e-Residency October 16, 2019

INTRODUCTION

Ever since June 23, 2016, when Britons voted on whether to leave the EU or remain a Member State, the world has been anxiously waiting for the culmination of Brexit. As the change in the economic climate of the UK will probably be rapid and, in large part, irreversible, the volatility of upcoming events worries local entrepreneurs most of all. Thus, one of the most widely discussed topics has been the effect Brexit has on international trade and taxation, especially when dealing with the EU.

In short, as a result of Brexit, companies operating in the UK will become third country companies for other EU Member States, with limited opportunities to benefit from the EU legal framework. However, there is a lifeline to consider when combating the uncertainty accompanying Brexit: **the Estonian e-residency program**. The e-Residency program is a unique program designed for foreign entrepreneurs, enabling them to conduct their business digitally and completely location independent. For non-EU companies, the program also offers a gateway to the European single market and means to conduct business within the EU.

For example, in a post-Brexit scenario, if an e-resident from the UK would establish a company in Estonia, access to similar (if not the same) tax treatment and benefits would be made available. This means that thanks to Estonian domestic rules, the Estonia-UK tax treaty and most importantly, the fact that Estonia is a member state of the EU, e-residents from the UK will be able to continue doing business almost as if Brexit never happened. The same applies for UK resident companies wishing to establish a subsidiary in Estonia.

The e-Residency team commissioned law firm PwC Legal to assess the potential legal impacts and challenges that Brexit poses to the UK businesses in order to promote e-Residency program among the affected markets. Our assessment focuses on the legal areas which are potentially more exposed to the impacts of Brexit and more related to the e-Residency target industries.

Before moving on, it is important to keep in mind that we are focusing our analysis on the premise that the UK leaves the EU without a deal (hereinafter referred to as „**no-deal Brexit**"). If no agreement on a deal can be reached by October 31, 2019, and no further extension granted, the default position is that the UK leaves the EU without a deal. In this scenario, there would be no transition period and the numerous no deal statutory instruments will come into force, transferring EU legislation to ensure that the UK has a functioning statute book from November 1, 2019.[1] Over the next weeks, it is vital that all businesses keep an eye on developments and, for now at least, continue to prepare for the 'default' option of a no deal exit on October 31, 2019.

[1] Please see also PwC UK „Brexit Next Steps": https://www.pwc.co.uk/the-eu-referendum/beyond-brexit-insights/brexit-next-steps.html

(I) DIRECT TAXATION

In this section we provide a brief overview of the overall nature and benefits of the Estonian tax system and present an analysis comparing the pre-Brexit and post-Brexit position of e-residents. As you may know, EU is a customs union, and therefore the terms of Brexit are negotiated between the EU and UK, meaning that Estonia (or any other member state for that matter) cannot gain a competitive advantage. The same applies to VAT, which is harmonized within the EU and where the Member States have little discretion. For these reasons we are excluding these areas from the analysis and are focusing on direct taxes.

The nature and benefits of the Estonian corporate tax system

As opposed to classical corporate income tax systems where a company's profits are taxed on an annual basis, the Estonian unique tax system allows for either deferring the corporate income tax (hereinafter „**CIT**") charge indefinitely or freely deciding on the moment when to distribute dividends along with paying the tax due. This means that all retained profits are tax exempt and only distribution of profits triggers payment of tax, providing Estonian companies with an incentive to re-invest their profits.

Generally, dividend payments or deemed profit distributions are subject to 20/80 CIT (20% on the gross amount) on the level of the Estonian company. However, CIT rate on regular profit distributions can be lowered to 14/86. The payment of dividends in the amount which is below or equal to the amount of average taxed dividends paid during three preceding years is taxed with a rate of 14/86 (the tax rate on the gross amount being 14% instead of the regular 20%). If the recipient of the dividends taxed with the lower CIT rate is an individual, an additional 7% withholding tax (hereinafter „**WHT**") would be applied. The lower CIT rate was introduced to encourage companies to distribute their profits regularly.

It is also important to note that Estonia does not levy WHT on dividend or interest payments made to non-resident companies, meaning that WHT would only be levied if the recipient of dividends was an individual and if the profit distribution itself was subject to the lower tax rate at the hands of the paying company.

Royalties (i.e. all types of license fees, payments for trademarks and patents, know-how, etc.) paid to non-residents are generally subject to 10% WHT. However, in accordance with the Estonia-UK double tax avoidance treaty, royalties arising in Estonia and paid to a UK tax resident shall only be taxable in the UK. Thus, Estonia does not levy WHT on royalty payments to UK tax residents. Applying the treaty is not difficult: the UK resident only needs to submit its Certificate of Residence to the Estonian company making the payment and confirm it is the beneficial owner of the royalties.

Comparative analysis (pre-Brexit vs post-Brexit)

The tables below present two scenarios: the Estonian tax implications for UK resident e-residents before and after a no-deal Brexit. Consequently, the first scenario illustrates the period when UK was part of the EU/EEA and the second scenario the period after UK becomes a third country. Also, we have analysed the Estonian company both as a subsidiary/personal company and as a parent company or head office with respect to the UK.

