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CONTENTS

I. European Law/Cross-border Contracts

Buse Heberer Fromm

How Brexit will affect

US Companies3

VKK Patentanwälte

It's BREXIT again!5

II. U.S. Elections

Venable LLP

The 2018 Midterm Election

Results and What They Mean

for Congress7



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How Brexit will affect US Companies

For many US companies, the United Kingdom has been the first port of call when doing business in the European Union. This is mainly due to the geographic situation and the fact that people in both countries share the same language and cultural background. For many years, this seemed to be an ideal condition for a US company. The UK's membership in the European Union was the guarantor for doing business swiftly from or through the UK with the other 27 EU countries.

This will definitely change after March 29, 2019.

The European Union is based on four core principles:

- Free movement of goods
- Freedom to provide services
- Free movement of capital, and
- Free movement of individuals, namely workers.

These four freedoms will, however, not be in force anymore between the UK and the EU after March 29, 2019 unless there will be a Withdrawal Agreement between the EU and the UK in place which at least grants some more time for negotiations. And even with a Withdrawal Agreement major challenges for the business between the UK and the other 27 member countries of the European Union will come up.

US subsidiaries based in the UK could enjoy the same privileges as any other UK Company with regard to the four freedoms, which means that they could hire workers easily from the EU working in the UK or send employees to one of the other member states. They could sell their goods to any other member state without any customs clearance or other bureaucratic impediments.

Without a deal between the UK and the European Union, the UK, its people and companies, including foreign subsidiaries, will be considered as third parties vis-à-vis the European Union. The main purpose of the Withdrawal Agreement is to guarantee both individuals and companies their vested rights which they acquired when the UK was a member to the European Union. The other major advantage of a Withdrawal Agreement, however, would be a transition period (until the end of 2020) that would allow for the negotiation of a new framework of relationships between the UK and the European Union.

Given the many uncertainties with regard to the future status of the UK vis-à-vis the European Union, companies which are now doing business out of the UK towards Europe should take into consideration that it will become more difficult

- To hire workers from the European countries into the UK or send workers from the UK to other European countries;



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- To sell goods from the UK to the other European countries (there may be tariffs/VAT imposed on the exported/imported goods and also new requirements in place as to product safety and licenses, such as the CE-mark);
- To render services from the UK to the other European countries will become more difficult, as long as there are no new „passporting“ rules in place;
- To enforce UK-judgments in the other EU countries, and vice versa;
- To move capital cross-border will possibly be subject to new regulatory measures.

US companies should also be aware of the fact that if they have registered trade marks only in the UK, they may have to re-register them in other countries of the European Union. If they already have a community trademark registered in all European countries, this will continue to apply in the European Union but not necessarily in the UK.

If the contractual territory for, e.g., a distribution or agency agreement is defined by the term „European Union“, there will be doubt whether the territory of the UK will in the future still be covered by this clause. If a sales agreement refers to certain Incoterms which relate to tariffs (such as DDP=Delivery Duty Paid), the seller will have an additional burden in form of possible tariffs and customs clearance.

Any industry depending on regulatory licenses or admissions will need to check whether the products or services will be affected by the Brexit.

The above list of topics is, of course, far from being exhaustive. As a general rule, companies and businesses should check their contractual agreements in place as to possibilities to renegotiate or, as measure of ultima ratio, terminate them rather than taking new burdens resulting from the Brexit. For many companies, it will also make sense to establish a subsidiary on the continent in order to continue barrier-free business with the European Union.



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It's BREXIT again!

Europe is currently a lively and exciting place to be. Especially, if you are a trademark practitioner and forced to advise your client or employer how to best protect your trademarks in Europe.

It is still completely unclear what will happen to Union Trademarks after March 29, 2019 when the United Kingdom will leave the EU. Rumors are flying but certainty is non.

In the worst scenario, Union trademarks will just cease to be valid in the United Kingdom. In other, somewhat better scenarios, the Union trademarks will be declared valid or will be transformed into national British Trademarks. There is a hint, that this will happen.

There exists a draft agreement between the remaining EU member states and the United Kingdom, 585 pages strong, which has already passed the EU commission on parliament. There will be a transition period at least until 31 December 2020, in which the UK will remain in the EU internal market and customs union with all EU regulations remaining in force in the UK. The citizens living abroad will not be restricted in their current rights. This applies to three million EU citizens living in the UK and one million UK citizens living in the EU.

Referring now to Intellectual Property rights, Britain will maintain the protection of the EU protected designation of origin covering more than 3.000 products. Likewise, the EU will maintain the protection of UK-related protected designations of origin. This is a very positive first step in ensuring proprietors intellectual property rights.

