

# Momentum

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**Brexit**

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**31**

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**1° quarter**

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### Brexit

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# **The EU-UK Trade and Cooperation Agreement: doubts and challenges**

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The signature of the trade cooperation agreement between the European Union (EU) and the United Kingdom (UK)<sup>1</sup> marks another step in the Brexit process, following the **2016 referendum**, the **withdrawal notification** (2017), the **withdrawal itself** (1st February), the **agreement's signature** (24th December 2020) and its **provisional application** (1st January 2021). The provisional application has a precise meaning: if it is considered that this is not a mixed agreement and that, as the European Commission argues, it does not require approval and ratification by the Member States, then **it is in force and is applicable in the legal order of the EU and of the Member States**, and may even exclude the application, in the exact extent of its provisions, of contrary national legislation. But what will happen if the European Parliament does not approve it or if the approval decision is subject, within the boundaries of the European Court of Justice jurisdiction, to an appeal? These are scenarios that have not yet arisen, but which could have cataclysmic implications.

Reality shows that Brexit turned out to be a semi-hard Brexit, since neither the application of the European Economic Area's (EEA) solution was followed nor the UK formally participates in the internal market nor the Customs Union, the main objectives of European economic integration shared between the EU and the UK until the Brexit's moment (as the euro or the Schengen area were never joint projects).

The objective, according to PM Boris Johnson, was that of *«take back control of our laws, borders, money, trade and fisheries. It changes the basis of our relationship with our European neighbours from EU law to free trade and friendly cooperation»*. It should be remembered that despite the enormous range of differences between the supporters of the "leave" vote in the referendum, they converged essentially on a return to the legislative sovereignty of the British Parliament (compared to the legislative process in the formula resulting from the Treaty of Lisbon - Johnson even wrote that *"the UK will fully recover its national independence"*) and independence also from the EU judiciary power, represented by the Court of Justice of the European Union (in particular from the Court of Justice itself, *stricto sensu* - in the words of the UK PM, *"Most importantly, the agreement provides for the UK to take*

*back control of our laws, affording no role for EU law and no jurisdiction for the European Court of Justice"*).

The conclusion of the agreement was an economic and civilisational inevitability. And this is so since the economic interdependence between the Parties (EU and UK) and the importance of their respective markets demanded it. But also because neither Party wanted to take the risk of the absence of an agreement and the chaos and uncertainties that would arise, both from the economic and other points of view (security, cooperation in combating terrorism, movement of persons, etc.). This is why the agreement was accompanied, in record time, by a decision by both Parties **to apply it provisionally** (from 1 January 2021).

The trade and cooperation agreement is most complex, as it was already the withdrawal agreement<sup>2</sup> and the legal framework that the EU has put in place over the last few years. Focusing the attention on the agreement: the UK becomes a third country for all intents and purposes.



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A joint Partnership Council is established and also an independent arbitral body to settle disputes. We anticipate that this part will not prove so peaceful, but the future will tell.

The agreement does not cover many matters, such as foreign policy, security and defence, or matters on which the EU wanted to maintain the intangibility and integrity of its legislation and control (financial services, phytosanitary protection, cybersecurity, etc.). Each Party will maintain its own requirements. But it covers matters such as trade in goods, including digital trade, intellectual property, environment, investment, competition, public aid (but e.g. the “*joint declaration on subsidies monitoring policies*”), fiscal transparency, transport (road and rail, but air not so much), energy, protection of personal data, the controversial fisheries and access to the extensive waters of the UK, etc.

The agreement is very substantial and elaborate. It amounts up to almost 1500 pages! It provides for free circulation of goods, including agricultural products (unlike an EFTA free trade area) and facilitates customs procedures (“Authorised Economic Operators” regime). Although the origin of goods is again relevant, exporters can self-certify. However, the principle of mutual recognition will not apply in the traditional way in which we operate at UE level, neither to goods nor to services. And there will be controls on both sides, which will inevitably make economic activity less porous. In the case of services, home country control will no longer apply. In professional qualifications, mutual recognition no longer operates in the same way. At the same time, however, the agreement has numerous tax and customs implications: VAT has been covered and the fight against harmful tax regimes has been the subject of a joint political declaration, as well as others which will be read out below. And just as importantly, in labour or movement matters, no stricter regime is applied than was already the case under the regimes for movement of third-country nationals within the EU (but here in both directions). In financial services, the agreement was a semi-agreement,

deferring for the future a final understanding on the principles of equivalence and freedom. In transport, the paradigm is the “level playing field”, covering matters such as passenger rights, safety or, without limitation, environmental protection. Airspace management and safety will be the subject of an agreement. Finally, for the time being, the UK will participate in European programmes in the areas of R&D and space. Including Horizon Europe (successor of Horizon 2020), in addition to others.