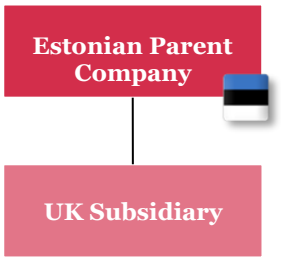
First, when looking at a situation where a UK resident e-resident wants to establish a subsidiary in Estonia, there are no notable changes in respect with direct taxes when comparing the pre-Brexit and post-Brexit scenarios. No WHT would be levied on dividends, interests or royalties paid to the UK resident company irrespective of whether the UK is a part of the EU/EEA or not. The only minor change between the two scenarios is that royalty payments to associated parties are no longer inherently tax exempt. To gain tax exemption, a Certificate of Residence should be submitted by the UK resident company to the Estonian payer.

Table 1: Tax implications of a subsidiary/personal company established in Estonia

	Scenario 1: Pre-Brexit	Scenario 2: Post-Brexit	Comments
WHT on **dividends** paid to non-residents*	0%*	0%*	No changes, no need to apply a tax treaty
WHT on **interest** paid to non-residents	0%	0%	No changes, no need to apply a tax treaty
WHT on **royalties** paid to non-residents	0%	0%	Within the EU, royalty payments are tax exempt if made to an EU tax resident associated party. In a post-Brexit scenario this no longer applies. However, going forward, to reduce the WHT to 0%, a UK resident company should submit its Certificate of Residence to the Estonian payor to apply the tax treaty and arrive at the same result.

*7% WHT applies on payments to individuals (non-EU as well as EU) if paid from an Estonian company making reduced rate dividend payments

It may also be that the e-resident's Estonian company establishes a subsidiary in the UK, making the Estonian company the parent company. This scenario can be illustrated as follows:



It could also be that an e-resident has an Estonian company, but he/she will work and manage the business from its UK office. Since this scenario might result in a permanent establishment (hereinafter "**PE**") in the UK. The situation looks like this:

The definition of a PE in the UK is quite standard: *„a permanent establishment means a fixed place of business through which the business of an enterprise is wholly or partially carried on"*. Liability to pay tax arises when a non-resident company carries out trade through a local PE and a PE is created if a non-resident company:

- has a fixed place of business in the UK through which the business of the company is wholly or partially carried on; or
- an agent acting on behalf of the company has and habitually exercises authority to do business on behalf of the company in the UK.

As UK resident e-residents most likely will manage their Estonian companies from the UK, creation of a PE is highly probable. If taxes are paid either by the UK subsidiary or the UK permanent establishment, then Estonia will not seek to tax the same profits at the hands of the Estonian parent company or the Estonian head office for a second time. Estonian rules provide for eliminating any potential double taxation regardless of where the PE or the subsidiary is located:

Table 2: Tax implications of a parent company established in Estonia

	Scenario 1: Pre-Brexit	**Scenario 2: Post-Brexit**	**Comments**
Dividends distributed by Estonian companies are exempt from CIT if the distributions are paid out of:			
Dividends received from Estonian, EU, European Economic Area (EEA), and Swiss tax resident companies (except tax haven companies) in which the Estonian company has at least a 10% shareholding	*Tax exempt*	*N/A*	*When UK leaves the EU and is no longer part of the EEA, it would henceforth be considered as a third country. Thus, slightly different requirements apply to redistributed dividends received from associated parties or distributed profit attributable to a PE.* *In a pre-Brexit scenario, dividends were considered exempt from CIT if they were received from an UK company in which the Estonian company had at least 10% shareholding or they were paid out of profit attributed to a PE of a resident company. In a post-Brexit scenario, however, additional burden of proof arises, i.e. it needs to be proven that underlying profits of received dividends and profits attributable to a PE have been subject to foreign income tax, i.e. taxed in the UK*
Dividends received from all other foreign companies in which the Estonian company (except tax haven companies) has at least a 10% shareholding, provided that either the underlying profits have been subject to foreign tax or if foreign income tax was withheld from dividends received	*N/A*	*Tax exempt*	
Profits attributable to a PE in the European Union, European Economic Area, or Switzerland	*Tax exempt*	*N/A*	
Profits attributable to a foreign PE in all other countries, provided that such profits have been subject to tax in the country of the PE.	*N/A*	*Tax exempt*	

Again, there is no significant difference between the pre-Brexit and post-Brexit scenarios when comparing avoidance of double taxation. Basically, in a post-Brexit scenario, it needs to be proven that underlying profits of received dividends from a UK subsidiary and profits attributable to a PE have been subject to UK income tax.

Another tax aspect should be taken into consideration: if salaries and other fees are paid by an Estonian company to a non-resident individual, who does not physically work in Estonia, then no Estonian personal income or social tax liability should arise. However, this approach differs for directors' fees which are usually taxed with income tax based on the company's tax residence. All one needs to worry about is being tax compliant in the UK and pay relevant taxes on received salaries.

