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How to continue your activities in Belgium post-Brexit?

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With the D-Day of 29 March looming, we see many UK clients with operations in Belgium seeking to implement contingency plans to mitigate the most pressing risks to their crossborder operations. In this context, on 19 February 2019, a Bill was introduced in the Belgian Parliament aimed at dealing with the consequences of a hard Brexit.

This outline intends to provide a high level summary on how UK businesses can continue conducting business in Belgium after 29 March 2019 in case of a "no deal". We also set out possible actions in case of a delay or a deal that does not recognise equivalence.

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Table of Contents

You are a UK company without establishment in Belgium

- UK companies performing commercial activities in Belgium without an establishment in Belgium will be treated as third country companies. This means that they can no longer rely on the free movement of services, goods, capital and workers.
- The consequences of a hard Brexit for UK companies should therefore be examined on a case-by-case basis, as specific requirements might apply depending on the legislation applicable to the exercise of such activities on Belgian territory. For example, customs and duties will be applicable to the importation of goods into Belgium, a third country company might be obliged to take out insurance with a Belgian insurer or set up an establishment in Belgium in order to perform specific services in Belgium, etc.

You are a UK company with a branch office in Belgium

- UK companies with a branch office in Belgium that carry out their only or main business in Belgium: As UK companies performing commercial activities in Belgium will be treated as third country companies, they can no longer rely on the freedom of establishment. This implies that if the company was set up in the UK only for the purpose of establishing itself in Belgium, where its only (or main) business is conducted, the Belgian authorities (courts, tax authorities....) can apply the so-called real seat theory, refuse to regard it as a legal person and hold its shareholders and directors liable for the debts of the company. Please note however that this risk applies only as long as Belgium applies the real seat theory and that a draft law intended to come into force on this issue on January 1, 2020 provides for the abolition of the real seat theory.

- All other UK companies with a Belgian branch office in Belgium: Following Brexit, the Belgian branch office of a UK company will be considered by Belgian company law as a Belgian branch office of a non-EU company. The distinction between branch offices of EU-companies and non-EU companies is only relevant when a foreign company opens a Belgian branch office as non-EU companies have to comply with stricter formalities. Once a foreign company has duly registered and opened a Belgian branch office, there is almost no distinction between an EU-company and a non EU-company as far as corporate formalities relating to the Belgian branch are concerned. A hard Brexit will therefore have no significant impact on an existing Belgian branch of a UK company from a corporate law perspective.

You are a UK company with a subsidiary in Belgium

- Belgian company law does not impose any nationality requirements for the shareholders or the directors of a Belgian company.

- A hard Brexit will therefore have no significant impact on an existing Belgian subsidiary of a UK company from a corporate law perspective.

You are a UK company offering securities to the public in Belgium or listed on Brussels

- A UK company that makes an offer to the public in Belgium (or requests the admission to trading on a Belgian regulated market, such as Euronext Brussels) will be treated as a third country issuer and will no longer be able to rely on the European passport of a prospectus that is approved by the UK FCA.

- After a hard Brexit, UK issuers wishing to access both UK and Belgian capital markets will, in principle, have to obtain two separate approvals, one from the UK FCA for a prospectus compliant with the UK rules and one from the Belgian FSMA for a prospectus compliant with the EU rules.

- Under the current Prospectus Directive and the new Prospectus Regulation (which shall apply in full as of 21 July 2019), the competent authority of an EEA member state may, however, approve a prospectus of an issuer outside of the EEA (such as a UK issuer), provided that: (1) it has been drawn up in accordance with international standards and the third country's rules are "equivalent" to the Prospectus Directive or Prospectus Regulation, respectively; and (2) in the case of the Prospectus Regulation, a cooperation agreement has been entered into between the two regulators. To date, the European Commission has not found a single country to be "equivalent" for prospectus purposes. It will have to be seen if, after a hard Brexit, the UK rules will be considered equivalent and whether there will be a cooperation agreement between the Belgian FSMA and the UK FCA.

You are a UK company with ongoing contracts under Belgian law

- If performance of a contract becomes financially more burdensome because of Brexit, it should nevertheless be performed. Except in case a hardship clause applies (which generally will require that a hard Brexit and its consequences were unforeseeable at the time of the contract), a party will not obtain relief from its obligations. The other party's claims (for specific performance, damages or termination) could nevertheless be tempered in exceptional circumstances, if they constitute an abuse of rights.