Regarding the rights of individuals, it should be recalled the **bilateral agreement** concluded between Portugal and the UK on the participation in local elections of nationals of each state residing in the territory of the other<sup>3</sup>. Although the UK leaves the area of freedom, security and justice created with the Treaty of Amsterdam (remember that the UK has never participated in the Schengen area), the trans-European platform for the protection of fundamental rights is reaffirmed (a common value of the EU Member States and the UK, expressed in the ECHR and in the European Court of Human Rights), the visa waiver (for short periods) is maintained and concerns in relation to social security (pensions, health care, accidents at work or maternity benefits) or health (maintaining conditions for the development, here, of an enlarged market for health services, in which Portugal may invest) are safeguarded.

The UK will no longer have immediate access to European databases (e.g. the Schengen Information System II), but the exchange of information on matters such as air passenger data, criminal records, DNA, fingerprints or vehicle registration is regulated. The agreement also establishes forms of cooperation with Europol and Eurojust, which is essential in matters such as the fight against cross-border crime, money laundering and terrorism. The mechanism of the European Arrest Warrant will no longer apply (an area in which there has been very significant case-law in recent times), creating another mechanism, of a voluntary nature. It is impossible to cover here – even despite the texts that follow – all the changes that this new reality will bring about. The importance that the British economy and the



interests of Portuguese and British companies and citizens have, here and there, justify the attention that SÉRVULO devotes to all regulatory and practical aspects that this new framework will bring.

Despite the uncertainties, the importance of the Agreement for everyone – people and businesses – is unquestionable. **On the one hand**, in 2019, 10% of imports of goods from the EU-27 originated in the UK, compared to 15% of exports<sup>4</sup>. **On the other hand**, 53% of goods imported by the UK originated in the EU, against 46% of exported goods. For Portugal, the UK is a permanent and historical ally (as Winston Churchill recalled on 12 October 1943, when he submitted for Parliament's approval the agreement to use the Azores in the war against the nazis<sup>5</sup>), fundamental in many critical times of our history. But it is also a fundamental market (the UK is the 4th largest destination for our exports of goods and services, representing 6% of Portuguese exports in 2019; an impressive decrease from 9.6% in 2017). And here and there, thousands and thousands of citizens and families live and work, demand

the generous application of Article 15 of our Constitution, which highlights Portugal's culture open to the world.

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[1] In fact, there are several agreements contained therein – v.g. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2020:444:TOC> (JO, L 333, of 31.12.2020) and <https://www.gov.uk/government/publications/agreements-reached-between-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-european-union>

[2] Already published in Portuguese – Miguel Gorjão-Henriques, Tratado de Lisboa, 9.ª ed., 2019.

[3] It came into force on 10.2.2020 – Notice no. 16/2020, DR, I, from 18.2.2020

[4] [https://ec.europa.eu/eurostat/statistics-explained/index.php/Extra-EU\\_trade\\_in\\_goods](https://ec.europa.eu/eurostat/statistics-explained/index.php/Extra-EU_trade_in_goods)

[5] [https://ec.europa.eu/eurostat/statistics-explained/index.php/Extra-EU\\_trade\\_in\\_goods](https://ec.europa.eu/eurostat/statistics-explained/index.php/Extra-EU_trade_in_goods)



# Cross-border mergers and the activity of UK companies carried out in Portugal

With regard to the United Kingdom's departure from the European Union, we point out two aspects (amongst many) of particular significance to companies:

- cross-border mergers;
- activity of companies with registered office in the UK carried out in Portugal

**Cross-border mergers – between companies with registered office in Portugal and companies incorporated under the laws of the UK and with registered office, central administration or principal place of business in the UK**

From a corporate law perspective, one of the significant changes arisen from the UK's departure from the EU regards the legal regime applicable to cross-border mergers.