To sum up, thanks to the Estonian e-residency program, Brexit doesn't necessarily have to be a daunting experience. The uncertainty that accompanies Brexit can be significantly reduced by conducting business as an e-resident through an Estonian company. Especially when considering the fact that, other than an additional burden of proof (which does not significantly increase a company's administrative tasks), there is no relevant drawback regarding tax treatment between the UK and Estonia after Brexit.

Conclusion

In general, it can be concluded that being deprived of the benefits of EU directives regulating direct taxation, the UK companies can fall back on the Estonia-UK double tax avoidance treaty. What is more, the need for treaty application might not even arise where Estonian domestic rules already provide for no withholding taxes or offer relief from double taxation.

Thus, in a post-Brexit scenario, if an e-resident from the UK would establish a company in Estonia, access to similar (if not the same) tax treatment and benefits would be made available. This means that thanks to Estonian domestic rules, the Estonia-UK tax treaty and most importantly, the fact that Estonia is a member state of the EU, e-residents from the UK will be able to continue doing business almost as if Brexit never happened. The same applies for UK resident companies wishing to establish a subsidiary in Estonia.

(II) COMPANY LAW

Increasing bureaucracy and higher administrative expenses

In case of no-deal Brexit, the UK based companies lose their rights and benefits, which arise from EU law. This means that the UK based companies are no longer able to take certain actions or must comply with additional requirements while taking those actions.

A few examples to illustrate possible influence of no-deal Brexit on the UK based companies regarding bureaucracy and higher administrative expenses in different EU-27 Member States are as follows:

1) In some EU-27 Member States the UK based companies and branches may face recognition issues and additional requirements may arise. Estonian law recognises all foreign legal entities and therefore, no recognition issues shall arise (see section "Recognition of companies and branches" below).

2) In addition, the UK companies lose their right to carry out their activities in another EU Member State(s) based on the freedom of establishment. Therefore, additional requirements may arise, if the UK companies want to provide service in EU-27 Member States (see section "Providing business in EU-27" below).

3) In some EU-27 Member States additional requirements may arise due the fact that the UK citizens, who are board members, are considered as third country national. In some EU-27 Member States at least one board member shall be resident of an EEA Member State. Accordingly, if a company is registered in such a EU-27 Member State and has only the UK resident board members, then this company is obliged to appoint an additional board member. This is not the case in Estonia. According to Estonian law, if all board members are non-residents, the company shall appoint a contact person, who has the right to receive official documents on behalf of the company.

4) The UK based bodies will lose access to databases, which are held throughout the EU. For example, the UK will be disconnected from the Business Registers Interconnection System, which connects the business registers of each EU Member State to a European Central Platform. Accordingly, the UK authorities will no longer have access to European Business Registry and the UK companies will not appear in this data base.

5) The UK based companies lose benefits arising from EU law, such as cross border merger, conversion and establishment of SE (see below).

6) Currently, founders based in the UK can open in the name of the company being founded in Estonia a payment account with a credit institution or payment institution, which is in the UK. After no-deal Brexit, the UK based founders lose such right and they shall open an account in EU-27. As the UK incorporated companies are treated as non-residents in EU-27, the process of opening an account may be more time consuming and involve higher administrative expenses.

Recognition of companies and branches

Companies, which are incorporated in the UK, will be third country companies after no-deal Brexit and will not automatically be recognised under Article 54 of the Treaty on the Functioning of the European Union (hereinafter "the **TFEU**"). The UK incorporated companies may be recognised in accordance with each EU Member State's national law or international treaties. Consequently, depending on the applicable national or international law rules, such companies might not have a legal standing in the EU-27 and shareholders might be personally liable for the debts of the company.[2] Subsidiaries of the UK companies in the EU-27 are EU companies and will of course continue to be covered by all relevant EU (and national) legislation. As a rule, Estonian law recognises all foreign legal entities and, therefore, no recognition issues shall arise.

[2] European Commission Notice to stakeholders. Withdrawal of the United Kingdom and EU rules on company law. See: https://ec.europa.eu/info/sites/info/files/file_import/company_law_en_0.pdf.

Branches of the UK based companies, which are located in EU-27, will be branches of third country companies and accordingly the rules relevant to branches of third country companies will apply.[3] Depending on the EU-27 Member State, such branch may have to comply with additional requirements as after Brexit. In some EU-27 Member States, the law states that the only companies incorporated in an EEA Member State can establish branches and act through branches. The Commercial Code applicable in Estonia does not generally distinguish between a company based in the EU or a third country company (except cross-border merger and obligation to appoint contact person). Therefore, in Estonia no additional requirements will arise to the branches of companies, which are incorporated in UK after hard Brexit.

UK based companies may lose the benefits arising from EU law, such possibility of cross-border merger, conversion and establishment of SE

A company governed by the law of one EU Member State can be converted into a company governed by the law of the other EU Member State because of the freedom of establishment of the TFEU, and the judgments of the European Court of Justice. After no-deal Brexit, freedom of establishment as well as EU law and court judgements will no longer apply to UK companies. Therefore, such benefits as conversion of a company from EU-27 Member State to the UK or from the UK to EU-27 Member State will disappear.

