

Brexit: what might change

Pensions & Employment

Introduction

On 23 June 2016 the UK population voted for the UK's exit from the European Union (EU). The applicable exit procedure and certain possible legal consequences of Brexit for Pensions & Employment will be discussed below.

In the short term, we do not identify material changes for the legal practice. The European law and regulations will remain in force until the negotiations between the EU and the UK have been completed and the withdrawal procedure has come to an end. To which extent European law and regulations will also apply following the UK's exit from the EU, will largely depend on the outcome of the negotiations. One of the fundamentals of the EU is the internal market, allowing for the free movement of goods, services, workers and capital (Internal Market). In this context we note that in January 2017, Prime Minister May announced that the UK will opt for a "hard Brexit", meaning that the UK will no longer maintain membership of the Internal Market, nor accede to any associated status. Instead, the UK will seek a free-trade deal with the EU outside the Internal Market.

Brexit – background

Since 2007 (Treaty of Lisbon), the EU Treaty offers a Member State an explicit legal basis to leave the EU (Article 50 TEU). Pursuant to Article 50(2) TEU, the UK can start the exit procedure by giving notice to the European Council. The exit agreement will be concluded on behalf of the EU by the Council¹, acting upon a qualified majority² and after having obtained the consent of the European Parliament. The agreement must set out the arrangements for the UK's exit and take account of the framework for the UK's future relationship with the EU. The UK cannot participate in the relevant discussions or decisions of the European Council or Council.

The EU Treaties cease to apply to the UK from the date of entry into force of the exit agreement or, if there is no such agreement, 2 years after the date of notice under Article 50 TEU, unless the European Council, in agreement with the UK, unanimously decides to extend this period. The exit procedure has never been called for and the way forward is full of uncertainties. Apart from Article 50 TEU, no further provisions or guidelines apply.

1 The Council consists of a representative of each Member State at ministerial level, who may bind the government of the Member State in question and cast its vote (Article 16 TEU).

2 The qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States (Article 238(3)(b) TFEU).



Free movement of workers

After Brexit, EU citizens who would like to work and/or reside in the UK will probably need a work and/or residence permit and, vice versa, UK citizens who would like to work and/or reside in the EU may be required to apply for a work permit and/or residence permit.

For British nationals (and other nationals of European Member States) and their families, who are currently living and working in the Netherlands, the Dutch legislator provides the option of applying for a regular residence permit based on Dutch national law ("*Vreemdelingenwet 2000*"). A distinction would have to be made between British nationals who have already been resident in the Netherlands for a period longer than 5 years and those who have been resident for less than 5 years. British nationals who have already been working and residing in the Netherlands for a (uninterrupted) period of more than 5 years may have to apply for permanent residence.

The following requirements must be fulfilled:

- having an employment contract in the Netherlands;
- the employee must earn an income that will be higher than the income required according to the Dutch minimum wage act; and
- proof that they are subject to the Dutch National Health Insurance act.

British nationals whose current stay is less than 5 years will be faced with the condition that Dutch employers need to submit a separate work permit or they may have to use what is referred to as the highly skilled migrant program. The application for a work permit and a related residence permit would have to be based on an intra-company

transfer. If this is not the case, it will be very difficult to get permission to work and reside in the Netherlands. The highly skilled migrant program is based on the Dutch employer's recognition as sponsor as well as fulfilment of the income requirement for the employee.

Wage tax and social security

The EU Social Security Regulations may not apply to the UK and its citizens after Brexit. This may involve expats from a Member State to the UK and from the UK to a Member State no longer being covered by European coordination rules on social security. As a result, the applicable social security legislation may have to be determined by using bilateral treaties on social security or by using national social security laws.

Initial legal and day-to-day operational implications of Brexit will be relatively minimal for wage/personal income tax due to the fact that the right to levy tax is governed by bilateral tax treaties.

Employment legislation

It is highly unlikely that the existing employment laws in the UK which implement EU minimum requirements will be fully or even substantially repealed once the exit from the EU is invoked, as much of the employment protection reflects acceptable standards and could be considered as fundamental rather than administrative principles. Leading examples in that regard are the non-discrimination rights and equal treatment. Such rights, amongst others, were already originally embodied into UK law prior to the European standards.

Despite the above we deem it likely that the UK government will delete or alter some aspects of the UK employment legislation that is currently based on EU legislation in order to create more flexibility for employers, such as the Working Time Regulation (“WTR”), the Agency Worker Regulations 2010 and the Transfer of Undertaking Regulations 2006 (“TUPE”).

Working Time Regulation

Nowadays there is ongoing litigation regarding inconsistencies between the WTR and the European Directive. Recent decisions by the Court of Justice of the European Union (“CJEU”) have made this area far more complex and confusing. Examples are the accrual of holidays during sick leave and that holiday pay should be calculated on all aspects of the employee’s remuneration. With this in mind it is likely that the UK wish to alter the WTR in order to clarify the current working time rules for employers and to soften this area of legislation for employers, in any event with regard to the working hours, holiday pay and sick pay.