With the UK's departure from the EU, the legal regime on cross-border mergers of limited liability companies laid down by Directive 2005/56/EC of the European Parliament and of the Council, of 26 October 2005 and transposed into the Portuguese Companies Code by Law 18/2009 of 12 of May, is no longer available for companies with registered office in Portugal and companies incorporated under the laws of the UK and with registered office, central administration or principal place of business in the UK intending to merge.

Thus, instead of the application of relatively uniform and simplified legal regimes in the two countries on mergers between companies with registered office in Portugal and companies with registered office in the UK, which were based on Directive 2005/56/EC, the possibility and feasibility of mergers based on the (cumulative) application of the two countries' internal regimes will now have to be assessed.

In the absence of an UK's internal legal regime specifically applicable to mergers, the extent to which it will be possible to achieve similar effects to those arising from mergers, through the application of other UK internal rules, will have to be analysed, as well as their compatibility with the Portuguese law.

The analysis of the rules on the protection of employees (e.g., their potential participation in the merger procedure); on the rights of shareholders; on the protection of the merging companies' creditors; on the registration and effective date will be particularly relevant.

We anticipate, therefore, an increased complexity and, possibly, an increase on the costs related to merger procedures between companies with registered office in Portugal and companies with registered office in the UK carried out after the entry into force of the Trade and Cooperation Agreement between the EU and the UK.

#### **Activity of companies with registered office in the UK carried out in Portugal**

Another relevant aspect raised by the departure of the UK from the EU regards the activity of companies with registered office in the UK carried out in Portugal, considering that these companies no longer benefit from the freedom to provide services laid down in Directive 2006/123/EC of the European Parliament and of the Council, of 12 December 2006.

It might be questioned whether companies with registered office in the UK intending to carry out their business in Portugal, for a period longer than 1 year, after 1 January 2021, and that would benefit from the freedom to provide services pursuant to Directive 2006/123/EC were it not for the UK's departure from the EU, are now subject to the obligation to establish a permanent representation in Portugal and to comply with the provisions set forth under

the Portuguese law on commercial registration and also if they are subject to the consequences arisen from the breach of such obligations, pursuant to paragraphs 1, 2 and 3 of article 4 of the Portuguese Companies Code.

It would appear that under the Trade and Cooperation Agreement between the EU and the UK, the general rule applicable on this matter is that Portugal will not be permitted to require a company with registered office in the UK intending to supply services in Portugal to incorporate a company under the Portuguese law or to incorporate a branch (see SERVIN 3.3 the Trade and Cooperation Agreement between the EU and the UK), save for the exceptions foreseen for specific sectors, such as, amongst others, certain types of financial services, energy and related activities.

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## After all, EU trade marks and designs do not escape unharmed

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With the withdrawal of the United Kingdom (UK) from the European Union (EU), intellectual property rights were subject to changes, including those registered at the European Union Intellectual Property Office (EUIPO), namely trade marks and designs.

As foreseen in the Withdrawal Agreement, registration mechanisms were created at the *Intellectual Property Office* of the UK (UKIPO), including the automatic registration of rights including the automatic registration of rights on 1 January 2021, comparable to those granted by EUIPO, benefiting from similar protection to that offered in the EU and with no need for intervention from the rights' owners.

Nevertheless, there are exceptions. In some situations, such as the enforcement of a priority right in the UK, it is essential that the rights' owners act in due time; whereas in situations where an invalidation process of such rights in the EU is pending, the rights' owners may have their UK trade mark or design affected.

Moreover, it must be stressed that the rights registered at the UKIPO are independent from those registered at the EUIPO. Hence, these rights may be challenged, assigned, licensed or renewed separately and are subject to different renewable fees. Also, UK lawyers are no longer able to represent their clients on new applications or proceedings at the EUIPO.

Therefore, despite the effort to mitigate the effects of Brexit in this matter, trade marks and community registered designs' owners should be aware of all these changes, otherwise they risk having the protection of their rights affected, with possibly no turning back. After all, EU trade marks and designs do not escape unharmed.