Companies of different EU Member States may merge with each other on the basis of EU law and national rules based on these. According to the Estonian law, a limited liability company registered in the Estonian commercial register may merge only with another limited liability company founded on the basis of the law of another state which is a contracting party to the EEA Agreement. After no-deal Brexit, the UK is not a party of the EEA Agreement, accordingly the Estonian law does not allow an Estonian company to merge with an UK company. Therefore, a cross-border merger involving an UK company and an Estonian company will be impossible after a no-deal Brexit, unless new legislation is implemented. As far as we know, there are also other EU Member States, in which cross-border merger is only allowed if the other party of the merger is incorporated in another state which is a contracting party to the EEA Agreement. Considering above, the UK companies will have difficulties with cross-merger and conversion to EU-27 Member States.

According to Regulation No 2157/2001, the European Companies (hereinafter "**SE**") can be created by legal bodies formed in an EU Member State, with their registered and head offices within the EU. Accordingly, after no-deal Brexit, the UK companies will not be able to participate in the formation of an SE. SE has to have its registered office in the EU, in the same EU Member State as their head office. Therefore, after no-deal Brexit, SEs that have their registered office in the UK no longer enjoy the status of an SE. The recognition of such companies by an EU-27 Member State would only be possible on the same basis as other UK companies (see above). SEs that have their registered office in the EU-27 at the time of withdrawal will preserve their legal status, even if they were formed, before the withdrawal date, by an UK company. The same applies with regard to subsidiary SEs.

Investors and co-operation partners may prefer to do business with companies based in EU-27

Directive 2017/1132 applies to limited liability companies incorporated in EU. This directive stipulates ground rules for corporate life and various corporate transactions, including formation of companies, minimum share capital requirements (including rules on the distribution of funds and amending share capital amount), compulsory disclosure of certain company information in the business registers, mergers and divisions. After no-deal Brexit, these rules no longer apply to the UK and companies incorporated in the UK.[4] Consequently, stakeholders, including employees, creditors and investors dealing with the UK companies cannot rely on the rules arising from EU law. As a consequence, the investors and possible co-operation partners have less

[3] European Commission Notice to stakeholders. Withdrawal of the United Kingdom and EU rules on company law. See: https://ec.europa.eu/info/sites/info/files/file_import/company_law_en_0.pdf.
[4] European Commission Notice to stakeholders. Withdrawal of the United Kingdom and EU rules on company law. See: https://ec.europa.eu/info/sites/info/files/file_import/company_law_en_0.pdf.

knowledge of the law and obligation applicable to the UK incorporated company and therefore less certainty that their rights are adequately protected, e.g. in case on winding up or demerger, etc.

In addition, judicial decisions issued by the UK may not be enforceable in EU-27 and vice versa.[5]

Considering above, after no-deal Brexit, the investors may prefer to invest into companies registered in the EU-27 as the investors have more knowledge about the law and obligations, which apply to the company in EU-27 and feel that their rights are better protected in EU-27. For the same reasons, the EU-27 based companies may prefer to cooperate with another EU-27 based companies.

Providing business in EU-27

Legal entities established within the EU may, on the basis of the freedom of establishment, the regulations and judgments of the European Court of Justice, carry out their activities in another EU Member State without establishing a company or branch in that EU Member State. In the event of a no-deal Brexit, the UK companies can no longer rely on the freedom of establishment and will have to comply with the additional requirements imposed by the local legislature on foreign companies in different EU Member States. These additional requirements depend on the local law of the chosen EU Member State and may include, *inter alia*, obligation to provide certain information to the trade register, establish a company or branch in this EU Member State, etc.

According to the Estonian law, a company incorporated in a third country can provide services as a non-resident, unless there are additional requirements arising from the activity, such as the granting of credit. Therefore, the UK company does not have to establish a company nor branch in Estonia in order to provide services. Depending on the nature of the services, length of service, etc., the company may need to register itself for VAT and/or income tax purposes with the Estonian Tax and Customs Board. If a UK company wants to provide goods and services in Estonia on a permanent basis, the UK company may be obliged to register a permanent establishment for tax purposes.

Conclusion

In case of no-deal Brexit, the UK companies will be considered as third country companies and therefore they will lose their rights arising from the EU law, e.g., the UK companies will lose their right to cross-border merger. Depending on the national laws of different EU-27 Member States, the UK companies and their branches may have to comply with additional requirements arising from the national laws. In general, in case of no-deal Brexit, for the UK companies there will not be substantial changes for doing business in Estonia.

[5] European Commission Notice to stakeholders. Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law. See: https://ec.europa.eu/info/sites/info/files/file_import/civil_justice_en.pdf.

