GSK Update

24 January 2019

Brexit: Qué será, será.

„Qué será, será. Whatever will be, will be. The future's not ours to see. Qué será, será." Less than ten weeks before the Brexit date on 29 March 2019 scarcely anything summarises the current situation better than the lyrics of Doris Day's beautiful song. What has happened? Or even more importantly, what hasn't?.

Executive Summary

> After the British Parliament's House of Commons overwhelmingly rejected the draft Withdrawal Agreement regarding the forthcoming Brexit and after Prime Minister May survived the following vote of no-confidence, the most likely Brexit scenario is now a hard Brexit

> Prime Minister May's "Plan B" presented on 21 January 2019 is a disguised Plan A. In other words, she remains in line with her original Brexit plan (Chequers), with only minor deviations

> A hard Brexit on 29 March 2019 would have a significant impact on the legal systems of the European Union, its member states (including Germany) and the United Kingdom

> On the UK side, there are general contractual issues, transfer of contract matters, jurisdiction and evidence issues in litigation, and of course the financial markets and their regulation in a "no deal" world

> On the EU side, there is a plethora of financial regulatory and other issues to be dealt with, including banking restructuring and resolution matters, capital markets rules, EUR clearing, funds regulatory issues, outsourcing questions and much more

> The German legislator plans a Brexit Transition Act on naturalisation issues, an amendment to the Law Regulating the Transformation of Companies to deal with cross-border corporate law problems, a Brexit Tax Accompanying Act with provisions on tax law, building societies law and covered bonds law as well as a further statute or statutes to deal with all German law references to "EU member states" (after Brexit not including the UK anymore)

> In summary: The only thing certain now is that there remains uncertainty at least until 29 March 2019, possibly beyond

INTRODUCTION

On 15 January 2019, the British Parliament's House of Commons ("**HoC**") rejected the draft Withdrawal Agreement that had been negotiated between HM Government and the European Union ("**EU**") over the last 1 ½ years, and which in its ultimate form more or less reflected the Government's so-called "**Chequers plan**". More than that, the Government's 202:432 defeat in the HoC was a humiliating one, as no United Kingdom ("**UK**") Government has been defeated in Parliament so significantly since Ramsay Macdonald's first Labour (minority) government in 1924. Immediately after this defeat, Jeremy Corbyn (Labour Party) as leader of the opposition called for a vote of no-confidence. However, Prime Minister ("**PM**") Theresa May has survived this with a 19 votes majority on 16 January 2019. Earlier this week, on 21 January 2019 and as a result of a previous HoC decision, PM May has announced her plans on what to do now and how to do it. On 29 January 2019, the HoC shall have a vote on these plans.

DRAFT WITHDRAWAL AGREEMENT

Despite intensive and partly fierce negotiations, the Government was not able to present another result than the "draft Agreement on the Withdrawal of the United Kingdom from the European Union" ("**draft**

Withdrawal Agreement")[1] published on 14 November 2018.

Large parts of the draft Withdrawal Agreement (for example, a transition period until the end of 2020 (which could be extended once by mutual consent), the amount of money to be paid by the UK to honour its commitments under the EU treaties ("**Exit Bill**") and the citizens on both sides' freedom to move (and stay), etc.) had already been pre-agreed in 2017. Another and perhaps most important part was always clear not to be part of the draft Withdrawal Agreement, the future relationship between UK and EU. This is the subject of a "political declaration"[2] between the two sides adjuncted to the draft Withdrawal Agreement, and subject to a future free trade agreement ("**FTA**") to be negotiated during the above-mentioned transition period.

The last open question was the Irish border issue. In this context, both sides have the same target, namely to avoid a hard border (i.e., the otherwise mandatory EU external border) between the Republic of Ireland and the UK's province Northern Ireland. But they still do not know how to achieve this. The respective compromise in the draft Withdrawal Agreement is a so-called "**backstop**" provision under which, in case a FTA cannot be achieved during the transition period, the UK shall remain in the EU's Customs Union (*Zollunion*), and neither party shall be able to unilaterally withdraw from this Customs Union.

During the last four weeks, this Irish backstop issue has become the symbol of the fight between moderate Brexit supporters including the Government, hard (even a "no deal") Brexit supporters ("**Brexiteers**") and EU supporters ("**Remainers**") within the two major parties in the UK, Conservatives ("**Tories**") in particular but also Labour. Currently, neither of these groups have a majority in the HoC, but hard Brexiteers and Remainers were and are vividly opposed to the Government's Chequers plan and thus the draft Withdrawal Agreement.

[1] Draft Agreement on the Withdrawal of the United Kingdom from the European Union, available at: https://www.consilium.europa.eu/media/37095/draft_withdrawal_agreement_incl_art132.pdf.

[2] Political declaration setting out the framework for the future relationship between the EU and the UK, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom__.pdf.

