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NEWSLETTER

BREXIT AND THE IMPACT ON COMPANIES AND BUSINESSES

SUMMARY

The Brexit referendum of June 23, 2016 caused a chain reaction in all dimensions of society, also shaking the fiscal and legal framework, with immediate impact on the economy and promoting an aura of uncertainty in the face of the lack of agreement on a diverse set of issues.

Just days before we know the exact terms of the UK Exit Agreement, it is now important to analyze several aspects where the exit from the UK may be felt more strongly, namely for companies and multi-national businesses that have a presence in that country.

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INTRODUCTION

The British Parliament's approval, at the end of December 2019, of the final text of the Brexit bill provides for the UK to leave the European Union on 31 January 2020, with an 11-month transition period during which London and Brussels will negotiate a trade agreement.

The final vote is scheduled for 9 January, and after 31 January 2020 the UK will no longer be part of the European political institutions, but will remain within the customs union and the European Single Market and will continue to respect the rules of the European Union until the end of 2020 - end of the transitional period.

While it is true that there will be consequences for all the Member States of the European Union, only by confirming whether or not there is an Exit Agreement, and the terms of it, will it be possible to understand and analyze the impact of these consequences. Without prejudice, we hereby present our considerations concerning the impact caused by Brexit, depending on the possible exit options.

EXIT STRATEGIES AND SUBSEQUENT LEGAL FRAMEWORKS

First, it was anticipated that the exit would be based on the Norway agreement, in which the United Kingdom would remain part of the European Free Trade Association (EFTA) and the European Economic Area (EEA), thus maintaining many of the advantages inherent in the European Union, namely free trade agreements, the Single Market and its regulatory framework, as well as the fundamental freedoms that characterize the European Union. However, this solution has not been adequately reflected in the UK's political concerns about the European Union.

Secondly, consideration was also given to agreeing on more specific access to the Single Market, as is the case with Switzerland. However, this agreement would prove less attractive for the European Union.

Thirdly, a Customs Union could be created and shaped along the lines of the existing agreement between the European Union and Turkey.

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Finally, there is the possibility that the UK may rely, to some extent, on its existing network of Double Taxation Conventions and the rules and agreements related to the World Trade Organization (WTO) and the General Agreement on Tariffs and Trades (GATT).

Bilateral investment agreements between the United Kingdom and the European Union may be negotiated through the European Commission.

In any of the models presented, consideration was given, and certain sectors wished it, to the possibility of the UK continuing to benefit from the free movement of capital, as well as from the decisions of the European Court of Justice, in order to protect investments originating from third countries (which will be achieved, even if only temporarily, if the transitional agreement is approved).

TAXATION OF DIVIDENDS, INTERESTS AND ROYALTIES

The Double Taxation Convention in force between the UK and Portugal does not grant the same tax elimination effect as that granted by the European Directives on direct taxes, which are applied mainly to groups of companies, and also allows withholding taxes on the payment of dividends (15% or 10%), interest (10%) and royalties (5%).

Accordingly, companies with cross-border investments may wish to review their current strategy and determine the potential risk and impact of such a change with a view to eliminating or mitigating international double taxation.

On the other hand, Portugal remains an attractive country for investment by allowing companies to benefit from the participation exemption regime which should, without further, apply to profits and reserves distributed by an entity resident in Portugal, since the Double Taxation Convention in force between the two countries will also allow the application of the said regime.

Furthermore, with or without Brexit, a company based in Portugal may choose to exclude the profits and losses of a permanent establishment it has abroad, thus being able to separate foreign and domestic profits for taxation purposes.

It will be important for multi-national companies to review their strategies in order to understand the extent to which the UK will currently serve as an effective platform for entry into the EU and should benefit and take advantage of

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the transition period to implement any changes (such as redomiciliation of group companies or holdings).

MERGERS, DIVISIONS, TRANSFER OF ASSETS AND EXCHANGES OF SHARES

The Merger Directive, which prevents tax obstacles from being created, is applicable to companies that carry out their transformation, but may no longer be applied by the UK.