(III) DATA PROTECTION

Overview

In the event of a no-deal Brexit, the UK will become a third country (country with an inadequate level of data protection) as of the moment Brexit comes into effect. This means that the transfer of personal data to the UK, requires the introduction of additional safeguards.[6]

If a UK based company processes data about individuals in the context of selling goods or services to citizens in other EU countries then it will need to comply with the General Data Protection Regulation (hereinafter "**GDPR**") irrespective as to whether or not the UK retains the GDPR post-Brexit. The UK Government has indicated it is committed to maintaining the high standards of the GDPR and the government plans to incorporate it into UK law after Brexit.[7] The expectation is that any such legislation will largely follow the GDPR, given the support previously provided to the GDPR by the ICO and UK Government as an effective privacy standard, together with the fact that the GDPR provides a clear baseline against which UK business can seek continued access to the EU digital market.

UK Businesses with an Estonian presence or Estonian clients

If a company incorporated in the UK operates in Estonia (part of the EEA) through a local branch or if a UK based business has clients in Estonia, it will need to comply with both UK and EU data protection regulations after Brexit. If businesses have offices, branches or other establishments in Estonia, their European activities will be covered by EU law, even after Brexit.

If a UK business is only based in the UK but they offer goods or services to individuals in Estonia, or monitor the behaviour of individuals in Estonia, the UK business will still need to comply with the EU data protection regime in relation to these activities. In most cases they will also need to appoint a suitable representative in within the EEA. This representative will need to be set up in an EU or EEA state where some of the individuals whose personal data they are processing in this way are located. This person will act as the local representative with individuals and data protection authorities. The UK based company will need to find a provider in the EEA who offers services as a GDPR representative. This situation may be especially beneficial to the e-residency programme through which UK based companies can easily establish branches here in Estonia.

In the absence of an adequacy decision[8] at the time of the Brexit, the following are the available data transfer instruments: standard or ad hoc data protection clauses, binding corporate rules, codes of conduct and certification mechanisms or derogations.

The most relevant of the aforementioned instruments in case of the UK based businesses with an Estonian presence are binding corporate rules (hereinafter "**BCRs**"). BCRs are personal data protection policies adhered to by group of undertakings (i.e. multinationals) in order to provide appropriate safeguards for transfers of personal data within the group, including outside of the EEA. Organisations may still rely on these BCRs authorised under the former Directive 95/46/EC which remain valid under the GDPR. These BCRs need however to be updated to be fully in line with the GDPR provisions. If a UK business does not have BCRs in place, they must be approved by the competent national supervisory authority, following an opinion of the European Data Protection Board (hereinafter "**EDPB**"). Ordinarily (but not always) this national supervisory authority would be the place of its central administration, i.e., in case of UK based businesses it would be the UK's Information Commissioner's Office (hereinafter "**ICO**"). When the UK exits the EU, the ICO will no longer be a supervisory authority for GDPR purposes. The ICO will also lose its power to be the lead supervisory

[6] European Data Protection Board. "Information note on data transfers under the GDPR in the event of a no-deal Brexit". 12.02.2019. See: https://edpb.europa.eu/sites/edpb/files/files/file1/edpb-2019-02-12-infonote-nodeal-brexit_en_0.pdf
[7] Information Commissioner's Office. "Data protection and no-deal Brexit for small businesses and organisations". See: https://ico.org.uk/for-organisations/data-protection-and-brexit/data-protection-and-brexit-for-small-organisations/
[8] An adequacy decision is a decision adopted by the European Commission on the basis of article 45 GDPR. At the moment, there is no such an adequacy decision in place for the UK. See: https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en

authority for approving BCRs. Businesses which currently have their main establishment in the UK carrying out data processing across the EU (i.e. in Estonia), should be thinking about where their lead supervisory authority will be once the ICO is no longer a supervisory authority for GDPR purposes and indeed, whether they will be able to nominate one. These businesses should carry out an evaluation of their activities in other Member States and establish where their main establishment will be once the UK is not in the EU. This will most likely be the place of central administration in the EU, but that principle is overruled where the decisions about the processing of personal data are taken in another EU establishment. The main establishment for GDPR purposes will always be the one which has decision making powers in relation to the data processing operations. If there is no such establishment (for example where these decisions are taken outside the EU), there will be no main establishment. Businesses without a main establishment in the EU will be required to appoint a representative in the EU and will be regulated by the local supervisory authorities in each jurisdiction in which they are active through their representative. Hence, if a UK based company only operates in Estonia but has its central decision-making body in the UK, it will need to decide if they want to move their main establishment to Estonia so that the Estonian Data Protection Inspectorate will become the lead supervisory authority who can approve BCR's. If the company is based in Estonia and has its central decision-making body here, then the Estonian Data Protection Inspectorate already is the lead supervisory authority.

A company based in Estonia and its UK counterpart may agree on the use of Standard Contractual Clauses approved by the European Commission.[9] These contracts offer the additional adequate safeguards with respect to data protection that are needed in case of a transfer of personal data to any third country. It is important to note that the Standard Contractual Clauses may not be modified and must be signed as provided by the European Commission. However, these contracts may be included in a wider contract and additional clauses might be added provided that they do not contradict, directly or indirectly, the Standard Contractual Clauses adopted by the European Commission. Any further modifications to the Standard Data Protection Clauses will imply that this will be considered as ad-hoc contractual clauses. Prior to any transfer, these tailored contractual clauses must be authorised by the competent national supervisory authority, following an opinion of the EDPB. If the company is based in Estonia and has its central decision-making body here, then the Estonian Data Protection Inspectorate is the national supervisory authority who can approve the contractual clauses.