- If performance of particular obligations (such as timely delivery of goods) become materially impossible because of a hard Brexit, the affected party could possibly invoke force majeure, but such force majeure will probably only be temporary. Moreover, it is subject to the condition that the impediment could not reasonably be prevented. The lack of measures taken by a contract party since a hard Brexit was announced could prevent it from invoking force majeure.

- Reference in a contract to a territory such as "the EU Member States" or "all countries outside the EU" could trigger a sudden change of scope (for performance, for non-compete obligations, ...). However Belgian law – more than English law – allows a rather flexible interpretation of contracts, more based on the intention of the parties than on the literal wording. It is nevertheless advised to anticipate and agree to clarify the territorial scope - be it temporarily, until a future negotiation or decision.

- These observations should be applied on a case by case basis, taking into account contractual provisions such as cost clauses, price variation clauses, force majeure clauses, material adverse change clauses, change of law clauses, hardship clauses or interpretation clauses.

You are a UK company processing personal data on Belgian persons

- In the event of Brexit, the UK will be considered a third country. As a consequence, any UK based companies will be subject to the 'extra-territorial' scope of the GDPR and will have to comply with the GDPR and even Belgian personal data processing regulations to the extent they are either (1) offering goods or services, irrespective of whether a payment of the data subject is required, to data subjects in the Union or Belgium (for the application of Belgian law), or (2) they are monitoring the behaviour of data subjects as far as their behaviour takes place within the Union or Belgium (for the application of Belgian law). Such companies will have to continue to comply with GDPR and Belgian data protection regulations.

- UK based companies processing personal and subject to GDPR in accordance with the conditions set out above will also, in all likelihood, have to appoint a representative in the EU. There is an exception to this principle, in fine, for occasional, small scale personal data processing that is unlikely to result in a risk for the rights and freedoms of natural persons. However, to the extent that few business activities and personal data processing can be considered 'occasional', it is most probable that the UK companies subject to the GDPR will have to name a representative. This is to be assessed and determined on a case by case basis.

- Any personal data transfers to the UK from Belgium (or even from any place in the EU for that matter) will be considered a personal data transfer to a third party state. Such transfers require that an equivalent level of data protection be ensured. This entails implementing measures of adequate protection.

- To the extent the Commission has not (yet) adopted an adequacy decision recognizing that the UK legal system offers an equivalent level of data protection, transfers will have to be carried out on the basis of the following mechanisms: (1) the conclusion of the 'standard data protection clauses' between the parties (the most simple solution); (2) the adoption of binding corporate rules - more burdensome solution in the short terms but more advantageous on the longer term, as it allows for the free flow of personal data within a group of companies across the world; (3) in the future codes of conduct and certification mechanisms will also be available (not yet in existence).

- It can be noted that there are some exceptions to the above principle that any transfers to third party states require implementing measures of adequate protection, which apply to ad hoc, non-systematic transfers of personal data.

You are a UK bank with operations in Belgium

- Post-Brexit, a UK bank will be treated as a third country bank. This means that it can no longer rely on the European passport. In case the UK bank is parent of an EU licensed credit institution, it can restructure its activities through that EU institution.

- It is currently not clear whether the UK bank can establish a branch office post-Brexit as it is not certain that the necessary cooperation agreement will be in place. However, an alternative is to establish a representative office in Belgium. This rep office needs to be registered with the National Bank of Belgium (the **NBB**). Its activities are limited however to (1) promotion, (2) information gathering, and (3) information dissemination. The rep office is not allowed to conduct banking activities.

- Another option is to rely on a reverse solicitation model. It should be noted that this concept is extremely limited in Belgium and should not be relied upon as a model, except in exceptional cases (e.g. Belgian expats with residence in the UK). It would require that a Belgian client actively approaches the bank in the UK, upon that client's own initiative and without being solicited in any way.

- Regardless of any option chosen, a UK bank is typically permitted to conduct brand awareness campaigns (e.g. sponsoring a certain marketing event organized in Belgium). Brand awareness requires that any communication is strictly limited to the promotion of the brand and no products or services are being discussed. Typically brand awareness excludes reverse solicitation. One complicating factor is that the public use of the term "bank" (or similar terms) in Belgium is generally restricted to licensed institutions and representative offices.