The special Portuguese tax neutral regime, on the other hand, applicable to mergers and transfers of assets, similarly to what the Directive also promotes, is limited to companies based in the European Union.

On the other hand, the withdrawal of the United Kingdom from the EU also raises several problems regarding competition law. The UK has already published official documents (notably by the Department for Business, Energy & Industrial Strategy), indicating that companies will only be affected if they are subject to a pending investigation or if a merger or restructuring is being assessed, and that State Department has indicated that, if on the date of Brexit, an undertaking has a pending merger or re-origination, it must contact the British Competition and Markets Authority (CMA) and the European Commission to find out whether it has to make parallel notifications under those procedures.

Furthermore, Council Regulation 139/2004 on the control of concentrations between undertakings stipulates that certain mergers or other acts of concentration which exceed certain thresholds, must be notified in advance and approved by the European Commission. Given that CMA may wish to increase its powers of control over concentration operations, it is possible that when these operations involve English companies, there is a situation of double control - European, by the Commission and English, by CMA - which may lead, absurdly, to situations in which one operation is approved by one entity and rejected by another, insofar as it is the Commission that has exclusive competence over the control of concentration operations. This position has already been officially recognized by CMA in March 2019.

In this document, CMA states that a distinction will have to be drawn, between mergers that have already had a decision by the European Commission on the Brexit date, in which case CMA will

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have no jurisdiction, unless the decision is annulled on appeal; and cases where there is still no Commission decision on the Brexit date, in which case CMA will have jurisdiction over that control and review of the merger.

COMPETITION

First of all, it is important to note that in the context of UK companies' relations with companies based in Member States of the European Union, all agreements with English companies will have to continue to comply with European competition law, just as, at present, an agreement between an English company and a Chinese company, for example, will also have to comply with those rules, it being sufficient for one of the contractual parties to be subject to European competition law.

On the other hand, the European Commission no longer has the power to carry out inspections or conduct raids on English companies, nor does it have the power to ask the CMA to do so, but only the power to request written information, as it currently has with third countries.

It is also relevant to examine the fact that the provision of English domestic law, which provides that English competition law must be interpreted and applied in a manner consistent with European case law on the subject, is to be repealed. It is now envisaged that this provision will be repealed and replaced by a provision requiring only that inconsistencies with European case law be avoided. However, as is well known, the departure of the European Union means that the English courts will no longer be able to have recourse to the mechanism of the preliminary ruling when questions of interpretation and integration of competition law arise.

As regards State aid issues, the English Government has already stated that competence for State aid issues will be transferred to the CMA and has already passed provisional legislation establishing a British State aid prohibition regime, in line with the European regime.

It is therefore to be expected that, in the field of competition law, the UK will adopt its own rules, which are all similar to European rules, but there is still a risk of investigations and even divergent decisions between CMA and the European Commission.

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CROSS-BORDER LOSSES

The fragmentation of the possibility of loss relief, which still exists for companies, is a current challenge, but the little progress made, through various decisions of the European Court of Justice, will disappear with Brexit. In fact, the United Kingdom is one of the states targeted by some of the most emblematic decisions in this field (Marks & Spencer).

This picture could change if the well-known Common Consolidated Corporate Tax Base (CCCTB) Directive were to be introduced, although the matter is rather controversial among the Member States.

This Directive will provide companies with a common legal framework for calculating profits and losses between EU Member States and possibly EFTA/EEA Member States, thus allowing the transfer of profits and losses that companies have in different Member States. We believe that under the terms of the Exit Agreement, terms which are still pending approval by the British Parliament, the United Kingdom may, after the end of the transitional period, cease to benefit from the development taking place in European Union tax law.

CUSTOMS UNION

Another main and long-standing feature of taxation in the European Union is the Customs Union, from which the UK will also no longer benefit, unless it enters into a special agreement with the European Union. If this agreement is not reached, the UK will certainly rely on the rules and regulations coming from the World Trade Organization (WTO) and the General Agreement on Tariffs and Trade (GATT).