Therefore, it's rejection in the HoC came neither for anybody in the world nor for Theresa May herself as a surprise. She had already lost a part of her cabinet over this issue when the Chequers plan had been set up by the Government and another part when the draft Withdrawal Agreement was published, and she had postponed the HoC's vote from December 2018 to January 2019 because she felt that the draft might be rejected by Parliament.

As a result, both the rejection of the draft Withdrawal Agreement as well as PM May surviving the opposition's no-confidence vote in a slightly perverted way match together. No wonder that immediately after her colossal defeat over the draft Withdrawal Agreement Theresa May (who neither wants to call for a second referendum, as the Remainers still hope/dream of, nor ask for an extension of the 2 ys period under article 50 of the EU Treaty) showed the typically English "stiff upper lip" and announced that she will now check what Parliament wants and go back to Brussels in order to explore what of this is possible - which is, in all likelihood, what she has already done during the last four months, and which, again in all likelihood, will not lead to much, if to anything at all. Is there really a Plan B she can now follow with at least some remote chance of success?

PLAN B

On 21 January 2018, as she had been obliged to by the HoC, Theresa May announced her Plan B which, as it turned out, has in terms of continuity and sustainability the immense charm not really to deviate much from Plan A (which had led to her colossal defeat in Parliament).

In a short speech in the HoC, she has made clear that she is against both, a new referendum and an extension of the article 50 of the EU Treaty timeframe. Instead, she announced three steps she now intends to take:

(i) A more "*consultative approach*" to the next round of negotiations for which she intends to involve Members of Parliament ("**MPs**"), business groups and unions stronger than before.

(ii) Stronger reassurances on workers' rights and environmental standards (probably an attempt to win over some Labour MPs).

(iii) Another try on the Irish backstop which she should then negotiate in Brussels. Neither did

PM May clarify how this new attempt could look like nor how she thinks she could overcome the fact that the EU has already announced its unwillingness to re-negotiate this (or any other) issue.

It is of course not surprising that Jeremy Corbyn as leader of the opposition immediately called this Plan B a "*PR sham*". But - for once - he was right.

Therefore, as it seems, an uncontrolled (if not uncontrollable) hard Brexit on 29 March 2019 is now the by far most likely Brexit scenario. And even devoted Brexiteers like UK trade secretary Liam Fox admitted that this would in economic terms massively damage the UK (but it will economically also damage the EU). However, the damages will not only be economical ones. Whatever happens now (Withdrawal Agreement with transition period/soft Brexit or uncontrolled/hard Brexit either on 29 March 2019 or later or even a new referendum and/or ultimately the UK remaining in the EU), it will leave the UK deeply split. And the devastating economic future, on the one hand, and the demoscopic development (with ever less (dying out) old people/Brexiteers and ever more young people/Remainer being frustrated), on the other hand, will make this split even harsher. Furthermore, inevitably Scotland and Northern Ireland will more and more think about and work towards a dissolution of the UK Union (which would even more economically marginalise and politically demoralise England and Wales). Historically, the Brexit will not be the end but only the end of the beginning of the UK's crisis and decline. However, no other scenario will be as devastating as an uncontrolled/hard Brexit scenario.

HARD BREXIT

In the light of the fact that precisely this uncontrolled/hard Brexit has become the most likely scenario, it is worth to have a closer look at particularly the legal implications of it (but please note that the following can only be some - more or less arbitrary - examples and by no means a comprehensive analysis) from all perspectives, UK, EU and Germany:

1. United Kingdom

No other European country is in greater need of properly preparing for the possible/likely hard Brexit than the UK and no other country has started to prepare so late and even that only half-heartedly.
On the one hand, the British Government's policy to make people (and companies) believe in its ability to come to a meaningful soft Brexit solution was surprisingly successful and even today there are

still companies around that wait with their necessary Brexit preparations because they hope for or rely on the Withdrawal Agreement's transition period, or a miracle.

On the other hand, on 23 August 2018, HM Government has actually published 25 technical notices informing people, businesses and stakeholders about the steps needed to be taken in case of a "no deal" (i.e., hard) Brexit scenario.[3]

1.1 Financial sector

No other industry in the UK is more important for its economic wellbeing and future prosperity than the financial sector, the "City of London". Nevertheless, when Theresa May and her Government developed the Chequers plan they did not focus on safeguarding the interests of financial services providers. On the contrary, they did focus on the movement of goods (although this is not that crucial for the UK economy), but financial services are by and large invisible and there cannot and will not be any traffic jams of financial services at the borders (whereas long jams of lorries with goods on both sides of the Channel could lead to panic buying and public unrest, endangering the then acting government). As a result of this policy and with or

[3] HM Government, 25 technical notices of 23 August 2018, available at: https://www.gov.uk/government/collections/how-to-prepare-if-the-uk-leaves-the-eu-with-no-deal.

without the draft Withdrawal Agreement, banks, insurance companies, investment funds and other financial services providers in the UK generally will not be or become subject to a special Brexit regime in the EU and the rest of the European Economic Area ("**EEA**") when as a result of the Brexit their EU passports will vanish. Instead, they will have to obtain respective licences in the EU/EEA countries (in case of cross-border business or the setting up of branches as well as in regard of certain product distributions). However, some (and important) EU legislation has special "third country regimes" under which UK firms could do business in EU or other EEA countries, but the application of these "third country regimes" (*Drittstaatenregime*) requires preparations and their scope is more limited than that of the EU passports.

