



Brexit Briefing

Will Brexit affect Polish subsidiaries and branch offices of EU-based companies?

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Brexit will have major implications for UK investors operating in Poland or planning to establish a presence on the Polish market. The UK's departure from the EU will not only restrict UK investors in the forms in which they may conduct business in Poland, but may also pose a significant risk to those already operating in Poland.

While Brexit will not affect EU-based subsidiaries of UK entities, it is generating much legal uncertainty as to the status of already existing EU-based branch offices of UK entities.

The Withdrawal Agreement and Political Declaration on the future relationship between the UK and the EU was endorsed by leaders at a meeting of the European Council on 25 November 2018. While the Withdrawal Agreement specifies the terms of the UK's separation from the European Union, the Political Declaration provides a framework for the shape of future relations between the parties.

Brexit as a source of uncertainty for investors

There are many uncertainties surrounding the issue of Brexit. In general these relate to the scenario for separation—will the Withdrawal Agreement and Political Declaration be accepted or not. This issue is crucial to the shape of future trade and investment relations between the UK and the EU, and thus crucial to investors operating or planning to operate on these markets.

This note aims to briefly discuss the implications of Brexit for UK investors wishing to operate, or already operating, on the Polish market.

How will the EU freedom of establishment and cross-border mobility of entities change?

The separation of the UK from the EU indicates that UK investors, including entities incorporated in the UK, will not benefit from, among other things, the right to freedom of establishment under Art. 49 of the Treaty on the Functioning of the European Union. In this case, states remaining in the EU will be allowed to apply restrictions on setting up by UK investors—which will be non-EU by virtue of Brexit—of agencies, branches or subsidiaries in the territory of any EU member state, which may pose a risk to the cross-border mobility of entities set up in the UK.

Whether this is the case will ultimately depend on the following factors:

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- Separation scenario—will the Withdrawal Agreement and Political Declaration be accepted or not?
- If so, the provisions of the Withdrawal Agreement and Political Declaration themselves.

Polish legal framework: restrictions on freedom of establishment

The (corporate) nationality of an investor is crucial to determine its capacity to operate on the Polish market. If the investor is a national of a non-EU state, such as the UK in the speculative post-Brexit reality, restrictions on its freedom to conduct economic activity in Poland will apply.

Under Polish law, nationals of non-EU states that do not enjoy the right to freedom of establishment or equal treatment (derived, for example, from a bilateral treaty) may operate on the Polish market only through a limited-liability company, joint-stock limited partnership, limited partnership, joint-stock company, or representative office. This indicates that the option to set up a branch is not available to non-EU investors. In the Brexit context, this may pose a significant risk to the corporate cross-border mobility of UK investors and impose additional burdens. There is uncertainty, however, as to the treatment of UK entities already operating on the Polish market through a branch office, which may pose additional risk for such entities.

In addition, the option to provide services on a cross-border basis (from one EU-based entity to another EU-based entity) on the Polish market will not be available to non-EU nationals, which further limits the ability of third-country nationals to operate in Poland.

Changes for UK individuals acting for example as management board members in Polish subsidiaries

Brexit will not prevent non-EU nationals from undertaking duties as members of the management board of entities established in Poland. Polish law does not require members of management boards to be Polish nationals (or EU nationals), nor to be physically present in Poland to fulfill their duties. Still, it is clear that the status quo for a company's shareholders' meetings will remain unchanged; they have to be held in Poland.

Nonetheless, depending on the Brexit arrangements, visas and work permits may be mandatory. This will have to be monitored.

What is new for UK individuals acting as members of the management board of entities established in Poland, as well as commercial proxies and liquidators, is that they will have to have a correspondence address in the territory of the European Union. Otherwise, it will be necessary to appoint a person authorized to accept service of documents in Poland.