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# Impact of Brexit on Civil and Commercial Litigation issues

The end of the transitional period and the departure of the United Kingdom from the European Union have an impact at various levels on Civil and Commercial Litigation, notably and with special relevance:

- Jurisdiction, free movement of judgements, and establishment of enforceable titles
- Service of judicial and extrajudicial acts, and taking of evidence
- Cross-border insolvency procedures
- Determination of the applicable law to contractual and non-contractual obligations

## I. Jurisdiction, recognition and enforcement of judgements in civil and commercial matters, and European Enforcement Order

With the departure of the United Kingdom from the European Union, European provisions concerning jurisdiction, recognition and enforcement of judgements in civil and commercial matters provided for in **Regulation (EU) No. 1215/2012 of the European Parliament and of the Council** will no longer be applicable in the United Kingdom or in other Member States, in situations involving the United Kingdom, to the proceedings brought as from 1st of January 2021, although these provisions will continue to apply to proceedings brought before the end of the transitional period, even if the judgement is delivered subsequently.

Similarly, as regards the **enforcement of authentic instruments and court settlements**, the corresponding European provisions will be applicable only to the instruments formally drawn up or registered and to the settlements approved or concluded before the 1st of January 2021.

On the other hand, the regulation that created the **European Enforcement Order** for uncontested claims<sup>1</sup> will only remain applicable to judgments, authentic instruments and court settlements to which the abovementioned European rules continue to apply to, as long as the certification as a European Enforcement Order has been requested before the end of the transitional period.

Regarding the **European payment order**, applicable to cross-border cases in civil and commercial matters, Brexit will prevent resorting to this procedure as well, both in courts of the United Kingdom and in Portuguese courts, in situations involving the United Kingdom. However, **Regulation (EC) No. 1896/2006 of the European**

**Parliament and of the Council, of 12 December 2006** creating and regulating this procedure, will still be applicable to European payment orders requested before the 1st of January 2021.

The cases where European regulations are no longer applicable will be regulated by the conventions and treaties to which the United Kingdom<sup>2</sup> and Portugal are contracting parties and, failing that, by each States' domestic laws, in order to solve issues of judicial cooperation. In the absence of an applicable international instrument, it should be noted that judgements handed down by the United Kingdom in proceedings brought after the 1st of January 2021 will not be automatically recognised in Portugal and will need to be revised and confirmed by Portuguese courts, namely for enforcement purposes.

In this regard, Brexit entails a significant step backwards in terms of ease of recognition and enforcement of foreign judgements, handed down in European Union countries, in the United Kingdom, as well as of extrajudicial payment orders issued there, and vice versa, besides putting an end to uniformity of rules in matters of court jurisdiction.

## II. Service of judicial and extrajudicial acts in civil or commercial matters and taking of evidence in civil or commercial matters

Likewise, Brexit has significantly reduced the previously existing ease of cooperation between courts on notifications, including summonses, and of evidence, in the relations between the United Kingdom and Member States.

In fact, the withdrawal of the United Kingdom from the European Union also limits the application of **Regulation (EC) No. 1393/2007 of the European Parliament and of the Council, of 13 November 2007, on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)** to judicial and extrajudicial documents received for service

only until 31 December 2020. From this date, the **Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters** will apply, since the United Kingdom and Portugal are both contracting parties.

The same applies to **Regulation (EC) No. 1206/2001 of the Council, of 28 May 2001, on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters**: it is applicable only to requests received by 31st of December 2020, and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is applicable from that date.

## III. Cross-border insolvency proceedings

Lastly, concerning **cross-border insolvency proceedings** with connections to the legal orders of the United Kingdom and Portugal, **Regulation (EU) No. 2015/848 of the European Parliament and of the Council, of 20 May 2015**, governing, namely, the jurisdiction of courts to open insolvency proceedings and the automatic recognition of a decision to open main insolvency proceedings, without further formalities, in any Member State, no longer applies. However, this Regulation will continue to apply to cross-border insolvency proceedings as long as the main insolvency proceedings has been opened (in Portugal or the United Kingdom) by the 31st of December 2020. The proceedings initiated after this date will be regulated - in the absence of international agreements or conventions on the matter - by the domestic laws of each State.

## IV. Rome I and II Regulations

Until leaving the European Union, the United Kingdom was bound by **Regulation (EC) No. 593/2008 of the European Parliament and of the Council, of 17 June 2008**, on the law applicable to contractual obligations (Rome I). In addition, the United Kingdom was equally bound by **Regulation (EC) No. 864/2007 of the European**

**Parliament and of the Council, of 11 July 2007, on the law applicable to non-contractual obligations (Rome II).**

In order to forestall the effects of Brexit in this area and to prevent the determination of applicable law from becoming a more complex, time-consuming and uncertain operation, considering the impact it could have on relations between economic operators in the United Kingdom and the European Union, the United Kingdom has incorporated those instruments into its internal legal order, meaning that the solutions contained in the Regulations will therefore remain applicable.

