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Brexit. What Next?

ANTICIPATED BREXIT IMPACT ON COMPANIES DOING BUSINESS IN ROMANIA ▪ A LEGAL AND TAX OVERVIEW

While the UK EU-Leave vote itself does not alter the legal relationship between the UK and Europe, the Brexit impact on your business will not be immediate. But that does not mean that you should not now be proactive in reviewing how the vote may or may not affect your legal obligations and best practice. In this note we summarise by topic some of the more immediate considerations which may arise in your doing business in Romania.

Employment

Romanian companies having employees seconded to work in the UK or companies leasing personnel which operate abroad might face two main issues: the access of the workers to the UK territory and the procedure to be followed for these foreigners to have the legal right to work for UK companies.

As regards the access of workers to the UK territory, it is possible that the right of free circulation might be maintained. The Romanian President announced recently that our country would do its best to protect the interests of Romanian citizens working abroad, therefore it would try to negotiate with UK to maintain free circulation of citizens between the two countries.

The situation is not easy in the case of Romanian citizens working in the UK, either employed directly by UK companies or seconded from Romanian companies to UK companies for limited terms.

It is anticipated that UK might require again work permits in these cases, which will complicate the procedures by which UK employers can hire EU citizens. Consequently, this can result in a lower interest in receiving workers from Romania and from any other EU country. UK already has a points-based system for non-EU citizens who apply to live and work there and this could be extended to EU citizens as well.

Brexit can also have a significant impact on automatic coordination (the so-called E forms) of national systems of social securities and health insurance that will translate into more intricate procedures for confirming seniority in work, payment of social contributions, and access to the UK health system. All these will clearly depend on the negotiations between Romania and UK and the treaties that can be signed to this effect.

Depending on the result of negotiations with EU during this transition period, however, employment legislation could remain largely stable, with implemented Directives and existing Regulations remaining. Alternatively Regulations could fall away but Directives already enacted in domestic law should remain. EU driven domestic legislation might be replaced on a case by case basis.

Financial Services

In banking and finance (banking, insurance, capital markets) the European Economic Area is treated as a common market from a legal standpoint (and not just at EU level, as in other sectors) through specific mechanisms such as the mutual recognition of licenses, permits and by exercising integrated and recognized supervision at the level of financial groups by the authorities of the home Member States.

Therefore the impact of the UK leaving the EU for the UK entities from the financial sector doing business in the rest of EU (and the other way around) will be limited, as long as the UK remains a member of the European Economic Area.

Taxation

If the UK decides to activate Art. 50 and it effectively leaves the EU the companies involved in cross-border transactions with UK companies should pay attention especially to indirect taxation.

Obviously, after leaving the EU, the UK will be treated from a fiscal perspective as a non-EU member country. This will attract all related tax consequences applied currently in case of Switzerland for example.

From a VAT perspective the intracommunity transactions will cease to exist in case of the UK and they will be replaced by imports / exports transactions. This will impact the way of recognition, declaration and payment of VAT. In case of services Romanian entities will apply, for transactions with the UK, the EU VAT Directive paragraphs related to non-UE partners instead of paragraphs related to EU partners.

At the same time the potential change will impact the customs regime. The customs duties should be taken into consideration in terms of costs of good structure as well as in terms of cash flows as the value of custom duties will be effectively paid in customs.

Another point to be taken into consideration is the clearance procedure of goods in customs. The freedom of movement of goods will be a bit more restricted than in case of intracommunity transactions as goods will need to be physically controlled in the customs points and all related customs' papers should be filled in.

Certainly the double taxation treaty between Romania and the UK will continue to exist and to be applicable in terms of direct taxation. However a special attention should be paid to potential new international arrangements which will be probably signed between the EU and the UK in order to implement the results of Brexit negotiations.

Due to the globalization process it is expected that many business flows to be changed and most of the companies currently based in the UK to continue to do business with EU member states not directly from the UK as they do currently, but by using permanent establishments, branches of subsidiaries located in EU countries.

Competition and State Aid

While Brexit is not expected to cause *per se* overwhelming effects on the competition environment on the short, even medium, term (considering that UK legislation, just as Romanian one, mostly replicates EU competition rules and the rulings of UK courts are generally harmonized with EU rules and the case-law of the European Commission or the "EC"), things may definitely change on the long run.

Some of the EU implementation legislation may be either changed or repelled and, based on the agreement that will be allegedly reached with the EU institutions, UK may decide to implement stand-alone competition rules. Additionally, UK courts will no longer be bound by European case-law (ruled by either the EC or the ECJ) and will not be able to submit preliminary ruling requests to the ECJ, which is naturally anticipated to cause a gap between the EU and UK interpretation and application of competition rules, even in the absence of a manifest change in the UK legislation.

Precedents ruled by the national competition authority (i.e. Competition and Markets Authority or the "CMA") or UK courts on competition matters have been consistently relied upon by lawyers, academics, experts and even case-handlers of the Romanian Competition Council ("RCC") in antitrust cases. Anticipating a future gap between EU and UK competition legislation and case-law, it is equally predictable for UK precedents to be less and less evocative. Likewise, the influence of UK mindset through the European Competition Network (a valuable working instrument, including for the RCC) is likely to become immaterial.

