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BREXIT DESK

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Do Not Panic! *There is remedy and opportunity ahead.*

Brexit would almost certainly have a short to medium term negative impact on international investors looking to deploy capital into UK but also on British investors and developers seeking to invest or trade with Romania and practically all of the remaining 27 members of the EU. What is likely to happen - an end to free movement of people, goods and services as we know it, which could ultimately also affect the cost of doing business and impact the market in general. However, what is likely to have the biggest impact on investors and developers, is the resolve of the UK economy, and any external perceptions of its strength.

As we see it, the repercussions of the British leave vote 23 June 2016 are more significant from a business rather than legal perspective. However, businesses throughout Europe may face legal uncertainty as a result of the anticipated impact on the rights and obligations actors in all sectors. Amongst the areas likely to be most affected are: (i) trade and single market access, (ii) missing the benefit of the 50+ free trade deals which the EU has secured, (iii) fluctuations in exchange rates, (iv) access to EU funding for ongoing projects, (v) recruitment, retention or relocation of employees from the EU to UK and vice versa, together with the issue of EU-wide recognition of qualifications, (vi) missing the customs union benefits and effects on exports between the EU and the UK and vice versa, (vii) application of EU VAT regime, (viii) lack of further reliance on EU directives on withholding taxes applicable to intra group interest, dividends and royalty payments with possible negative effects on EU subsidiaries ability to make payments to their UK holding companies free from withholding taxes.

The good news is that, we are here to assist and well prepared too. Our lawyers, tax consultants and restructuring practitioners have been spending considerable time in the past months on anticipating and evaluating the possible legal consequences of a Brexit for Romania-UK business relations and have considered multiple facets that may be worked-around in the interest of our clients which are likely to be affected one way or the other.

With that in mind, this brief seeks to point-out what would likely happen in some key areas of legal practice in the event Art. 50 negotiations are triggered.

See the views and gather-ups of our specialized lawyers/consultants below:

- Banking & Finance
- Capital Markets & Securities
- Competition & IP
- Corporate & Commercial
- Labor & Employee Benefits
- Tax

Banking & Finance

Brexit confirmation was immediately followed by a burst of predicting regarding potential consequences both at the European and the global scale. Hard to predict at this point which of these will be actually materialized and which not and, particularly, how they will affect the economic climate already crippled by the economic crisis that seemed to fade, though it is certain that the breaking up with the European Union will entail, in principle, the inapplicability of the *acquis communitaire* in what the Great Britain is concerned and, thus, in what regards its relationships with the other Member States.

Regarding the Banking and Financing field, one of the most important consequences is related to the current principle of the freedom to directly provide services on the territory of a member state based on the “EU passport”. Thus, if currently the affiliation of the Great Britain to the European Union confers to the credit institutions and the other financial institutions authorized and supervised by the competent authority from the Great Britain the possibility to provide services on the Romanian territory (or on the territory of the other member

states) by incorporating a branch or by directly providing services based on a simple notification sent by the competent authority from the member state to the National Bank of Romania, as a result of the exit from the European Union such privilege will become inapplicable, which will harden or discourage such services between the EU member states and the Great Britain.

In other words, in order to provide services on the Romanian territory, in lack of the "EU passport", the credit institutions and the other financial institutions from the Great Britain will have to go through a more cumbersome authorization process, complex in terms of the necessary documentation and related timing, and also more expensive, with the view to obtain the relevant authorization from the National Bank of Romania.

The loss of other privileges is not be neglected, like the one relating to the free movement of capital, such as, for example, the one regarding the cross-border payments within the European Union, according to which charges for cross-border payments within the European Union are the same as those for payments in the same currency within a member state, principle which will no longer be applicable between the Great Britain and the other member states once with the withdrawal of the Great Britain from the European Union.

Likewise, it is worth mentioning the potential impact over the principle according to which a judgment given in a member state shall be recognized in the other member states without any special procedure being required for this purpose, especially from an enforcement perspective regarding the security agreements governed by the Romanian law securing loans governed by the English law. Time will ascertain whether and how the exit of the Great Britain from the European Union will affect/ harden the potential enforcement trials in front of the competent courts of law.

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Capital Markets & Securities

Although Great Britain is still a member of the European Union, one thing is clear. The vote on Brexit unleashed uncertainty on all fronts. The wave of doubt has hit capital markets as well, with substantial losses in the magnitude of billions at the level of exchanges being heralded in the news.

Brexit has had a clear negative impact on the capital markets. We have seen decreases in ratings of the UK as sovereign issuer, we have seen UK banks share price fluctuations and trading suspension, and we see generally concern as to what is to happen next, or who may also leave in the future.

At this stage, it is still too early to say if this is all. Negotiations have not even commenced, and the UK seems to be leaning on taking its time to ponder on what it really wants to replace the EU regime with.