[1] Regulation (CE) No. 805/2004 of the European Parliament and of the Council

[2] It should be noted that the United Kingdom has applied to accede to the 2007 Lugano Convention (to which, as a Member State of the EU, Portugal is a contracting party), which, if approved, will govern matters of jurisdiction, recognition and enforcement of judgements in civil and commercial matters between Portugal and the United Kingdom.

[3] Through the means provided for in Article 68.º subparagraph a) of the Agreement on the withdrawal of the United Kingdom of 12/11/2019

[4] Idem


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**In this regard, Brexit entails a significant step backwards in terms of ease of recognition and enforcement of foreign judgements, handed down in European Union countries, in the United Kingdom, as well as of extrajudicial payment orders issued there, and vice versa, besides putting an end to uniformity of rules in matters of court jurisdiction.**

# Working (o)n Brexit

Once the transition period is over, it is of utmost importance to assess the labour impacts of the UK's withdrawal from the European Union. With this goal in mind, the Labor department of Sérvulo proposes to answer to the most pressing issues raised around this new reality.

## 1. During the transition period, what have been asked to UK citizens living and working in Portugal to continue working on national territory?

UK citizens and their respective families had to apply to the City Council (Câmara Municipal) of their area of residence for a *Registration Certificate* (Certificado de Registo), valid for up to five years. After completing 5 years in Portugal, UK citizens may then apply to the Borders and Immigration Agency (SEF) for a *Permanent Certificate* (Certificado Permanente), which will be valid for 10 more years, subject to renewal. For those who already hold a *Permanent Certificate*, there will be no further steps to consider, and they remain able to work, study and access to public services and benefits without any implications whatsoever.

## 2. What if, following the end of the transition period, a UK citizen wants to work in Portugal now?

Except in the event of future legislative amendments, the rules on residence and work permits for third country nationals will apply to UK citizens coming to Portugal to work. However, the criteria for staying in Portuguese territory will depend on the specific status of each individual, as well as on the foreseeable residence period in Portugal and on the employment conditions for the purposes of the work permit requirements. Nevertheless, family members of UK citizens already living in Portugal may apply for a visa and a residence permit free of charge, through the same process applicable to UK citizens residing in Portugal during the transition period, as explained in the previous point.

## 3. Under what conditions may UK citizens travel to Portugal for professional reasons?

Currently, UK citizens can only travel to Portugal for periods inferior to 3 months without a work visa, although, in practice, after those 90 days nothing prevents them from traveling to the UK and returning immediately to Portugal, since there is no annual limit for stays on national territory. Regarding the purposes of these short term professional trips, the Exit Agreement provides for all the authorized activities to be carried out by visitors (among them, meetings and consultations with partner



companies, marketing research, training seminars, fairs and exhibitions, as well as after-sales services and commercial transactions), as long as they are carried out within the scope of their company and respective establishments and partners in Portugal, being expressly forbidden the provision of services to local entities, without having a specific work visa (even if such services are provided during the referred 90 days). In short, UK citizens may travel to Portugal on business trips, but may only carry out the activities mentioned in Annex III of the Exit Agreement, in the scope of their professional activity.

**4. And can companies established in Portugal hire UK citizens? Is there any specificity to consider now that the UK is no longer an EU Member?**

Companies will have to take extra care when hiring, since

it is also their obligation to ensure that these employees have the right to work in Portugal, under penalty of a fine varying between 2,000.00€ and 90,000.00€, depending on the respective company's turnover and the degree of fault. Furthermore, hiring a foreign employee who is not an EU citizen requires a written employment contract, which must observe all the mentions set forth in Article 5 of the Portuguese Labour Code and be registered with the Authority for Working Conditions..

**5. What about the situation of cross-border workers?**

Cross-border workers - i.e., working in the UK, but living in Portugal, or vice versa – have had their rights protected by the Exit Agreement (Brexit). Therefore, they should request the competent Portuguese authorities to issue a document proving their employment status to simplify the trips between both countries.