In regard of the activities of EU/EEA banks, insurance companies, investment funds and other financial services providers, ie of those 8,500 who currently use EU passports for cross-border business into or branches in the UK, the UK has established a "Temporary Permissions Regime" ("**TPR**") under which they can continue with their (previously passported) business into or in the UK until they have obtained a proper national UK licence for it.[4]

1.2 Transfer of contracts

If, eg for regulatory reasons, it is or will become necessary to shift business from London to an EU/EEA location, this is likely to not only relate to new contracts (then to be concluded by the licensed EU/EEA entity) but also bring the need for a transfer of already existing contracts.

Regarding contracts under German law this can be done by means of a contract transfer agreement (*Vertragsübernahmevertrag*), including assignment/cession (*Abtretung/Zession*) of rights/receivables and assumption (*Übernahme*) of liabilities, corporate acquisition (*Unternehmenskauf*) or another form of universal succession (*Gesamtrechtsnachfolge*).

In regard of contracts under English law, "novation" changing the parties to an agreement is the proper English law method to achieve this. A novation requires (i) an agreement, (ii) the consent of all parties involved, and (iii) involves not insignificant costs (eg, USD 1,000 per trade). Some parties have used alternative transfer mechanisms, namely the Part VII Financial Services and Markets Act of 2000 mechanism, "schemes of arrangement" under either the UK Companies Act 2000 or the EU cross-border merger regime implemented by the UK 2007 Companies Regulation, the establishment of a European Company *Societas Europaea* ("**SE**"), or a synthetic transfer (eg, by a "pass through arrangement").

1.3 Contractual issues

Generally, irrespective of the type and time of Brexit, contracts remain valid and enforceable and have to be performed (incl payments to be made, settlements, collateral, contractual choices, etc). However, Brexit-driven so-called "life cycle events" (eg, novations, certain portfolio compressions, postponements, amendments, etc) could in certain cases jeopardise this finding and/or trigger new licence requirements and then lead to contractual "illegality" events terminating contracts. In the context of derivatives agreements, this subject of enforceability/terminability in the derivatives sector has led to a joint working group of European Central Bank ("**ECB**") including its Single Supervisory Mechanisms ("**SSM**"), the Bank of England ("**BoE**") and the UK's Prudential Regulatory Authority ("**PRA**"). Other crucial matters in the context of contracts and Brexit are the choice of applicable law clauses, jurisdiction clauses, recognition and enforcement of judgements, the service of documents and taking of evidence, particularly in a "no deal" scenario.

When it comes to contractual choices of English law as the applicable law, there will be no change of the legal position in the EU/EEA, as the relevant EU Rome1 Regulation[5] (and in non-contractual matters the Rome2 Regulation[6]) remain in place in the EU/EEA and set(s) forth the general acceptance of contractual choices of law. In reverse, when it comes to applicable law issues (ie, choices of the laws of an EU/EEA country) in the UK, it looks as if

[4] UK Temporary Permissions Regime, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720298/HM_Treasury_s_approach_to_financial_services_legislation_under_the_European_Union__Withdrawal__Act.pdf.

[5] Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), available at: https://eur-lex.europa.eu/-LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF.

[6] Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), available at: https://eur-lex.europa.eu/-LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF.

that would work as before as well. That would at least be the result under a draft "Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendments, etc) (EU Exit) Regulations 2018"[7].

Similarly, in a "no deal" scenario EU/EEA courts will apply the relevant national rules to contractual jurisdiction clauses (in favour of the English courts in London, etc), and English courts will apply English "common law" rules to contractual jurisdiction clauses (in favour of certain EU/EEA courts), but it is also fair to say that traditionally English courts had a tendency to accept such contractual jurisdiction clauses. However, in this area also the "Hague Choice of Law Convention" ("**HagueConv**")[8] could become relevant in the context of fully exclusive jurisdiction (ie, choice of court) agreements in favour of the courts of Hague countries (incl the EU member states). In summary, the legal situation in regard of jurisdiction clauses is in the case of a "no deal" Brexit not entirely clear and requires in each case individual attention and analysis.