CROSS-BORDER WORKERS AND PENSIONERS

Persons already resident in the UK or other Member States of the European Union are expected to be the focus of special protection, particularly in the context of European citizenship under the Exit Agreement.

When the UK White Paper on Exit from the EU was published, a series of rules on the subsequent integration of European Union law into English law were listed, namely stating that European rules which benefit from direct applicability (namely the Directives) would be converted into English law and directly applicable in the UK, while preserving English domestic legislation designed to

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implement and transpose European law into English law.

Workers' rights are specifically mentioned in the White Paper as one of the areas that will be preserved, which means that substantial changes in basic labor law concepts and principles that are already established as a result of European law should not be expected.

The same White Paper states that, in order to avoid legal uncertainty and insecurity, when questions of labor law derived from European law arise, not only should it continue to be interpreted by the English courts in the light of ECJ case law as it existed at the time of the official departure of the EU, but European case law will have the same value as the case law of the English Supreme Court.

The regime for Non-habitual Residents in Portugal, designed to attract qualified professionals, people with high net worth and foreign pensioners, is now gaining a renewed interest. Non-habitual Residents are individuals who become residents in Portugal and who, during the five years prior to their registration as residents, were not domiciled, for tax purposes, in Portuguese territory; granting them an undeniably advantageous tax regime of various income tax exemptions.

Brexit may trigger even more interest in the Portuguese gold visa regime, aimed at people interested in obtaining a residence permit in Portugal, through investment activities, namely in real estate, and capital transfers or job creation.

THE ANTI-AVOIDANCE DIRECTIVE AND INFORMATION EXCHANGE DIRECTIVES

With the departure of the United Kingdom from the European Union, several directives will also no longer be imposed, as well as a range of measures promoted by the European Union. Nevertheless, in particular regarding information exchange schemes for tax purposes, some of these measures could be replaced by the Multilateral Convention on mutual administrative assistance in tax matters.

VALUE-ADDED TAX

Regarding the issue of VAT, being a tax based on a European Directive, Brexit will also motivate the exit of the United Kingdom from the VAT system.

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However, it is expected that the United Kingdom will maintain the current VAT system in place but will have exclusive power and competence in certain matters, such as the definition of exemptions or the creation of additional rates.

Should the United Kingdom join the EEA, like Norway or Switzerland, it could benefit from its own customs system, which would allow for the suspension of customs duties and VAT on goods in circulation on their way to another EU Member State, which could be particularly relevant in relations with Ireland and Northern Ireland.

On the other hand, it will be important to understand the reaction of the United States of America, particularly with regard to the negotiations on the Transatlantic Partnership Agreement on Trade and Investment (TBRIP) which includes the possibility that certain customs duties and other duties may be removed in EU-US trade, thus leaving the UK out.

THE EUROPEAN COURT OF JUSTICE

Finally, as regards the influence of the European Court of Justice, whose case law has significant impact in the application of EU law, this may still be subsist even in a transitory fashion, but the question remains open in view of an imminent departure without agreement (under which the Transitional Agreement will not enter into force and, as such, none of the transitional measures provided for therein will apply).

For its part, the European Commission wants the European Court of Justice to retain full jurisdiction over pending cases, but also, in certain circumstances, over future cases during this transitional period.

In fact, under the terms and for the purposes of the Transitional Agreement, there will be a time limit after the end of the Transitional Period for the continuation of use of the preliminary ruling to the European Court of Justice (4 years for matters of indirect taxation and 5 years for matters concerning mutual assistance in the recovery of tax claims).

CONCLUSION

Relations between individuals and companies with the UK will change fundamentally, but it is difficult to foresee the exact shape of these relations at present, and there will be a tendency for

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the UK to equate certain domestic legislation with European legislation.

It will, therefore, be necessary in the coming weeks to continue to monitor the Brexit situation, in particular regarding the United Kingdom's integration model and any trade agreements that are to be entered into.

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