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# ● Brexit: Aspects which individuals should consider

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**With the withdrawal of the United Kingdom from the European Union, British citizens will lose their European citizenship rights being subject to a set of different rules and obligations in each of the Member States.**

## **Tax representation**

Citizens who have a Portuguese taxpayer number and have an address in the United Kingdom are now required to appoint a tax representative.

Under the transitional regime, they can do so until June 30, 2021, without any penalty.

As for new registrations, as well as changes of address to the UK, it is mandatory to appoint a tax representative as of now.

## **New residence permit**

British citizens will also deal with immigration restrictions, in accordance with the rules in force for non-EU citizens.

For UK citizens who lived in Portugal on 31 december 2020, a new residence permit has been created which replaces the European Union's residence documents (i.e. Certificate of Registration as European Union Citizen, issued by the City Halls and Permanent Residence Certificate issued by the Foreigners and Border Service). The exchange of the certificates can be made until the end of June 2021.

Citizens who come to live in Portugal henceforth, they require a residence visa and permit, being eligible for the different existing categories in Portuguese legislation, including the "Golden Visa" – option which not only allows them to travel to Portugal but also within the Schengen area.

Notwithstanding, such eligibility has not yet been confirmed by the competent entities.

## **European Health Insurance Card**

Even for citizens covered by the Withdrawal Agreement, the European Health Insurance Card, valid in EU Member-States, is no longer valid in the UK.

The UK has already informed Member-States that it will issue a new card to this end. However, until the new card is created, a Provisional Replacement Certificate should be issued.

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# ● Brexit: what changes tax-wise for companies?

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**The end of the transitional period and the consequent withdrawal of the UK from the European internal market generates a potential tax impact on the relations between Portuguese and UK companies, which may take on several dimensions.**

## **Interest, royalties and dividends subject to withholding tax**

For tax purposes, legislation such as the Interest and Royalties Directive and the Parent-Subsidiary Directive, are no longer applicable. Therefore, not only dividends but also interest and royalty payments made between Portugal and the UK are now subject to withholding tax. Notwithstanding the application of the Double Taxation Treaty, which allows for the reduction of the mentioned taxation, it still represents a constraint in the relationship between companies based in these two countries. Regarding specifically dividends paid by a Portuguese company to a UK-based shareholder, they continue to benefit from an exemption from withholding tax, under the participation exemption regime foreseen in Portuguese legislation, provided the requirements at stake are met.

## **Taxation of restructuring operations**

Similarly, the Mergers Directive requires that companies are headquartered in a EU Member-State in order for mergers and spin-offs, among other operations to be considered tax-neutral, and, consequently, will henceforth be taxed.

## **Other lost benefits**

There is a set of Portuguese internal rules, which UK entities will no longer benefit from, as they apply exclusively in relations with EU entities, such as the special tax regime for groups of companies and the tax regime for the transfer of residence of a Portuguese company to another EU Member-State.

## **VAT on services provided**

EU VAT rules no longer apply.

Therefore, the services rendered by a provider established

in Portugal to a taxpayer in the UK and vice-versa will be considered outside of the EU's scope.

### Customs controls

Trade between Portugal and the UK will be subject to customs procedures and controls, similar to what happens with all third countries.

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# The provision of financial services in Portugal after Brexit

The 1st of January of 2021 marked the end of the United Kingdom's participation in the European internal market.

As financial services were not covered by the agreement reached between the United Kingdom and the European Union on December 24th of 2020, the decision adopted in Portugal was to establish a special transitional regime, provided for in Decree-Law no. 106/2020 of 23 December, on the basis of which, subject to specific conditions, certain financial services may continue to be provided in Portugal by the following entities based in the United Kingdom:

| Institution                                                   | Financial Activity                                                                                                                              |
|---------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|
| Credit institutions                                           | . Acceptance of deposits<br>. Lending<br>. Investment services and activities and ancillary services<br>. Payment services and e-money issuance |
| Investment firm                                               | . Investment services and activities                                                                                                            |
| Payment institutions                                          | . Payment services                                                                                                                              |
| Electronic money institutions                                 | . E-money issuance<br>. Payment services                                                                                                        |
| Management entities of undertakings for collective investment | . Management of collective investment undertakings                                                                                              |