Rather uncomfortable is the situation also when it comes to the recognition and enforcement of judgements: The UK Government seems to have the intention to revoke the currently applicable EU Brussels1 Recast Regulation[9] and Lugano Convention 2007[10]; see its "Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019"[11] (with some grandfatherings). If so, recognition and enforcement of EU/EEA judgements in the UK will become subject to common law. Similarly, in the EU/EEA the recognition and enforcement of UK judgements will become subject to the relevant national "private international law" (*Internationales Privatrecht*). Moreover, the EU Service Regulation[12] and the EU Evidence Regulation[13] are likely not to be retained in the UK with some grandfathering being in place; see the UK Government's "Service of Documents and Taking of Evidence in Civil and Commercial Matters (Resolution and Savings Provisions) (EU Exit) Regulations 2018"[14], but both the pre-existing Hague Service Convention[15] and the Hague Taking of Evidence Convention[16] will remain in place.

It is also worth to note that an increasing amount of commercial contracts in Europe contain arbitration clauses and are subject to arbitration procedures, as the enforcement of arbitration decisions will continue to be effected via the New York Convention[17] (to which the UK is and will remain to be a member in its own right).

Additional problems, however, arise in insolvency matters, when the EU Insolvency Regulation[18] will no longer be applicable in the UK: UK insolvency receivers will then need national recognition in the EU/EEA countries, and EU/EEA insolvency receivers, although they themselves will still be able to rely on the UNCITRAL Model Law on Insolvency[19] implemented in the UK's 2006 Cross-Border Insolvency Regulations[20], will no longer be able to rely on an automatic UK recognition of EU/EEA insolvency decisions. Moreover, with the above-mentioned

[7] Exiting the European Union private international law, available at https://assets.publishing.service.gov.uk/media/5c0eb0daed915d0c221e4717/The_Law_Applicable_to_Contractual_Obligations_and_Non-_Contractual_Obligations__Amendment_etc.___EU_Exit__-_Regulations_2018_-_SI.pdf.

[8] The Hague principles on choice of law in international commercial contracts 2015, available at: https://docentes.fd.unl.pt/docentes_docs/ma/MHB_MA_31647.pdf.

[9] Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215&from=EN.

[10] Lugano Convention 2007, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221(03)-&from=EN.

[11] Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, available at: http://www.legislation.gov.uk/ukdsi/2019/9780111176726/contents.

[12] Regulation 1393/2007 of the European Parliament and of the Council of 13 November 2017 on the service in the member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) […], available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R-1393&from=EN.

[13] Council Regulation 1206/2001 of 28 May 2001 on cooperation between the courts of the member States in the taking of evidence in civil or commercial matters, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001-R1206&from=EN.

[14] Exiting the European Union civil proceedings, evidence, family proceedings, available at: https://assets.publishing.service.gov.uk/media/5bd749e2ed915d78c4c8a2fc/The_Service_of_Documents_and_Taking_of_Evidence_in_Civil_and_Commercial_Matters__Revocation_and_Saving_Provisions___EU_Exit__Regulations_2018.pdf.

[15] Hague Service Convention and Signatories 1965, available at: http://www.courts.ca.gov/partners/documents/ea_HagueService.pdf.

[16] Convention on the taking of evidence abroad in civil or commercial matters 1970, available at: https://assets.hcch.net/docs/-bc204380-0fd8-41f1-940c-4b4f21-d32b22.pdf.

[17] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.

[18] Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=C-ELEX:32015R0848&from=en.

[19] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, available at: https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf.

[20] The Cross-Border Insolvency Regulations 2006, available at: https://www.legislation.gov.uk/uksi/2006/1030/contents/made.

revocation of the EU Brussels1 Recast Regulation, the EU/EEA recognition of UK "schemes of arrangement" thereunder might fall away. However, the UK could retain the Lugano Convention. Currently unclear is also whether in case of a "no deal" Brexit the UK will keep the EU's banking regulatory Winding-up Directive's[21] UK implementation in place or return also in this context to "common law".

Please also note that it might become necessary for EU/EEA parties dealing with UK banks to accept contractual "bail in" clauses not only referring to the relevant EU legislation (section 55 of the Bank Recovery and Resolution Directive, "**BRRD**"[22] in Germany eg implemented in section 60a of the *Sanierungs- und Abwicklungsgesetz*, "**SAG**"[23]) but also to the then relevant UK legislation (currently the Banking Act 2009).

For further details see the UK Government's guidance note on the handling of civil legal cases in a "no deal" scenario, published on 13 September 2018.[24]

1.4 Other "no deal" preparations

Although the UK Government until its defeat in the HoC on 15 January 2019 ostentatiously believed in its ability to deliver a controlled, a soft Brexit, it did start in August 2018 with preparations for a worst case scenario, ie for an uncontrolled, a hard Brexit[25].
On a less technical scale, it is currently only clear that in the latter case the Government will "*need to take a different approach to the future of Britain's economy", ie "a new budget that set out a different strategy for the future", including "appropriate fiscal measures*"[26]. In other words, it is likely that the UK will decrease company taxes. Lower taxes and less financial regulation, together sometimes referred to as the "**Singapore approach**" (which is the future plan of some of the leading Brexiteers, such as David Davis and Liam Fox) might transfer the City of London fully into an offshore market. But, on the one hand, it was such deregulation which, *inter alia*, led to the global financial markets crisis and voters in the UK will not appreciate this path and, on the other hand, economic advisers are not convinced that the "Singapore approach" could possibly work out[27].