However, no radical changes are expected and any changes made will also be reduced due to contractual terms.

Agency workers

It is likely that the Agency Worker Regulations 2010 will be substantially reformed following Brexit due to the fact that this type of legislation has proven to be unpopular with both the UK government and employers. The Agency Worker Regulations 2010 provides for a fundamental protection to agency workers in such a way that the UK employers must apply equal employment terms and

conditions as those for permanent employees after 12 weeks on assignment. Reforming the Regulations would most likely result in creating more flexibility for employers to shape their workforce with both permanent employees and agency workers.

TUPE

TUPE includes far-reaching restrictions for employers harmonizing the employment terms and conditions of transferring employees following the transfer if the proposed changes are related to the transfer, unless the employer can point to an economical, technical or organisational reason for doing so. It is likely that following Brexit the UK government is aiming to make TUPE more business friendly and in that view changes to the TUPE legislation might see on creating more flexibility for employers to harmonise employment terms and conditions following an acquisition and further thereto the TUPE transfer. In relation thereto this could also affect the employer’s information and consultation rights.

Remuneration

For companies offering remuneration such as awards to employees under employee share and/or incentive plans in the UK or other countries in Europe, Brexit has no immediate consequences on such employee conditions. However, Brexit might have a future impact on remuneration. The Capital Requirements Regulations and Directive (“CRDIV”), the Alternative Investment Fund Managers Directive (“AIFMD”) and the Undertakings for the collective investment in transferable securities (“UCITSV”) may than no longer apply, resulting in a prohibition to have a European passport. On the other hand, a likely result is that the UK removes the cap on

banker's bonuses based on the CRDIV. In the Benelux governments announced to take all measures to welcome financial institutions and it is expected that regulations on bonus caps will become more flexible.

Pensions

Pensions can be deemed as one of the most important elements of the employment relationship in general. Much UK pension legislation is enshrined from the EU, such as scheme funding requirements for DB schemes ("**IORP Directive**") and non-discrimination. It is unlikely that the UK will abolish or radically revise the pension legislation, but it is uncertain if the UK will adopt the IORP II, which most certainly come into force by the end of 2018. On the other hand it should be noted that the current regulations will not be subject to the EU jurisdiction anymore and will therefore be solely interpreted in the UK context which could result in a distinction. In addition, the cross-border pension might be an issue once the UK exit the EU. Whilst currently pension funds can manage pension schemes for companies established in another EU country and can have a single pension fund for all their subsidiaries, it is uncertain if those options will remain post Brexit. Although it is likely that the UK pension industry will face challenges, the UK's exit from the EU would likely not result in immediate and substantial reform and changes.

Data Protection and Privacy

Depending on the outcome of the Brexit negotiations, the UK may be free to amend its data protection legislation after Brexit is completed. UK data protection law is currently based on the EU Data Protection Directive, which the UK has implemented in the UK Data Protection Act. As per 25 May 2018, the new EU General Data Protection

Regulation (**the "GDPR"**) will become directly applicable in all EU member states, thereby (largely) superseding data protection legislation (such as the UK Data Protection Act in the UK) as it currently applies in the EU member states. At this moment however, it is unclear whether Brexit will have been completed before 25 May 2018 or whether negotiations on the terms of a Brexit will still be ongoing at that time. This leads to significant legal uncertainty as regards the data protection regime that will apply in the UK after Brexit.

This uncertainty may be particularly problematic for transfers of personal data from the EU to the UK in the post-Brexit period. Currently such personal data transfers do not require any specific mechanisms to be put in place because the UK is an EU member state. Post-Brexit however, such personal data transfers may require a resolution by the European Commission confirming that the UK provides an adequate level of protection for personal data, which resolution in our view is unlikely to be taken unless the UK offers protection of personal data similar to the level of protection provided by the GDPR. Alternatively, the UK might opt to become an EEA-member. In the absence of an 'adequacy-resolution' or an EEA-membership, additional mechanisms should be implemented to validly transfer personal data from the EU to the UK, such as de EU Model Clauses or so-called Binding Corporate Rules. For businesses that transfer personal data from the EU to the UK and that wish to be as certain as possible that they can continue to transfer personal data from the EU to the UK without interruption, it is recommended to implement either Binding Corporate Rules or EU Model Clauses before Brexit is completed.



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What next?

Once the UK invokes Article 50 TEU, the UK and the EU will negotiate the terms of Brexit. It will be a highly political process and the outcome is as yet unclear. Therefore it is of the utmost importance to monitor the developments and the potential impact on your company's position closely. We will keep you informed about further developments.

Please contact your trusted adviser at Loyens & Loeff or send an e-mail to Brexit@loyensloeff.com if you have any queries.

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