Although subject to specificities, depending on the type of institution and the financial activity at hand, the solution adopted in Portugal follows a common pattern: **to allow those financial institutions based in the United Kingdom** which have benefited from the “European passport” system to operate in Portugal either through the creation of a branch or through the freedom to provide services framework, under the CRD<sup>1</sup>, MIFID<sup>2</sup>, UCITS<sup>3</sup> and AIFMD<sup>4</sup> Directives, **to continue to provide such services in Portugal as from January 1st of 2021, provided that, within three months of that date** (i.e. until March 31st of 2021), **such institutions inform the respective supervisory authority**, by submitting the appropriate forms, if they wish, **alternatively to: (i)** terminate the contracts in force; **or (ii)** request authorization to maintain the activity in Portugal.

Should said institutions fail to proceed with the above mentioned communication or request authorization to maintain their activity in Portugal within the legally prescribed period, the activity of the said institutions in Portugal will be limited to the mere execution of the operations necessary to terminate the contracts in force, and they must cease their activity in Portugal by December 31st of 2021.

If they require authorization to maintain their activities in Portugal, the institutions concerned may continue to provide their services in Portugal, with the following particularities:

- a) As regards the carrying out of banking activities, the provision of payment services and the issue of electronic money, such activities shall be limited to the performance and enforcement of contracts entered into until 31.12.2020, and it shall only be possible to enter into new contracts or carry out new operations after obtaining prior authorization from the Bank of Portugal, under the terms of the framework laid down for entities from third countries.
- b) As for the provision of investment services and services relating to undertakings for collective investment, they may continue to take place, including entering into new contracts, provided that the institutions concerned submit to the Portuguese Securities Market Commission (“CMVM”), by June 30th of 2021, a request for authorization to continue to operate in Portugal.

The national transitional regime also provides for the continuation in force of insurance contracts entered into before December 31st of 2020 by insurance undertakings based in the United Kingdom covering risks situated in Portugal or for which Portugal is the Member State of Commitment, and the insurance undertakings concerned must send to the Portuguese Insurance and Pension Funds Supervisory Authority (ASF), no later than February 28th of 2021, information on the contracts which will be kept in their portfolios, and must resend that information on an annual basis, no later than March 31st of each year. Finally, it should be noted that entities authorized to provide investor representation services in the United Kingdom may continue to act as common representative of bondholders in Portugal, until the maturity of the issue or the issuance program, provided that (i) the issue or the issuance program has a defined term; (ii) its appointment has taken place by 31.12.2020.

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[1] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013.

[2] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014.

[3] Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014.

[4] Directive 2011/61/EU of the European Parliament and of the Council of 8 July 2011.

# Public Procurement post-Brexit: a reform in the making

One of Brexit supporters' ambitions was for the United Kingdom (UK) to no longer have to comply with the European directives on public procurement. In this regard, one is reminded of the copy-out approach to the transposition of EU rules into domestic law in the UK. Thus, a departure from that legislation was expected, with some anticipating a possible return to the minimalist public procurement regulation which was prevalent in the early 1990s.

*The EU-UK Trade and Cooperation Agreement (TCA)*, dated 24/12/2020, contemplates public procurement rules referring to - although not entirely coincidentally - the objective and subjective scopes of the Government Procurement Agreement (WTO), to which the UK has become party. Amongst the several issues covered by these rules, (e-procurement, conditions for tenderers' participation, environmental and social objectives, etc.), we would highlight the obligation for a European tenderer to be treated in a **no less favourable** way than a UK tenderer in the context of procurement procedures carried out in this country, and vice-versa where the procedures are carried out in any EU Member State.

**UK public procurement legislation remains substantially unchanged for the time being**, with only a few formal amendments being made (for example, contract notices are no longer published in the OJEU, but instead via the Find a Tender online service). However, in December 2020, the British Government initiated a legislative reform of the public procurement law by publishing a **Green Paper titled Transforming Public Procurement**, under consultation until March 2021. The subsequent draft law is expected to be put forward by late 2021, to be approved in the summer of 2022 and to enter into force in September 2023, after a period of dissemination and much needed training.

Amongst the main proposals announced in the Green Paper there is the (alleged) simplification and called-for flexibility in terms of the available procedures and respective requirements, which aim to guarantee a greater margin of **discretion** for contracting entities to make public procurement related decisions based on **commercial judgments**. The details of these proposals will only be known when they are subsequently implemented into the law.

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