1.5 Hope dies last?

If one is not a devoted Brexiteer, the prospects of a "no deal" Brexit are so much not promising that it is not a surprise that many, in particular of course the Remainers, still hope for a second referendum. However, there is currently not much hope, as PM May has declared that she still wants to deliver a Brexit on 29 March this year and would not support the idea of a second referendum and as the majority in the HoC seems equally to be against it. But isn't time running out?

Legally, it has been clarified by UK courts[28] as well as by the Court of Justice of the European Union ("**CJEU**")[29] that the notice pursuant to article 50 of the EU Treaty to exit the EU could be unilaterally revoked. If this is good news, the bad news is that after Brexit, whether it is an uncontrolled/hard Brexit on 29 March 2019 or a controlled soft Brexit on 31 December 2020, the time for unilateral revocation of the exit notice is over; to avoid a hard Brexit, the UK could still ask for an extension of the article 50 of EU Treaty's 2 ys negotiation time (which on the EU side would require unanimous

[21] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0024&from=EN.
[22] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms […], available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0059&from=DE.
[23] *Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen*, BGBl. 2014 Part I No 59, available at: https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl114s2091.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl114s2091.pdf%27%5D__1548152137473.
[24] Handling civil legal cases that involve EU countries if there's no Brexit deal, available at: https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal.
[25] See Sparrow, Philip Hammond: no-deal Brexit will jeopardise budget plans, The Guardian of 28 October 2018, available at: https://www.theguardian.com/uk-news/2018/oct/28/philip-hammond-no-deal-brexit-will-jeopardise-budget-plans.
[26] Esterházy, "*Wir sind an einem Wendepunkt unserer Geschichte*", Wirtschaftswoche of 29 October 2018, available at: https://www.wiwo.de/politik/europa/grossbritanniens-haushaltsplan-wir-sind-an-einem-wendepunkt-unserer-geschichte/23244718.html.
[27] Jeremy Hunt, "Why the Singapore model won't work for the Uk post-Brexit", The Guardian of 2 January 2019, available at: https://www.theguardian.com/politics/2019/jan/02/why-the-singapore-model-wont-work-for-the-uk-post-brexit
[28] First Division, Inner House, Court of Session, Opinion dated 21 September 2018, [2018] CSIH 61, available at: https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018csih62.pdf?sfvrsn=0.
[29] Judgement of the CJEU of 10 December 2018, C-621/18, available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=2A7CF3196CECDB20DB45F1D15074B747?text=&docid=208636&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=8260108.

decision by the EU Council) and this would also extend the time for unilateral revocation, but at the end the result is that after Brexit there will be no more unilateral revocation, ie no re-entry into the EU is automatically possible. However, the remaining EU27 member states have done everything subjectively possible to keep the UK in the EU, and have often stated this publicly. Therefore, politically it is quite unlikely that they would not support a fast-track re-entry of the UK (although possibly not with the extremely favourable (in particular the monetary) exceptions the UK had been granted in the past, mainly due to PM Margaret Thatcher's successful negotiations with the EU).

2. European Union

In a realistic analysis of the economic preferences, the EU side has in the last two years worked on many EU law and regulatory issues to prepare for Brexit, but in particular on the rules of the financial markets.

For a good overview see for example the recommendations paper by Deutsches Aktieninstitut *("***DAI***")* "Minimise Brexit Rules and strengthen the European Capital Markets"[30]. In the following just a few examples:

2.1 Bank recovery and resolution

In the context of the EU bank recovery and resolution rules (ie, the BRRD, SRM Regulation, etc), a subject which is, in the aftermath of the global financial markets crisis which had triggered the creation of these rules, of a crucial importance on both sides of the Channel, the issue has come up that in case of a "no deal" Brexit the UK shall be a "third country" and the instruments issued under English law might in an EU/EEA based bank's crisis no longer qualify for a so-called "bail in", and would for EU/EEA banks thus no longer qualify as instruments for "**MREL**" (Minimum Requirements for own funds and Eligible Liabilities) purposes. However, on the one hand, in regard of instruments to be created in the future they can and should be drafted and agreed in a way including a contractual acceptance of EU bail in rules and, on the other hand, in regard of instruments of already existing instruments (if they do not already have such a clause and if one cannot be contractually added) it has been clarified that there would be enough non-English law MREL-qualifying instruments available in order to avoid MREL problems and ensure that effective resolution of banks is not endangered.