You are a UK MiFID firm with operations in Belgium

- Post-Brexit, a UK investment firm licensed under MiFID will be treated as a third country investment firm. This means that it can no longer rely on the MiFID European passport. On 21 February 2019 the Financial Services and Markets Authority (the **FSMA**) published a circular on how the UK investment firm can continue certain business in Belgium.

- A first option is to restructure its activities through an EU firm, or if that is possible, to set up a branch in Belgium.

- A second option is to rely on a reverse solicitation model or conduct brand awareness campaigns (see above, You are a UK bank with operations in Belgium). In that case the UK investment firm may not publicly use the term "investment firm".

- Alternatively, the UK investment firm can opt for a limited registration. This means that the firm must register itself in Belgium with the FSMA. This registration process is relatively easy and entails few costs, be it initial or recurring costs. Once registered, the third country investment firm can perform MiFID investment services in Belgium to a limited number of investors: (1) eligible counterparties (such as other investment firms; credit institutions; insurance companies; UCITS; pension funds; etc); (2) professional clients; and (3) UK expats. The Bill that was introduced in the Belgian Parliament on 19 February 2019 authorizes further rules to be enacted to ensure that there is a level playing field between a limited registration firm and a MiFID firm.

You are a UK firm dealing in OTC derivatives

- Regarding OTC derivatives, UK investment firms will typically be able to continue to hold and perform existing derivate contracts without having to obtaining a Belgian authorization.

- However, if during the lifecycle of the OTC derivative, an event occurs that gives rise to conclusion of a new contract or a substantial modification of an existing contract, this may be perceived as the performance of an investment service and thus be subject to Belgian licensing requirements (see above, You are a *UK MiFID firm with operations in Belgium*). Further detail will likely be added through a Royal Decree.

You are a UK fund manager with operations in Belgium

- Post-Brexit, the UK fund manager with operations in Belgium will be treated as a third country fund manager. This means that a UK fund manager will lose any of its European passport rights under the UCITS Directive. Solutions will depend on a number of factors. It may in certain cases be possible to replace the UK manager by a UCITS licensed entity which in turn will delegate certain activities.

- Under the AIFMD the situation is different. Third country AIFMs may market in Belgium AIFs they manage under the conditions of Article 497 of the Belgian AIFM Law. This requires that the Belgian private placement conditions must be satisfied and that the AIFM will notify certain information to the FSMA. Furthermore, the FSMA and the UK FCA must have entered into an adequate cooperation arrangement for the supervision of system risks; it is currently not clear whether any such cooperation arrangement would exist post-Brexit.

- Alternatively, it will also be possible for UK AIFMs to continue certain models of reverse solicitation or pre-marketing. It must be noted however that Belgian law typically only tolerates reverse solicitation or pre-marketing under strict circumstances.

You are a UK insurance company with operations in Belgium

- Post-Brexit, a UK insurance company will be treated as a third country insurance company. This means that it can no longer rely on the European passport. In this case the UK insurance company can continue certain business in Belgium by restructuring its activities through an EU insurance company.

- Alternatively, the UK insurance company can establish a branch. The conditions to establish a branch are: (1) the law of the third country can be considered as equivalent, (2) there is a cooperation agreement with the NBB and the supervisors of the UK, (3) the insurance company obtains authorisation in the UK, and (4) is authorised by the NBB.

- The UK insurance company can also rely on a reverse solicitation model or conduct brand awareness campaigns (see above, You are a UK bank with operations in Belgium).

You are a UK company with intellectual property in Belgium

- For the most part, not much will change for UK companies with IP in Belgium, save as with regard to ".eu" domain names and database rights.

- All registered intellectual property rights (trademarks, registered design rights, patents, supplementary protection certificates) that have effect in Belgium (i.e. they have been registered for the Belgian territory) will continue to be valid. This applies at all levels - whatever the registering institution- be it at the national level (patents, including European patents validated in Belgium, and SPCs), at the Benelux level (Benelux trademarks and designs) or at the EU level (EUTMs and registered community designs). Such registered rights will continue to be valid and to have legal effect in Belgium after Brexit whatever the nationality, and place of residence, of their owner. Likewise, UK companies, and individuals, will still be entitled to apply for such registered rights.

