer applicable.



The answer to the removal of the "EU passport" will be formed by the "equivalence principle" in the future. Thus, if the EU acknowledges in future that the regulations and legal provisions in the UK are equivalent to the EU legal requirements, the British financial service providers (banks, insurers, fund companies, etc.) must be granted unhindered access to the internal market. The equivalence rules fall within the competence of the EU Commission, and can be revoked by it at any time. This procedure was not part of the most recent agreement either. A decision is therefore still pending.

## VI. DATA PROTECTION

In connection with the transmission of personal data, the agreement provides for a transitional regulation of up to six months. It follows from this that the UK is temporarily not treated as a third country within the meaning of the GDPR. During this transitional period, data controllers and processors may continue to transmit personal data to recipients in the UK as previously. As soon as the European Commission has issued appropriate adequacy decisions, this transitional period will end.

## VII. COMPETITION / SUBSIDIES

With regard to the strict EU regulations and the associated minimum standards in the area of, among other things, labour and social law, environmental law and product quality (referred to as "level playing field"), a compromise could be reached. This stipulates that the existing standards of the UK must continue to be complied with and that they may not be undercut. However, the UK does not have to enforce new EU standards or regulations. This compromise has now been made to prevent the UK from improving its companies' position with less stringent regulations.

With regard to subsidies that are granted or maintained in the territory of the EU or UK, the subsidies granted must be published six months after each has been granted.

In the event that the EU or UK states that a subsidy was granted that could have a negative effect on trading, an attempt can be made between the trading partners to explain whether the principles with regard to this subsidy were complied with. This is intended to ensure that companies in the EU and UK compete with each other under the same competitive conditions and at the same time ensure that neither the EU nor the UK use any regulatory autonomy to grant unfair subsidies and subsequently distort competition. Penalties between the UK and the EU may also be imposed usually with prior referral to arbitration courts.

To improve and coordinate effective enforcement of the respective competition law between the EU and the UK, it is planned that a specific agreement can be concluded between the European Commission, the competition authorities of the individual EU Member States and the competition authority of the United Kingdom. This should enable the exchange and use of confidential information in the future.

## VIII. INSOLVENCY, RESTRUCTURING

As far as insolvency and restructuring are concerned, we are dealing with what is referred to as a hard Brexit. The trade and cooperation agreement between the EU and the UK does not regulate cooperation in this regard. This concerns in particular the European Union Council Regulation on Insolvency Proceedings (the "European Insolvency Regulation") revised in 2015, which regulates the determination of the international jurisdiction of courts for the opening of insolvency proceedings and provides for the automatic recognition of proceedings opened in other Member States and their effects,



including the powers of administrators. The withdrawal agreement agreed between the UK and the EU and implemented in UK law provides that the European Insolvency Regulation continues to apply to insolvency proceedings, provided that the main proceedings were opened before the end of the transitional period, i.e. 31.12.2020. The UK is therefore a third country within the meaning of EU law effective from 01.01.2021. The rules of the European Insolvency Regulation were largely implemented in the national legislation of the UK, in particular with regard to the determination of the jurisdiction of the British courts. According to current regulations, there will be grounds for jurisdiction to initiate insolvency proceedings in the UK if the focal point of the debtor's main interests (COMI) is in the UK or the COMI is in a Member State and there is a branch in the UK, in addition to the existing grounds for having jurisdiction to initiate such proceedings as set out in the laws of any part of the UK. It will therefore continue to be possible to open insolvency proceedings in the UK by a debtor domiciled in the EU. A much larger problem is the lack of mutual recognition of procedures and their effects. The relationships between the UK and the EU member states are regulated by the respective national legal systems, which generally do not provide for automatic recognition and make them dependent on the implementation of a judicial procedure in individual cases. Recognition should be easier to achieve only in countries that, like the UK, have recited the UNCITRAL Model Law on Cross-Border Insolvency. At present, however, these are only Poland, Romania, Greece and Slovenia from among the EU member states.

As far as the restructuring guidelines are concerned, UK is not required to implement them. However, the British restructuring regime already meets many of the requirements of the Directive, in particular through an alternative form of the "Scheme of Arrangement" for companies in financial difficulties and a new, easier to achieve memorandum.

## IX. CONCLUSION

Fortunately, a deal could still be reached between the EU and the UK. Such a deal was considered unlikely right up to the end. In particular, there will be substantial changes in the area of general freedom of goods for imports and exports. British "Limited" companies, which have their administrative office in the EU, also have an unclear future. It should also be emphasised that there are still some uncertainties, especially in the area of capital market law.

The experts at Schindhelm Allianz are always available to answer any questions you may have about Brexit.

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