2.2 Capital Markets

There are many Brexit driven capital markets related legal issues in relation to financial markets regulation (eg, licensing issues of market players, "third country" regimes, market infrastructure issues, insurance services, etc), to capital markets regulation (eg, product distribution and licensing, EMIR, funds law, securities prospectuses, the transparency regime, the market abuse regime, benchmark rules, etc) and to corporate law issues (eg, acceptance of foreign corporate forms, cross-border mergers, European Company (SE) issues, employee involvement, merger control notifications, takeover law, etc). For more details, please see the above-mentioned DAI, Recommendations - Minimise Brexit Risks and Strengthen the Europoean Capital Market[31].

[30] Recommendations of Deutsches Aktieninstitut, 2nd Position paper, *„Minimise Brexit Risks and Strenghten the European Capital Market* ", available at: https://www.dai.de/files/dai_usercontent/dokumente/studien/2017-10-27%202nd%20Position-%20paper%20Brexit%20150dpi.pdf, Recommendations of Deutsches Aktieninstitut, 3nd Position paper, *„Minimise Brexit Risks and Strenghten the European Capital Market* ", available at: https://www.dai.de/files/dai_usercontent/dokumente/studien/2018-09-17%203rd%20Position%20paper%20Brexit.pdf.

[31] See footnote 30 above.

2.3 EUR clearing

EMIR[32] as one of the above-mentioned capital markets regulatory subjects has a number of interesting legal aspects, especially including the extremely crucial issue of Euro ("**EUR**") clearing. In case of a hard Brexit, all counterparties in EU/EEA countries could become unable to continue to act as clearing members at UK central counterparties ("**CCPs**") and in order to avoid this such UK CCPs would need to be recognised by the EU. This has not happened yet and, if it does not happen in time, could lead to the need for a massive migration of contracts. The EU is currently creating new rules for EUR clearing with the European Securities and Markets Authority ("**ESMA**"), on the one hand, and the European Central Bank ("**ECB**"), on the other hand, getting a more important supervisory role and in extreme cases being able to force foreign CCPs to move to the EU/EEA or become ineligible for EUR clearing[33]. On the one hand, as a result of Deutsche Börse AG's new so-called "Partnership Programme" (*Partnerschaftsprogramm*)[34] and its success in the markets, there is already migration from London to Frankfurt going on and, on the other hand, in the case of a "no deal" Brexit the EU seems to be willing to accept for a limited period the continuance of EUR clearing with UK CCPs.

2.4 Funds

Another result of a "no deal" Brexit would be that, from an EU/EEA perspective, UK funds will become "third country funds". Therefore, their distribution in the EU/EEA will require distribution permissions by the national competent authorities ("**NCAs**"), in Germany the Federal Financial Services Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "**BaFin**"). Moreover, some institutional investors (eg, insurance companies) are subject to statutory, regulating and/or own corporate investment restrictions and thereunder may not be permitted to invest into "third country funds".

2.5 Outsourcing

A "no deal" Brexit could also make it either impossible or significantly more difficult for supervised entities (banks, insurance companies, funds or other financial services providers) in the EU/EEA to outsource activities/functions (eg trading, risk management, compliance, back office, controlling, etc) to, or back to, entities in London. However, it seems that ESMA and the EU NCAs, on the one hand, and the UK's Financial Conduct Authority ("**FCA**"), on the other hand, intend to agree to a memorandum of understanding ("**MoU**") under which such outsourcing would continue to be permitted after 29 March 2019, and that the latter would even be true if the MoU had not already been concluded at that date.

2.6 Others

All the above are only examples from the plethora of legal and regulatory issues in the financial sector created by a hard Brexit and by no means a, or the attempt of a, comprehensive list of all relevant issues.

3. Germany

But not only EU Commission and European Supervisory Authorities ("**ESAs**") are preparing for the ever more likely possibility of a "no deal" Brexit. Relevant, in particular including German, legislators and NCAs are doing the same.

In Germany, for example, such national preparations include, *inter alia*, the following:

[32] Regulation 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0648&from=DE.
[33] See our GSK Update of 28 August 2017 "*EUR-Clearing nach dem Brexit*" (German language) available at: https://www.gsk.de/uploads/media/GSK-Update_EUR-Clearing-nach-dem-Brexit.pdf.; Recommendation of the European Central Bank dated 23 June 2017, ECB/2017/18, available at: https://www.ecb.europa.eu/ecb/legal/pdf/oj_joc_2017_212_r_0004_en_txt.pdf and Proposal of the European Commission dated 13 June 2017, 2017/0136 (COD), available at: https://eur-lex.europa.eu/resource.html?uri=cellar:80b1cafa-50fe-11e7-a5ca-01aa75ed71a1.0001.02/DOC_1&format=PDF.
[34] Deutsche Börse, *Eurex-Partnerschaftsprogramm*, available: http://www.eurexclearing.com/clearing-en/about-us/company-profile.