Derogations

It is important to underline that the derogations allow the data transfers under certain conditions and are exceptions to the rule of having to put in place appropriate safeguards (see the above-mentioned instruments like BCRs, Standard Contractual Clauses) or transfer the data on the basis of an adequacy decision. They must therefore be interpreted restrictively and mainly relate to processing activities that are occasional and non-repetitive.

These derogations include amongst others according to Article 49 of GDPR:

- where an individual has explicitly consented to the proposed transfer after having been provided with all necessary information about the risks associated with the transfer;
- where the transfer is necessary for the performance or the conclusion of a contract between the individual and the controller or the contract is concluded in the interest of the individual;
- if the data transfer is necessary for important reasons of public interest;
- if the data transfer is necessary for the purposes of compelling legitimate interests of the organisation.

[9] Three sets of Standard Data Protection Clauses are currently available. See: https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en

(IV) EMPLYOMENT AND IMMIGRATION

The UK citizens already residing in Estonia

In the event of a no-deal Brexit, the UK citizens lose their right to free movement under Article 21 of the TFEU and Directive 2004/38. They will be considered as third country nationals since no-deal Brexit. Therefore, the UK citizens may face different difficulties depending on the national law of EU Member States in travelling and working abroad, such as immigration checks, acquisition (under national law) of residence and work permits, calculation of residence periods for the acquisition of long-term residence status and applying for permits and visas.

In case of no-deal Brexit, the Estonian Aliens Act will immediately apply to UK citizens and their family members living in Estonia. The UK citizens who are already residing in Estonia will be able to continue to reside here on the basis of the principle of legitimate expectations, therefore they will be legal residents of Estonia for some time even in case of no-deal Brexit.

The UK citizens who have lived in Estonia for at least five years and have received the right of permanent residence on the basis of the Citizen of the European Union Act have the right to acquire a long-term residence permit of Estonia after no-deal Brexit. The UK citizens who have lived in Estonia less than five years can acquire a temporary residence permit for a period of five years after no-deal Brexit. Family members of the UK citizens who are third-country nationals will be able to stay in Estonia on the basis of their current residence permit.

The UK citizens who will arrive to Estonia after no-deal Brexit

All citizens of the UK who arrive in Estonia after no-deal Brexit have to apply for a visa or residence permit under the terms and conditions provided for in the Aliens Act, i.e. on similar conditions that currently apply to third-country nationals. To citizens of the UK the immigration quota (for residence permits) of Estonia does not extend.

If the UK citizens want to come to Estonia after no-deal Brexit, following steps have to be taken depending on the nature and length of staying in Estonia:

1) The employer in Estonia has to register the short-term employment of the employee, which usually takes 15 working days. After that the employee shall apply for a visa, which is granted up to a year.

2) The employer has to invite the employee and send an official invitation to the Police and Border Guard Board. The employee shall apply for a residence permit, which is usually granted for two years. Depending on the nature of work and education of the employee, the employer may be obliged to apply for a consent of the Estonian Unemployment Insurance Fund beforehand. In addition, the employer is obligated to pay to the employee a salary which is at least equal to the product of the recent average yearly wages in Estonia published by the Statistical Office of Estonia. The residence permit can be lengthened, but if the employee would like to stay in Estonia for more than five years, the employee may be obliged to prove that he/she knows Estonian language at least in level A2.

In summary, the conditions for a UK citizen to work in Estonia before and after Brexit are as follows:

	Before Brexit	***After Brexit (visa)***	***After Brexit (residence permit)***
Ground for staying in Estonia	UK citizens may work three months without registering a temporary right of residence. UK citizen obtains right of temporary residence upon registration of his/her place of residence in the population register of Estonia.	Applying for D-visa is suitable if the person wishes to stay in Estonia for a year.	If the person wants to stay in Estonia for more than a year, he/she shall apply for a residence permit.
Obligation to register short-term employment	N/A	+	N/A
Obligation to submit employer's invitation	N/A	N/A	+
Obligation to apply for a residence permit	N/A	+	N/A
Obligation to register staying in Estonia	+	N/A	N/A

Upon the change of status from an EU citizen to a third-country national, the UK citizens shall also keep in mind that they are allowed to stay in the Schengen Member States on the basis of Estonian visa or residence permit up to three months in six months period from the date of leaving Estonia and entering into another Schengen Member State.

In addition, the companies, who would like to employ the UK citizens to EU-27, and UK companies, who would like to employ EU-27 citizens, shall keep in mind that Directive 96/71/EC will no longer apply to EU-27 undertakings posting employees to the UK and the UK undertakings posting employees to EU-27.[10] Therefore, employing employees from EU-27 Member State to the UK or from the UK to EU-27 Member State will be more difficult.

