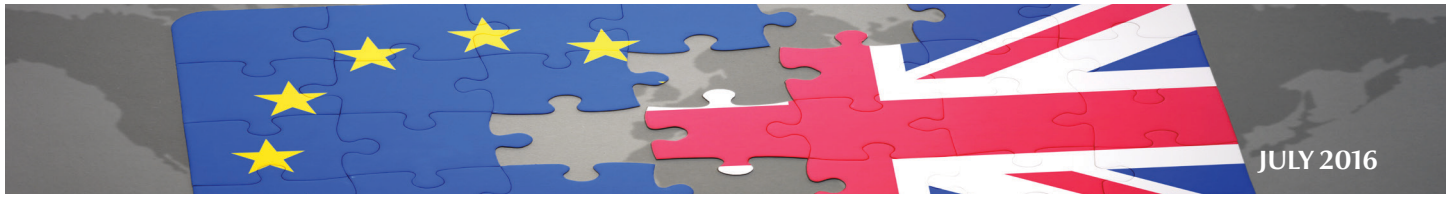




UPDATE BREXIT



BREXIT: CONSEQUENCES FOR UK CITIZENS LIVING AND WORKING IN PORTUGAL

In a referendum held on 23 June 2016, a majority of the UK electorate voted for the UK to leave the EU. This event created a number of doubts as regards its consequences for EU nationals living in the UK, as well as for UK citizens and nationals living in other EU Member States, such as Portugal.

In a referendum held on 23 June 2016, a majority of the UK electorate voted for the UK to leave the EU. This event created a number of doubts as regards its consequences for EU nationals living in the UK, as well as for UK citizens and nationals living in other EU Member States, such as Portugal.

Further to the referendum and in order to start a formal process with the EU, the UK must formally notify the European Council of its intention to withdraw from the EU. Under Article 50 of the Treaty of the European Union, this is to be done in accordance with UK's constitutional requirements, which may arguably entail a prior vote by the British Parliament and/or its repeal of the European Communities Act 1972 (as amended by later legislation). Once the exit procedure has been triggered, the UK and the EU will negotiate an agreement setting out the arrangements for the UK's withdrawal. The negotiation phase must be concluded within a period of two years, which may be extended by means of an unanimous decision of all Member States.

During the negotiation phase, the UK will remain a Member State of the EU, with all the corresponding rights and duties. Nonetheless, this context naturally creates a period of uncertainty and doubts for companies, as well as for UK citizens living and working in other Member States and EU citizens living in the UK, in particular in respect of their rights of residence and the applicable employment and tax rules.

The negotiation phase must be concluded within a period of two years, which may be extended by means of an unanimous decision of all Member States.

I. IMMIGRATION ISSUES

The UK's access to the single market and, as such, the future rules applying to the UK in terms of freedom of movement of goods, services, capital and persons is certain to be at the heart of its exit negotiations with the EU.

At this stage, it is not possible to anticipate the outcome of the negotiations. However, there are a number of potential scenarios as regards the freedom of movement of persons between the EU and the UK:

- **The EEA model (the so-called "Norwegian model")** – This would apply if the UK joined the EEA. The EEA Agreement provides, inter alia, for the free movement of persons. Therefore, the position of current and future UK citizens living and working in the EU (including Portugal) would remain unchanged.
- **Bilateral agreement providing for broad access to the single market** – In the case of a bilateral agreement specifically agreed between the EU and the UK, the free movement of UK citizens in the EU would depend on the specific terms of any such agreement. It is expected that any agreement granting the UK broad access to the EU market would entail the freedom of movement of EU citizens into the UK and vice-versa.
- **Other types of agreements** – Any agreement not providing for privileged access to the single market by the UK will most likely not provide for broad freedom of movement of persons between the EU and the UK. In that case, the UK could place restrictions on the entry of EU nationals into the UK and, conversely, EU member states such as Portugal could limit the admission and stay of UK citizens.

The UK's access to the single market and, as such, the future rules applying to the UK in terms of freedom of movement of goods, services, capital and persons is certain to be at the heart of its exit negotiations with the EU.

If the rules on free movement of persons between the UK and the EU ceased to apply as a result of the exit agreement, it is nonetheless expected that special attention would be paid to the situation of UK citizens already living in a Member State – such as Portugal – and of EU nationals already living in the UK. A transitional or special regime protecting such cases could be part of the exit agreement.

In any case, the following options might be considered by UK citizens already living in Portugal, in order to secure their residence rights to the extent possible:

- **Certificate of residence** – UK citizens who stay in Portugal for more than three months should register their presence with the municipal council (*Câmara Municipal*) in their area of residence.

The registration certificate will be valid for five years, although it is uncertain at this stage if this certificate will still be valid once the UK actually leaves the EU.
- **Permanent residence certificate** – UK citizens who have resided legally in Portugal for a continuous period of five consecutive years have the right of permanent residence. This also applies to family members who are nationals of a third state and have resided legally with the UK citizen in Portugal for a continuous period of five years.

The right to permanent residence in Portuguese territory may be enjoyed before the completion of five-year period in certain exceptional cases, such as the case of workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law for entitlement to an old age pension or workers who cease paid employment to take early retirement, provided that they have been working in Portugal for at least the preceding twelve months and have resided here continuously for more than three years.

Again, it is not absolutely certain that the permanent residence right will continue to exist after UK leaves the EU, but the chances of these situations being safeguarded by the exit agreement seem higher.

- **Portuguese citizenship** – A UK citizen living in Portugal may apply for Portuguese citizenship if he/she: (i) is of age; (ii) has legally resided in Portugal for six or more years; (iii) has sufficient knowledge of the Portuguese language (A2 level – elementary); (iv) has not been convicted of a crime that is punishable under Portuguese law with imprisonment of up to three or more years; and (v) does not constitute a danger or threat to the security or national defence, for their involvement in activities related to the practice of terrorism.