- However, UK based companies will no longer be able to enjoy any ".eu" domain names they may have acquired. This is because to be able to register for such a domain name the undertaking, legal person or individual should be based in the EU, which will no longer be the case for UK based companies post Brexit. A transitional plan is foreseen, giving registrants a two months period to demonstrate compliance with the residency obligation. After the two months all registrants who did not demonstrate their eligibility will be deemed ineligible and their domain names will be "withdrawn" and thus, will no longer function. As from twelve months of Brexit, i.e. on 30 March 2020, all such affected domain names will be finally "revoked", and will become available for future, EU public registration.

- This is different to any ".be" registrations, which do not require Belgian residency. These can still be held by UK based companies.

- As to unregistered IP rights held in Belgium by UK companies, such as copyright, "neighbouring" rights, sui generis database rights, unregistered design rights, they are subject to different legal regimes.

- Copyrights will continue to vest with UK companies, this is by virtue of the Berne Convention for the Protection of Literary and Artistic Works. This includes the copyright protection of computer programs. There are three elements of protection which will, however, be dependent on the UK's national regime: the 'special' protection of applied art and industrial designs and models, the duration of the copyright, and the 'droit de suite' regarding works of art and manuscripts. Consequently, any variations in these dimensions under UK law may impact protection afforded in Belgium to UK companies.

- "Neighbouring" rights will continue to vest with said companies, this by virtue of the Rome Convention of 1961, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. There does not appear to be any exceptions in this respect.

- Sui generis database rights held by UK companies however, will no longer be enforceable. Such rights are only recognized to EU residents. This implies that UK companies cannot invoke in Belgian courts the sui generis database protection regarding any databases they may have produced, either before or after Brexit.

- On a general note, regarding all IP rights, the application of exhaustion rules will change post-Brexit. After Brexit, goods placed on the UK market by, or with the consent of, the right holder will not be considered exhausted in the EEA (Belgium). This means that exporting these goods from the UK to the EEA (Belgium) will require the consent of the right holder in this territory, thereby giving them the opportunity to price-discriminate and prevent parallel importations.

You have obtained a UK judgment to be enforced in Belgium

In contract to the situation in the UK, where specific legislation has been adopted to deal with the enforcement in the UK of judgments from EU-27 courts after Brexit, there is no specific statutory regime that deals with the enforcement of UK judgments in Belgium in case of a hard Brexit.

Based on the Commission's Notice to Stakeholders of 18 January 2019 with respect to the "*Withdrawal of the United Kindom and EU rules in the field of civil justice and private international law*" ("the Notice") a distinction must be established between two situations:

- When enforcement proceedings of a UK judgment are **pending on the withdrawal date**, the application of the EU rules (Recast Brussels I Regulation) will depend on whether the judgment has been "*exequatured"* in the EU-27 before the withdrawal date:

    - If the judgment has been exequatured but not yet enforced, it can still be enforced in the EU-27 according to EU rules.
    - If the judgment has not been exequatured, the EU rules will not apply, even where the judgment was handed down before the withdrawal date, or the enforcement proceedings were commenced before the withdrawal date.

  It is not clear whether the Notice only tackles the question of the enforcement of judgments or also that of their recognition. In principle, the recognition of foreign judgments takes place automatically at the time the judgment is rendered. Therefore, the judgment handed down before the withdrawal date should continue to benefit from this automatic recognition even if the question of recognition arises after the withdrawal of the UK from the Union. However, the Notice would appear to suggest that only the judgments that have been 'exequatured' before the withdrawal date will continue to benefits from this automatic recognition.

- When proceedings for the enforcement of a UK judgment are **commenced after the withdrawal date**, the EU rules no longer apply. The recognition and enforcement are be governed by the national rules of the Member State in which recognition and/or enforcement is sought, unless the Member State and the UK are parties to a specific international convention.

  As things currently stand, the recognition and enforcement of UK judgments in Belgium after a hard Brexit are likely to be governed by the 2005 Hague Convention on Choice of Court Agreements (which has been ratified by the UK on 28 December 2018 and will enter into force on 1 April 2019 in case of a hard Brexit), which will apply to UK judgments issued in situations where there is a choice of court agreement, by the 1936 bilateral Convention between the UK and Belgium, which applies only to monetary judgments, and by the Belgian Code of private international law.