3.1 Legislation

On 7 September 2018, the German Federal Government (*Bundesregierung*) has published a draft Brexit Transition Act (*Brexit-Übergangsgesetz*, "**BrexitÜG**")[35] which contains transitional rules in regard of the naturalisation (*Einbürgerung*) of UK citizens in Germany and of German citizens in the UK (the latter to deal with their loss of the German citizenship). However, this draft legislation only deals with the situation during the transition period under the draft Withdrawal Agreement, ie only with a soft Brexit scenario, not with the "no deal" Brexit situation.

A draft Fourth Act for the Amendment of the Law Regulating the Transformation of Companies (*Viertes Gesetz zur Änderung des Umwandlungsgesetzes*)[36] prepared by the Federal Ministry of Justice shall deal with corporate law aspects of Brexit, namely with companies in form of UK company law but located in Germany (eg, the approx. 8 to 10,000 "private companies limited by shares" ("**Ltd**") in Germany) which will no longer be accepted as such and, under the rules of decisions by Germany's highest court in civil matters (*Bundesgerichtshof*, "**BGH**"), will have to be requalified as German law general partnership (*offene Handelsgesellchaft*, "**oHG**") or partnership under the Civil Code (*BGB-Gesellschaft*) or as sole proprietorship (*Einzelkaufmann*). The German Law Regarding the Transformation of Companies (*Umwandlungsgesetz*, "**UMwG**") shall be amended by the new sections 122a *et seqq* on the amalgamation (*Verschmelzung*) of companies to partnerships. In addition, there shall be a grandfathering for amalgamations which have already started on the Brexit date.

Alternative rules regarding soft Brexit and hard Brexit are contained in the Federal Ministry of Finance's draft Brexit Tax Accompanying Act (*Brexit-Steuerbegleitungsgesetz*, "**Brexit-StBG**") which contains provisions on various tax laws, building societies law (*Bausparkassenrecht*) and covered bonds law (*Pfandbriefrecht*). Basically, it is the purpose of this legislation to maintain the *status quo* in these areas and to avoid unwanted results of Brexit, for example detriments to taxpayers (eg, by ensuring that Brexit will not be qualified as a "detrimental event" ("*Schädliches Ereignis*") under income tax law (*Einkommensteuerrecht*). Moreover, taxation of capital appreciation on taking up residence abroad (*Wegzugsbesteuerung*) and liquidation taxation (*Liquidationsbesteuerung*) as well as a possibly retroactive taxation of contribution profits (*Einbringungsgewinne*) shall be prevented.

Under article 50 of the *Brexit-StBG*, it shall be ensured that building societies which have made investments in the UK before 30 March 2019 shall be permitted to keep them irrespective of a Brexit, and that collateral by way of charges/liens on real property (*Grundpfandrechte*) in the UK remain permissible until the end of the relevant transaction.

Pursuant to article 4 of the *Brexit-StBG*, section 49 of the Covered Bonds Act (*Pfandbriefgesetz*, "**PfandBG**") shall be amended granting a grandfathering/right of continuance (*Bestandsschutz*) regarding all cover pool assets (*Deckungswerte*) in the UK. However, the Association of German *Pfandbrief* Banks (*Verband deutscher Pfandbriefbanken*, "**vdp**") has rightfully pointed out that further amendments in the *PfandBG* will be necessary in order to ensure for *Pfandbrief* banks the right to do new business in the UK, as well as in the Banking Act's (*Kreditwesengesetz*, "**KWG**") provisions on refinancing registers.

Finally, it should not be left unmentioned that significantly more Brexit-related German legislation should and can be expected, amending the many German statutes and regulations containing references to EU member states (ie, in case of Brexit no longer to the UK).

3.2 Regulatory

The German federal regulatory authority BaFin has announced that in case of an uncontrolled hard/"no deal" Brexit it shall take emergency measures (*Notfallmaßnahmen*) in order to avoid chaos in the financial sector which could, *inter alia*, be triggered by market participants from the UK not having the necessary German licences in place, but only for a limited period of time.

[35] BT-Drs. 424/18, available at: http://dipbt.bundestag.de/dip21-/brd/2018/0424-18.pdf.
[36] BT-Drs. 637/18, available at: https://www.bundesrat.de/SharedDocs/drucksachen/2018/0601-0700/637-18.pdf?__blob=publicationFile&v=1.