Complete citizenship applications usually take up to one year to be decided.

Under Portuguese law, the acquisition of Portuguese citizenship does not, by itself, entail the loss of the original citizenship.

Having Portuguese citizenship will fully guarantee all rights of UK nationals living in Portugal irrespective of the results of the exit negotiation between the EU and the UK.

Naturally, the Portuguese Immigration Act applicable to non-EU nationals – which would not be affected by the UK exit – could be used by UK citizens in the future. This Act sets out the rules on residence visas and residence permits, which, provided certain conditions are met, may be granted to foreigners who are employed or self-employed, and for setting up companies in Portugal, etc.

Having Portuguese citizenship will fully guarantee all rights of UK nationals living in Portugal irrespective of the results of the exit negotiation between the EU and the UK.

II. EMPLOYMENT ISSUES

The possibility of UK citizens working in Portugal will depend on the results of the exit negotiations.

In the worst case scenario, if the UK exit entails the cancellation of the rights of residence of its citizens in EU countries, it may be cause for the subsequent nullity of the employment contracts of UK citizens in Portugal. As stated above, a transitional regime could nonetheless be adopted in order to allow UK citizens to obtain a residence permit under the applicable immigration rules.

To the extent UK citizens maintain their residence rights in Portugal, they will be able to continue working as employed or self-employed. Portuguese employment regulations will apply to UK nationals legally residing and working in Portugal in the same terms as they apply to Portuguese or EU nationals, with a few possible exceptions. Indeed, some additional formalities usually required in relation to non-EU nationals may come to apply, such as: the employee's obligation to indicate the identity of his/her beneficiary in case of death arising out of an accident at work or an industrial disease; the employer's duty to communicate the signing and termination of the employment contract to the Labour Conditions' Authority; the obligation to enter into employment contracts in writing. It is also uncertain whether the rules currently applicable to EU expats will still apply to UK expats after Brexit.

The possibility of UK citizens working in Portugal will depend on the results of the exit negotiations.

III. TAX ISSUES

Concerning taxation of individuals, there will be no changes, since the law applicable on taxation of tax residents in Portugal is Portuguese law. This applies to both habitual and non-habitual tax residents.

Furthermore, following Brexit and unless the UK agrees to be part of the EU system, workers may be liable to double Social Security contributions both in the UK and in the EU Member State where they are working, as the UK will cease to be part of EU Social Security contributions system.

When it comes to taxation of resident businesses, Portuguese law will remain fully applicable (i.e., corporate tax, VAT, etc.), as will all conventions for the avoidance of double taxation (DTAs) in force, including the Portugal-UK DTA. The applicability of EU law on transnational transactions may or may not be changed, depending upon the negotiations for Brexit.

Nonetheless, it is possible that secondary EU law, such as EU Directives, will cease to apply to the relations between Member States and the UK. This could be the case of the Mergers' Directive, the Parent-Subsidiary Directive, the Interest and Royalty Directive or the VAT Directive. The Mergers Directive grants tax neutrality to certain restructuring transactions, provided certain conditions are met. As it is likely that this Directive will cease to apply, cross-border restructuring operations may become more burdensome. The Parent-Subsidiary Directive provides an exemption for inbound and outbound dividend payments between qualifying companies of different Member States. Therefore, the Portuguese participation exemption regime will continue to be applicable to dividend payments between Portuguese and British companies, but under different and possibly more restrictive conditions.

Furthermore, if the Interest and Royalty Directive, which provides for an exemption from withholding tax on interest and royalty payments between EU Member State companies ceases to apply, the Portugal-UK DTA remains applicable but allows withholding tax on cross-border payments (10% on interest and 5% on royalties).

In the case of indirect taxes and specifically the VAT system, supplies of goods from the UK to the EU or from the EU to the UK will qualify as imports and exports respectively (rather than intracommunity transactions), which will impact on VAT obligations. Some technical changes relating to the methods of reclaiming VAT from EU tax authorities (for instance, VAT incurred by businesses in other Member States of the EU) are likely to occur.

Finally, the provisions of many of Portugal's tax codes apply only to EU (or EEA) Member States and not to relations established with third countries. Given that fact, companies' current investments strategies should be revised in order to mitigate tax impacts of Brexit.

In any case, as stated by Portuguese Government officials, the UK always will maintain the Most Favoured Nation status it has enjoyed since the beginning of the Anglo (now British)-Portuguese Alliance in the late 1300s.

The Most Favoured Nation clause means a status or level of treatment accorded by one State to another in international trade, under which the recipient of this treatment must receive equal trade advantages as the «most favoured nation» by the country granting that treatment, including low tariffs or high import quotas. A country that has been accorded MFN status cannot be treated less advantageously than any other country with the MFN status by the promising country.

This Newsletter is intended for general distribution to clients and colleagues and the information contained herein is provided as a general and abstract overview. It should not be used as a basis on which to make decisions and professional legal advice should be sought for specific cases. The contents of this Newsletter may not be reproduced, in whole or in part, without the express consent of the author. If you should require further information on this topic, please contact, in Oporto, Miguel C. Reis (miguel.c.reis@plmj.pt) or, in Lisbon, Sara Estima Martins (sara.estimamartins@plmj.pt).

Iberian Law Firm of the Year
The Lawyer European Awards, 2015-2012

Portuguese Law Firm of the Year
Who's Who Legal, 2016, 2015, 2011-2006
Chambers European Excellence Awards, 2014, 2012, 2009

Top 5 - Game Changers of the last 10 years
Top 50 - Most Innovative Law Firm in Continental Europe
Financial Times - Innovative Lawyers Awards, 2014-2011