As is always the case with capital markets, uncertainty equals risk and volatility, and this means companies, and their boards will need to exercise increased care insofar their exposure to the UK is concerned. Appetite for lending on the market, or investment in securities is also likely to decrease, while investors look for more predictable ways to invest their funds.

Furthermore, financial services firms based in Britain, from banks to clearing houses and funds, could lose their money-spinning EU "passports", and trading/dealing with such institutions from Romania may need to cease, pending alternative structures from other EU countries are put in place.

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Competition & IP

The triggering of the procedure laid down in article 50 TFEU will also have notable effects in terms of the extent of IP rights. The first effect will be felt in relation with EU trademarks. Such registration will no longer benefit from protection on the territory of a state which is no longer a Member of the EU. Consequently, the enabled actors will most likely have to conceive a strategy consisting in either transitory provisions or a self-standing separate agreement via which EU trademarks registered with the EU Intellectual Property Office ("EUIPO") up to the date of the Brexit to benefit from the same protection in the UK as they enjoyed ante Brexit. The UK leaving the EU will not impact, however, on the possibility of British citizens or companies to seek and obtain the registration of EU trademarks, such system being open to any individual or company, irrespective of the legal status of the jurisdiction to which they belong. The above-mentioned considerations apply mutatis mutandis to the registration and effects of EU industrial models and designs which are subject to registration with the EUIPO as well.

Another major impact of the Brexit will be felt in respect of the Unified Patent System ("UPS"), a project in which the UK was a frontrunner. Such system advocates for the creation of a EU-wide patent system and of a dispute resolution system that ensures flexibility and celerity to such procedures. During the preparation of the launch of the UPS, it was determined that the seat of the Unified Patent Court ("UPC") will be in London. In the context generated by the Brexit, it appears impossible for the UK to continue its membership in the UPS and to the UPC. Moreover, the EU decision-making bodies will have to identify a new suitable venue for the UPC, in an EU Member State, in order to precisely reflect the union-wide character of this new project.

Lastly, a question can be raised in respect of the value presented by ECJ decisions on copyright matters, many of which were rendered upon requests from UK courts of law, in the novel British legal system. Conversely, as regards the influence of UK jurisprudence, after a notable and laudable influence of the overall European framework, especially as regards the copyright-related directives adopted by the EU bodies, one may infer a diminishment, especially given the prevalence of the Continental *droit d'auteur* system over the copyright system specific to Common Law jurisdictions.

A Brexit impact on competition - although effects will be noticeable only in a two-year term, such are important from a competition law perspective, as all three pillars thereof will be impacted in a certain way. Thus, in terms of antitrust matters, articles 101 and 102 TFEU prohibiting anticompetitive practices at vertical and horizontal levels, as well as the abuse of dominance, will nevertheless be applicable to such breaches of competition perpetrated by UK companies and which have effect in the EU. Specifically a UK company member in an international or multinational cartel will nonetheless be subject to EU rules on competition and fines imposed by the European Commission, as will be a UK company which is dominant on the Single Market and which abuses its position thereupon.

A downside for the European Commission at least will be represented by the loss of its powers to directly conduct dawn-raids at the UK-based headquarters of investigated companies. However, a situation in which the UK's Competition and Markets Authority ("CMA") will conduct such inspections for the EC is not unconceivable in the future and depends strictly on the manner in which an agreement between the EU and UK competition law enforcers will be drawn up and executed. A down side for both the CMA and the European Commission is represented by the CMA's exit from the European Competition Network, an organization reuniting EU national competition authorities which exchange case information, experiences and decide upon policy making for competition law purposes. Ex post Brexit, the mandatory nature of the ECJ's decisions on points of competition law will be lost, but, the fact that the British courts' antitrust jurisprudence is in line with EU practice will ensure a congruence between the two systems for years to come.

In terms of merger control, the benefit of the one-stop-shop services offered by the European Commission will be lost. A merger control operation meeting the thresholds set by both UK and EU merger control legislation will be assessed and cleared by both the CMA and the European Commission which will burden the clearance and implementation process of the merger. Moreover, such may prove to be deterrent to investments due to the two-fold review of mergers and the potential different outcomes.

Finally, as regards State Aid rules, the UK will no longer be bound by the prohibition of aid consecrated in the TFEU. Thus, should it decide to support different companies, it will do so via its own national provisions (existing or regulated in the future) but it may also have to observe other State Aid-related obligations stemming from other international engagements undertaken by the UK, such as its membership in the World Trade Organization.

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Corporate & Commercial

In the event of an implemented Brexit, still looking at this as a possibility rather than a certainty, legal structures designed to take advantage of EU-wide arrangements or tax regime will require immediate attention to ensure they would continue to have their desired effect. There will be limitations and costs to it. However, there might be some work-arounds for UK-based companies to counteract effects of access to the EU's single market becoming restricted.