ON THE MOVE

In the light of the ever greater likelihood of an uncontrolled hard/"no deal" Brexit and of all the current uncertainties, it is perhaps no wonder that almost all important (and increasingly also smaller or medium sized) financial markets players in London have already started and/or intend to move business and staff from the City in the UK to locations in the EU27, most notably to Frankfurt. While some prefer Amsterdam, Dublin, Luxembourg or Paris, at least 25 of them now have moved, are moving to and/or significantly strengthening their presence in Frankfurt: Bank of Taiwan, Barclays, Caixabank, China International Capital, Citigroup, Credit Suisse, Daiwa Securities, Deutsche Bank, Essens Securities, First Commercial Bank, Goldman Sachs, JP Morgan, Lloyds Banking Group, Mizuho Financial Group Morgan Stanley, Nomura, Oppenheimer, Raymond Jameson, RBC Capital Markets, Silicon Valley Bank, Standard Chartered Bank, Sumitomo Mitsui, UBS, VTB and Woori Bank[37] (as well as several further of our clients who are not – yet – mentioned in this list). On 7 January 2019, EY has published a calculation according to which the City is relocating business worth GBP 800 bn to the continent.[38] In November 2019, press reports had mentioned that JP Morgan, Goldman Sachs, Citigroup and Morgan Stanley together would relocate business worth at least EUR 250 bn to Frankfurt[39] (not to speak of Deutsche Bank's massive relocation).

To all those who relocate business, staff and/or organisation to Germany, and in particularly to those planning it or thinking about it, it might be particularly reassuring that the German regulators at BaFin not only give Brexit-related projects some kind of priority treatment but quite noteably are also working on a new "welcome culture" that will help to make their move/relocation not only in the short but also in the medium and longer run easier and more successful.

BLIND CRYSTAL BALLS

And to what will all of this lead? Well, as Doris Day sang, "*the future's not ours to see*" and all those of us who look into their crystal balls, or in the UK perhaps at their tea leaves, to read the future are increasingly frustrated. The economic forecasts for both the UK and the EU are significantly differing. But how could they not, given that in the second half of January 2019 it is still not clear whether there will be a controlled or uncontrolled, a soft or a hard/"no deal" Brexit, or a Brexit at all, when it will be (if at all) and how prepared everyone will be for it, including the governments. In the meantime, trade between the UK and Germany has already started to decrease.[40] In the UK there are first signs of hoarding (*Hamsterkäufe*) and the UK Government prepares for long traffic jams at the borders.

In the EU, citizens seem to be happier and happier with their EU[41] although there are no signs of a big structural reform of its organisation and structure, despite even their leaders understanding that this is actually necessary.[42] In the UK, it is more or less clear that today a clear majority of the people is no longer in favour of Brexit. But neither hard nor soft Brexiteers are remotely influenced by this and still insist that they execute "*the will of the people*" (as shown in the Referendum years ago) when they resist the idea of a second referendum. Instead, there are now voices among the Remainers that the UK should leave the EU now, but that soon thereafter there should be a new referendum for the re-entry of the UK into the EU. And still everything is possible: MPs from the Remainer side and the soft Brexiteers side might get a majority in the HoC for a postponement of the Brexit date. Or, in the light of this danger, MPs from the hard Brexiteers side may change their mind and support May and the draft Withdrawal Agreement in order to ensure a Brexit on 29 March.

[37] Helaba, *Finanzplatzstudie Frankfurt: Koffer packen bei Brexit-Banken*, Frankfurt September 2018, available at: https://www.helaba.de/blob/helaba/475948/81383acf07203db4f2765033c949807d/finanzplatz-studie-20180924-data.pdf.

[38] EY Financial Services Brexit Tracker: Heightened uncertainty drives financial services companies to move almost £800 billion of assets to Europe, available at: https://www.ey.com/uk/en/news-room/news-releases/19-01-07-ey-financial-services-brexit-tracker-heightened-uncertainty-drives-financial-services-companies-to-move-almost-800-billion-pounds-of-assets-to-europe.

[39] *US-Banken verlagern wohl Vermögenswerte in Milliardenhöhe nach Frankfurt*, Handelsblatt of 9 November 2018, available at: https://www.handelsblatt.com/finanzen/banken-versicherungen/wegen-brexits-us-banken-verlagern-wohl-vermoegenswerte-in-milliardenhoehe-nach-frankfurt/23616764.html?ticket=ST-1433812-AP0x6NP7cE3aD7o3EbId-ap2.

[40] Rottwilm, *Brexit-Chaos – Handel der Briten mit Deutschland bricht ein*, manager-magazin of 29 October 2018, available at: http://www.manager-magazin.de/politik/weltwirtschaft/brexit-chaos-handel-der-briten-mit-deutschland-bricht-ein-a-1235670.html.

[41] *EU-Gipfel sondiert Brexit-Lösungen* in Börsen-Zeitung of 18 October 2018.

[42] European Commission, Completing Europe's Economic and Monetary Union, available at: https://ec.europa.eu/commission-/sites/beta-political/files/5-presidents-report_en.pdf.

Interesting!? Remember: In China it is an ancient curse to say “may you live in interesting times”.

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