[10] European Commission Notice to stakeholders. Withdrawal of the United Kingdom and EU rules on the provision of services and posting of workers (as of 28.06.2019) - https://ec.europa.eu/info/sites/info/files/file_import/provision-services-posting-workers_en.pdf.

(V) INTELLECTUAL PROPERTY

The first thing to understand is that only certain intellectual property (hereinafter „**IP**“) rights will be affected by Brexit. EU trademarks and Community (EU) designs (both registered and unregistered) are likely to be affected significantly, but European patents will be largely unaffected.

Trade marks

As from withdrawal day, EU trade marks (hereinafter “**EUTM**”) will, in principle[11], no longer be protected in the UK as a matter of EU law (Art 1(2) of EU Trade Mark Regulation). The UK’s withdrawal from the EU will thus limit the EUTM’s territorial scope of protection to the territory of the remaining 27 EU Member States.[12] Registered community designs (**RCDs**), unregistered community designs (**UCDs**), and protected international trade mark and design registrations designating the EU will no longer be valid in the UK. On exit day, these rights will be immediately and automatically replaced by UK rights. If someone owns an existing right, they do not need to do anything at this stage.[13]

While the UK remains a full member of the EU then EUTMs continue to be valid in the UK. When the UK leaves the EU, in any scenario, an EUTM will continue to be valid in the remaining EU Member States and the UK businesses will still be able to register an EUTM, which will cover all remaining EU Member States. In the event of a no-deal Brexit, all existing EUTMs will cease to provide protection in the UK. To ensure that UK protection is preserved, the UK government will provide holders of existing EUTMs with a comparable UK trade mark on exit day.[14] The UK businesses will still be able to obtain trade mark protection in the remaining 27 Member States of the EU through an application to the European Union Intellectual Property Office, and businesses from the EU and worldwide will still be able to apply for a UK domestic trade mark through the UK Intellectual Property Office. If a company holds a pending EUTM application on exit day, they will be able to apply to register a UK trade mark in the nine months after exit day and retain the earlier filing date of the pending EUTM.

Copyrights

Copyright is a national right that each country provides separately – there is no single worldwide or EU-wide copyright title. However, copyright is largely harmonized internationally by a number of treaties and, in the EU, by a body of EU copyright legislation that builds on the international treaties. Under the rules of these treaties, countries provide copyright protection for works originating in or made by nationals of other countries. On exit, the UK will be treated by the EU and EEA as a third country and the reciprocal element of these mechanisms will cease to apply to the UK.

Although the UK is leaving the EU, UK and EU copyright works (e.g. books, films and music) will continue to be protected in the EU and UK respectively because of the international treaties on copyright (e.g. the Berne

[11] Continuity of protection in the UK of EU trade marks registered (or applied for) before the withdrawal day depends therefore exclusively upon the conditions established by the law of the UK.
[12] European Union Intellectual Property Office. „Brexit General Impact on IP Rights“. See: https://euipo.europa.eu/ohimportal/en/law/brexit-q-and-a/general-impact-on-ip-rights
[13] United Kingdom Intellectual Property Office. „ Changes to registered design, design right and international design and trade mark law if the UK leaves the EU without a deal“. See: https://www.gov.uk/government/publications/changes-to-design-and-trade-mark-law-if-the-uk-leaves-the-eu-without-a-deal/changes-to-registered-design-design-right-and-international-design-and-trade-mark-law-if-the-uk-leaves-the-eu-without-a-deal
[14] United Kingdom Intellectual Property Office. „Changes to trade mark law in the event of Brexit without a withdrawal agreement“. See: https://www.gov.uk/government/publications/changes-to-trade-mark-law-if-the-uk-leaves-the-eu-without-a-deal/changes-to-trade-mark-law-in-the-event-of-no-deal-from-the-european-union

Convention and the TRIPS Agreement), which require all treaty countries to protect works originating in any other treaty country to a minimum standard.[15]

Patents

The UK's exit from the EU will not affect the current European patent system, which is governed by the (non-EU) European Patent Convention. Any existing rights and licenses in force in the UK will remain in force automatically after the UK leaves the EU and no action is required from the right or licence holder. For the UK, EU and third country businesses there will be no significant change to the legal requirements or the application processes. Pending applications will continue to be assessed on the same basis, and new applications can continue to be filed.[16]

[15] United Kingdom Intellectual Property Office. „Changes to copyright law in the event of no Brexit deal". See: https://www.gov.uk/government/publications/changes-to-copyright-law-in-the-event-of-no-deal/changes-to-copyright-law-in-the-event-of-no-deal

[16] UK Department for Business, Energy & Industrial Strategy. „Patents if there's no Brexit deal". See:https://www.gov.uk/government/publications/patents-if-theres-no-brexit-deal/patents-if-theres-no-brexit-deal#patents-and-supplementary-protection-certificates