Compliance matters of UK businesses operating in Romania (just as in any other EU country) will need to be assessed from a dual perspective – UK and Romanian/European competition rules. European antitrust rules will continue to be applicable to UK entities doing business in any EU member state (just as they are currently applicable, for example, to US- or Asia-based entities operating in the EU), therefore the EC or the national competition authority (including the RCC) may presumably still fine an UK-based entity for antitrust behaviour occurring in relation to its investment in any EU member state.

In exchange, it is expected for the EC not be able to conduct dawn-raids to UK-based entities any longer, as it is confined to EU member states only; however, we do not exclude the possibility for parallel investigations to be carried out by the EC and the CMA for identical breaches involving both the EU and UK, with potential different findings for the involved entities based on the two legislations.

EU state aid rules will equally cease to be applicable to purely UK-based entities. It is however anticipated that UK authorities will implement their own rules on state aid matters.

From merger control perspective, the 'one-stop-shop' concept will disappear; even if a merger is notified to the EC (under the Merger Control Regulation or any replacing EU legislation), the assessment of merger control implications on UK territory will lie exclusively with the CMA. Therefore, a two-fold notification process will be required (with the attached additional costs and efforts) and, most importantly, a merger clearance by the EC will not guarantee the same result from the CMA and *vice versa*.

Intellectual Property

With Brexit, some changes are expected to take place in the field of intellectual property rights, protection of personal data, and e-commerce, depending on how the UK will decide to continue cooperation with the EU, either by maintaining membership of the EEA, accession to EFTA, or entering into a separate agreement with the EU.

In order not to affect intellectual property rights of its own citizens and particularly of its own companies active in the field of life science, biotechnology and biochemistry (especially in the pharmaceutical sector), UK will probably retain legislation harmonized to EU legislation and implement mechanisms for recognizing European regulations and sign conventions for mutual recognition and protection of intellectual property rights.

Otherwise, intellectual property rights recognized at Community level (trademarks, designs) will lose their applicability, and the holder will have to register them separately in the UK.

UK is a signatory to the European Patent Convention and in this capacity it acts as a member of the European Patent Office, a status which grants its patents and the patents of the other signatories of the Convention the same level of protection. But, the Supplementary Protection Certificates, namely the instruments which extend the life of a patent for inventions such as pharmaceuticals or phyto-pharmaceuticals, are subject to EU law and would be ineffective in UK. Also, the Brexit will cause a significant delay in adopting the unitary patent system, initially forecasted for 2017, to which most likely UK will want to remain as a non-EU member.

The European Digital Market will lose an important partner, but most likely there will be agreements concluded to cover this loss.

However, while the decisions of the European Court of Justice will no longer be mandatory in the UK, any conflict in terms of intellectual property rights under the UK jurisdiction could receive a different interpretation.

In this context of uncertainty, people whose intellectual property rights were until now protected in the UK by the protection afforded at Community level, and those who want to protect those rights in the future should consider implementing a cost-effective plan for the registration of their intellectual property rights distinctly in the UK, a decision which should be wisely taken only from the date when UK's position towards the EU and also towards Romania is clarified by treaties and conventions.

Telecom

Brexit is definitely expected to impact the Digital Single Market; the specific extent of this impact, particularly on EU consumers but also on mobile network operators, still remains to be seen, based on the anticipated negotiations between the EU and UK officials.

In a nutshell, we may presume that the *Roaming Regulation* may become inapplicable to UK territory – therefore, even if not commencing on 15 June 2017 but at a later time, retail roaming charges may be applied or reintroduced in UK (and abolished in the remaining EU member states); the analysis of EU wholesale roaming market would also presumably exclude UK. The transition rules relating to roaming and net neutrality (consisting of unitary small amounts paid by EU mobile devices users on top of domestic prices and valid until 15 June 2017) will presumably continue in full force, until negotiations between EU and UK are finalized.

On a closely related note, it is also possible, in the context of Brexit and subject to future negotiations between the EU and UK officials, for UK-based mobile network operators to no longer benefit from regulated mobile termination rates (MTRs), which may directly impact the price of mobile voice calls between UK-another EU member state. It remains to be seen whether the developments in the MTRs anticipated at EU level (with the European Commission currently scrutinizing the subject) will include or materially influence UK as well.

The agreement on RLAH (*roam-like-at-home*) would most probably also exclude the UK, with direct impact on EU consumers travelling to UK.

While Andrus Ansip (VP of Digital Single Market) referred to the ambitious project of abolishing unjustified geo-blocking in the EU, allowing the "*cross-border portability of content to be a reality in 2017 so that Europeans can travel with their films, music, sports broadcasts, e-books across the EU*", it may be presumed that EU consumers may not necessarily enjoy or carry (or at least not to its full extent) this win in the UK.

Not only consumers are presumed to be potentially impacted by Brexit at a certain point in time, but also market operators – just at a first glance, the latter will be very likely subject to a twofold legal and regulatory regime for operating in Europe (based on UK and EU legislation).

Additional Information

We will continue to take a close look at the dynamics of the process and we will keep you updated with significant changes that could affect your business with UK based entities.

Together with our international partner Squire Patton Boggs – a top25 player on the global legal market – we are ready to set up a customized client briefing in Romania as well as in any European jurisdiction to discuss the consequences of Brexit in more detail.

If you have specific concerns arising from the Brexit vote or otherwise please contact your usual Voicu & Filipescu lawyer or any of the lawyers below.

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