



BREXIT

Corporate and Commercial Law aspects

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Brexit will have major legal implications for European companies doing business with the United Kingdom, and vice versa. Although the COVID-19 crisis will continue to have a major impact in the coming period, it is important to also consider which implications Brexit will have for your company.

Despite all the uncertainties concerning Brexit, it is clear that Brexit, in whatever form, will have major legal implications. Companies doing business, directly or indirectly, with the United Kingdom (**UK**), must anticipate on the withdrawal of the UK from the European Union (**EU**) in order to prevent their business operations being harmed or that they otherwise suffer damage due to Brexit. This brochure contains a brief overview of several significant legal implications with regard to commercial contracts, company law and mergers and acquisitions.

Commercial contracts

Territorial scope agreements

Commercial contracts, such as franchise and distribution contracts, generally contain provisions concerning the territorial scope of the agreement. It is for example possible to determine that activities may only be carried out within the 'EU' or that a non-competition clause is only applicable to activities conducted within the EU. The withdrawal of the UK from the EU means that the EU will be more limited in size. To avoid misunderstandings over the exact territorial scope of your contract – including or excluding the UK – you should consider discussing this with the contracting party/parties from the UK and clarifying or amending existing arrangements with regard to the territorial scope of the contract.

Choice of law and choice of forum

In international contracts it is important to agree on the applicable law and on which court shall be competent and have jurisdiction in case of potential disputes. If a contract between 'European parties' does not contain specific provisions with respect to these topics, it is generally possible to rely on certain harmonised legislation from multiple European Regulations (such as the Rome I-Regulation and the Brussels Ibis-Regulation). However, it is possible – and in case of a

'hard' Brexit likely – that it will no longer be possible to rely on these regulations following the transition period which ends after 31 December 2020 (the **Transition Period**).

In view of Brexit, it is even more important that international contracts contain provisions relating to the applicable law and the competent court. Proper and clear provisions reduce the risk that these will need to be determined on the basis of international private law. A consequence could be that litigation may unexpectedly have to take place in the UK, with all additional costs and other inconveniences associated therewith.

The possibility of amending the agreement

Brexit will also have implications for the factual and practical performance of contracts, for example in the following situations:

- ▶ the introduction of increased import- and export tariffs and/or duties, which might make it desirable to implement price adjustments or to agree on different Incoterms;
- ▶ the introduction of standard and permanent border controls, as a result of which delivery deadlines may no longer be feasible; and
- ▶ potential additional requirements in relation to safety, health, environment and similar matters, which may give rise to a sharpening of regulations, new licenses, checks, labelling, certification, etc.

It is therefore essential to evaluate in the short term if certain contractual arrangements will need to be amended in view of the situation after the Transition Period. It is also important to take into account the fact that generally a contract cannot be amended unilaterally. The manner in which a contract amendment can be implemented, depends among other things on the contract itself, the applicable legislative framework and the degree to which the contracting party/parties is/are willing to cooperate. In view of the uncertainties regarding the legal, economical and practical consequences of Brexit, contracts that are concluded before the end of the Transition Period should also contain provisions for arrangements after the Transition Period, to reflect the consequences of Brexit and/or divide the consequences of Brexit between the parties in a fair and balanced manner.

Company law

European corporate entities

European corporate entities such as the European company (**SE**) or the European Cooperative Society (**SCE**) that have a registered office in the UK are likely to be affected by Brexit. They may lose their legal basis in the UK and may have to move their registered office or effect a change in legal form. On the other hand, British legal entities may no longer be able to convert into European corporate entities, because the legislation which makes this possible (among others the SE Regulation and the SCE Regulation) will no longer be applicable to UK and British legal entities after the Transition Period.

Cross-border restructurings

Cross-border restructurings – such as cross-border mergers and cross-border conversions – may become impossible after the Transition Period. Cross-border mergers and cross-border conversions are based on the 10th EU Directive (Directive 2005/56/EC), and case law of the European Court of Justice. Following the Transition Period, the EU Directives and case law of the European Court of Justice will no longer apply to UK companies. Dutch corporate law does not provide a legal framework enabling the merger with, or conversion from or into, a non-EU legal entity. As such, after the Transition Period, it is likely that it will no longer be possible to implement a cross-border legal merger or conversion between companies in the Netherlands and the UK.

Law on Formally Foreign Companies

Companies (i) incorporated in the UK, (ii) which perform all or virtually all their activities in the Netherlands and (iii) do not have a genuine connection with the UK, should after the Transition Period meet the requirements of the Dutch Law on Formally Foreign Companies.

These requirements include, inter alia:

- ▶ a filing with the Dutch Trade Register that the company satisfies the definition of a formally foreign company, together with, among others, the name, the foreign register in which the company is registered and its registration number;
- ▶ the filing of an authentic or certified copy of the deed of incorporation and the articles of association

of the company at the office of the Dutch Trade Register;

- ▶ preparation of the annual accounts and the annual report in accordance with Dutch law and the filing of these documents at the office of the Dutch Trade Register; and
- ▶ compliance with the provisions of the Dutch Civil Code concerning distributions to shareholders, repurchase of shares and reduction of the issued share capital with repayment on shares.

Mergers and acquisitions

In view of all the uncertainties surrounding Brexit, companies from the UK and companies from other European member states, are seeking to guarantee their competitiveness and the continuity of their 'overseas' business operations. European companies could ensure their presence in and the continuity of their activities in the UK, by, for example, conducting strategic acquisitions in, or by entering into alliances and/or partnerships with parties from the UK. The same applies vice versa for companies from the UK. Our experience is that such transactions and collaborations between parties from the UK and parties from mainland Europe are gaining momentum. It is likely that it is going to become gradually more difficult to find suitable takeover candidates or alliance partners. From a strategic and competitiveness perspective it is of great importance that companies with overseas business operations complete already started takeover- and partnership trajectories and ensure that 'overseas' business operations are integrated in the short term.

Our added value

HVG Law has a team of experienced lawyers that can advise on any of the above in the run-up and aftermath of Brexit. Law Alerts on the effects of Brexit in fields other than corporate and commercial law, such as privacy law, healthcare law (manufacturers of medical devices), employment law and financing and financial regulatory law can all be obtained from our lawyers.

What HVG Law can do for you

We deal with all matters that keep an organisation in good shape. From reorganisations to acquisitions, from compliance to litigation. You will be doing business with lawyers and civil-law notaries who work together.

With you and with each other, at the highest level. We advise and litigate.



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About HVG Law

HVG Law LLP (HVG Law) ranks amongst the top Dutch law firms and is characterized by an entrepreneurial, innovative and solution-driven approach. With more than 150 dedicated and pragmatic lawyers, including (candidate) Civil Law Notaries, HVG Law offers high-quality, legal services in a broad and multidisciplinary context. Our lawyers are active in all legal areas and sectors relevant to business, directors, shareholders and government authorities and have knowledge of your business and your market. At our offices in Amsterdam, Rotterdam, Utrecht, The Hague, Eindhoven, New York, Chicago and San Jose (i.e., Donahue & Partners LLP in the USA), we are able to offer our legal services to national and international clients. HVG Law is part of the global EY Law network and we have a strategic alliance in the Netherlands with Ernst & Young Belastingadviseurs LLP.