(VI) TRADE AND CONTRACTS

Certificates, licences and authorisations

As a rule, if a company holds a licence, certificate or authorisation for economic activity in a specific regulated area in one of the EU Member States, which validity has not been confined to a specific territory or place of business, then such undertaking does not need a separate licence, certificate or authorization for the same activities in other EU Member States. If a person's activity relies on certificates, licences or authorisations issued by the UK authorities or by bodies based in the UK – or held by someone established in the UK – these may no longer be valid in the EU post-Brexit. The person may need to transfer or seek new ones issued by an EU-27 based body or authority. This is the case, in particular, for certificates, licences and authorisations issued for goods (for example in the automotive sector, or the medical devices sector) and for services (for instance in the transport or broadcasting sector).[17]

A few examples to illustrate the influence of no-deal Brexit on specific regulated areas of business are as follows:

1) **Electronic communications:** Providers established in at least one EU Member State enjoy the right to provide electronic communications networks and services in all other Member States without being required to have an establishment there. They can start providing networks and services without any formal licensing process and are subject only to a "general authorisation" in each Member State where they provide networks or services. As of the withdrawal date, providers of electronic communications networks and/or services established in the UK will cease to benefit from the general authorisation regime within the EU-27 Member States.[18]
2) **Audiovisual media services:** EU Member States shall ensure freedom of reception and shall not restrict retransmission on their territory of audiovisual media services from other Member States. As of the withdrawal date, audiovisual media services of UK media service providers received or retransmitted in the EU will no longer benefit from the freedom of reception and retransmission.[19]

The holders of certificates, licences and authorisations issued by Estonian authorities as well as service providers established in Estonia enjoy the rights established by EU laws. Therefore, for those companies active in regulated fields of business, it may be purposeful to establish their business and/or apply for an activity licence in Estonia.

As a rule, commencement of business in an area of activity subject to special requirements in Estonia can be characterised as a digitalised, transparent and relatively uncomplicated process.[20] It is possible to submit all notices and applications for licenses to an economic administrative authority by the principle of a point of single contact through the Estonian information portal or notaries. An application for an activity license as a rule will be processed in 30 days by the relevant authority.

Contracts

No-deal Brexit causes a certain degree of uncertainty in contractual relationships particularly where one party is a UK resident or when performance of the contractual obligations is related to the UK in other ways.

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[17] See: https://ec.europa.eu/info/sites/info/files/factsheet-preparing-withdrawal-brexit-preparedness-web_en.pdf
[18] European Commission Notice to stakeholders. Withdrawal of the United Kingdom and EU rules in the field of electronic communications, available at https://ec.europa.eu/info/sites/info/files/file_import/electronic_communications_en.pdf
[19] European Commission Notice to stakeholders. Withdrawal of the United Kingdom and EU rules in the field of audiovisual media services, available at https://ec.europa.eu/info/sites/info/files/file_import/audiovisual_media_services_en.pdf
[20] More detailed information available at: https://www.eesti.ee/en/licences-and-notices-of-economic-activity/business-activity-subject-to-special-requirements/commencement-of-business-in-an-area-of-activity-subject-to-special-requirements/

All contracts have the potential to contain clauses – relating to people, delivery of goods and services, business infrastructure, pricing, supply chain and data – that rely on the established legal framework provided by the EU. Major contracts (including those for outsourcing, supply of goods and services, support and maintenance contracts, and other long-term investments or financing arrangements) are unlikely to include commercial levers and mechanisms that will deal effectively with the specific issues that arise out of any future relationship between the UK and the EU. Contracts may include references to a particular currency or detailed pricing mechanisms. The impact of Brexit on external factors such as currency could result in significant increases in cost and render contracts uneconomical.

It cannot be excluded that a contract can be terminated as a result of Brexit as the contracting parties may wish to reconsider their current contractual arrangements under the changed commercial circumstances and look for ways to exit those contracts which are no longer required or profitable. The possibility to terminate a contractual relationship due to no-deal Brexit depends on the terms of the relevant contract and applicable mandatory laws (including, e.g. applicability of the doctrine of frustration or its alternatives), however, the possibility is there and should not be overlooked.

Such uncertainty is much less present in contractual relationships where the parties are entities registered in an EU-27 state, including Estonia.

Conclusion

To start with, you should understand the as-is situation and identify how much your activity relies on certificates, licences or authorisations issued by the UK authorities or by bodies based in the UK. These licences and authorisations may no longer be valid in the EU post-Brexit. You may need to transfer or seek new ones issued by an EU-27 based (e.g. Estonian) body or authority. You should take all the necessary steps to transfer certificates, licences or authorisations issued in the UK to the EU-27, or obtain new ones. Obtaining an activity licence in Estonia is a digitalised, transparent and relatively quick process.

With regard to contractual relationships, the first recommendation is to analyse your existing contracts and identify those with key suppliers and customers that Brexit may affect. Analysing your existing contracts will highlight both challenges and opportunities, some of which may be a matter of a simple or more complex re-contracting process, but others represent an opportunity for both sides to revisit the fundamental terms and conditions of the relationship. Some of these business relationships may become uneconomical, or have new factors to consider. It is important to engage with your key third parties and discuss proactively how to reshape your relationships.

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