At first glance, one possibility would be for Britons to pursue a fresh bilateral trade agreement with a friendly EU state (such as Romania). Then, by establishing a Romanian subsidiary, a UK-based company might avail itself (indirectly) of the pass porting regime to further expand throughout the remaining 27 EU members.

Significant impact on existing or new contracts is not to be necessarily considered an utmost priority, however, some contracts that contain an obligation for parties to comply with applicable laws or refer to compliance with EU derived legislation might need to be adapted. To this extent, customers and suppliers will need to review their contracts to determine whether any amendments to their contracts are required to be made, who is liable for any related compliance and who will bear the cost. The impact could be particularly substantial in regulated sectors.

Although remotely dangerous, we cannot exclude a scenario where a contracting party could claim a contract is frustrated due to Brexit, for example, where legal changes affect the lawful ability of service provider to deliver. Missing bits and pieces may also arise in existing contracts as a result of the non-applicability of any EU regulations or derived laws, including reference to EU standards that may need to be amended to refer to a suitable substitute.

Moreover, risks may appear where contracts already include a material adverse change clause, aimed to give the contracting party the right to retract if such an adverse change occurs in relation to the target company's business, or assets. It might also be that a purposely drafted "force majeure" clause could be triggered by Brexit, however it will ultimately be for the courts to consider the intention of the parties in relation to the terms of the agreement as a whole before giving specific effect to such provisions.

We also see scope to a disclosure position with respect to Brexit, which should be in place irrespective of the possible parallel regulatory and/or contractual obligations that might already impose it. Customers and suppliers, as well as investors, lenders and auditors may have a contractual or even legal right to be informed of a significant shift resulting from the UK's new status. Nevertheless, it might also be in the best interest of an entity to anticipate such effects and disclose them to relevant stakeholders and partners rather than being passive until effects emerge.

What about using English law or jurisdiction in a contract? Essentially, although parties to commercial contracts should be able to continue the same standing as today, post-Brexit status may affect the approach that parties take to including English governing law or jurisdiction clauses in their contracts where enforcement of English judgments would become more difficult within the remaining EU.

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Labor & Employee Benefits

The European Union legislation comprises extensive rules on employment rights, such as rules on discrimination, working time, rest time and transfer of undertakings. In theory, in the event of a Brexit actually taking effect pursuant to triggering Art. 50, the UK government could repeal or amend such laws, fact that will affect the Romanian citizens who work in UK, being possible the loss or the limitation of their employment rights.

Another area in which a Brexit could affect both employers and employees is the free movement of workers. Currently, the EEA workers have the right to reside and work in EEA without specific visas or work permits. Free movement restrictions in the event of a Brexit will directly impact the free access of Romanian citizens on the UK employment market and vice versa. Thus, without specific free movement provisions, employees from Romania could be subject in UK to the same visa rules and work permits as non-EEA workers and those moving from the UK could be subject to the equivalent rules in Romania.

Depending on the exit conditions, entities could implement specific measures affecting the employees, such as business relocation from UK, downsizing or termination of the secondment arrangements between UK entities and Romanian entities etc.

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Tax

Further to completing the exit negotiations with the European Commission, the EU legislation will no longer apply to the UK i.e. neither directives and regulations nor CJEU case law and developed principles.

This may lead to certain tax issues, one of the most important being that the current intra-community VAT exempt trade will turn into import/export transactions, with the consequences that (i) import VAT would be pre-financed by Romanian companies, upon acquiring goods from the UK and (ii) the Recapitulative and Intrastat declarations will no longer be filled in relation to any UK transactions (i.e. customs formalities and declarations will replace these VAT statements). Also, British goods may suffer certain customs duties upon importation into Romania, although such duties may be lowered further to exit negotiations (the same would apply to Romanian goods exported to the UK).

Another important aspect as regards VAT on transactions carried out with UK partners refers to the 20% VAT to be charged by Romanian suppliers on services such as loading/unloading/handling of goods (e.g. by local logistic companies to their UK clients), works on movable tangible property (e.g. by Romanian manufacturers, under a toll processing agreement with UK contractors) and local transport of goods (e.g. by transport companies, for the benefit of UK businesses), should such services be effectively performed in Romania.

In the field of direct taxation, the EU Directives that currently exempt from withholding tax the intra-group flows of dividends, interest and royalties will no longer apply and, consequently, additional taxation of these flows of income may not be excluded, making cross-border business more burdensome (however, further reductions may be obtained based on the provisions of the double tax treaty between Romania and the UK).

Last but not least, the Romanian employees temporarily working in the UK may be required to pay additional social security charges there, as the option to remain insured only under the social security scheme provided by Romania (by means of the A1 form) would no longer be available.

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