But what will happen to European Union trade marks? In the drafted and already partially accepted withdrawal agreement of 14 November 2018, it is stated in Articles 54 to 56 that the holder of a European Union trade mark registered or granted before the end of the transition period (31 December 2020) shall, without any re-examination, become the holder of a comparable registered and enforceable intellectual property right in the United Kingdom. Likewise, the International Registrations pursuant to the Madrid system, designating the EU shall be treated this way. This shall be carried out free of charge by the relevant entities in the United Kingdom, using the data available in the registries of the European Union Intellectual Property Office.

Although this sounds very promising for European Union trade mark owners, this agreement is still a draft. Furthermore, even if this draft will be ratified by the British Parliament on 11 December 2018 and in January 2019 by the EU parliament, EU court decisions to cease and desist will not have any effect in the UK, forcing trademark owner to parallel court proceedings in the UK.

We will very soon see if trade mark owners may relax a little in the calming feeling



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that their rights are protected and maintained. If everything runs smooth, there is even a chance to use the transition period by filing European Union trade mark applications in 2019 and early 2020, that will than still be registered in time and will become valid UK trade marks. We will keep you informed.





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The 2018 Midterm Election Results and What They Mean for Congress

After an energetic midterm election campaign season, voters across the country went to the polls and elected members of the 116th Congress on November 6. Venable's Legislative and Government Affairs team has provided a debrief on the results of the elections and what we can expect next from Congress as the 115th Congress winds down and the new Congress kicks off in January.

What Happened on Election Night?

Democrats have picked up at least 39 seats* to take control of the U.S. House of Representatives, winning a 234-seat majority. In the U.S. Senate, Republicans expanded their majority by securing 53 seats.

President Trump was a major factor in the midterms, demonstrating that the "Trump effect" is real. The president continues to be popular among his base in rural and exurban areas, but at the same time he is losing support in more affluent suburban and urban areas throughout the country.

Democrats picked up governors' seats in the key battleground states of Nevada, Wisconsin, and Michigan, and easily held Pennsylvania. But with losses in statehouses in Florida and Ohio, along with red-state Senate losses, the Democratic Party will have to figure out how to make inroads in states with large rural and exurban areas if they want to take the White House in 2020.

What's Next?

Before the gavels change hands there is work left to be done. Congress is currently in a lame duck session and is addressing government funding, including money for a border wall, flood insurance, and the farm bill, as well as other issues, such as tax extenders and technical corrections, before they adjourn for the year. Both the House and Senate are scheduled to adjourn on December 14, but we expect appropriations extensions to keep members here longer.

How Will the Democrats Run the House?

As of this writing, it is expected that Nancy Pelosi (D-CA) will regain the House speakership in the new Congress, and Steny Hoyer (D-MD) and James Clyburn (D-SC) will remain in their leadership roles as well.

*"House Election Results: Democrats Take Control," New York Times. <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-senate-elections.html> (accessed November 30, 2018).

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As speaker of the House, Pelosi will continue to find ways to include more members on her leadership team, with a new emphasis on younger and more diverse members. She has already demonstrated this with her leadership team choices. In the House committees, most of the current ranking members will become committee chairs.

We are watching for Pelosi to lead a Democratic caucus with attention to oversight, a few large policy bills, and many “messaging bills” in preparation for the presidential election in 2020. Their purpose will be to act as responsible opponents of the Trump administration, and Pelosi wants to demonstrate to voters a Democratic ability to govern by consensus, as the party addresses such popular issues as ethics reform, campaign finance, drug pricing, DREAMers, and protection of coverage for pre-existing conditions.

How Will House Republicans Work as the Minority?

House Republicans have regrouped and elected Kevin McCarthy (R-CA) as minority leader and Steve Scalise (R-LA) as minority whip. Republicans will have a number of new House committee ranking members because of term limits, retirements, and losses.

What Happens in the Senate?

Republicans will retain their Senate majority in the 116th Congress. Senate Majority Leader Mitch McConnell (R-KY) will continue in his role at the top, but because of leadership term limits, John Cornyn (R-TX) can no longer serve as the Senate majority whip. Senator John Thune (R-SD) will succeed him, with the rest of the leadership team expected to step up a rung.

His majority retained, McConnell will continue his laser focus on the confirmation of judges, with administration turnover widening the scope of nominees beyond the federal bench. The Senate will serve as a bulwark against anything unacceptable to the White House that comes out of the House.

Meanwhile, on the other side of the aisle, Senate Minority Leader Chuck Schumer (D-NY) will be tasked with leading a caucus even more dedicated to the anti-Trump resistance, with half a dozen or more Democratic senators exploring a run for president. Schumer will have little desire to cut deals, because of the makeup of his caucus and with only a single red-state Democratic incumbent to protect in 2020. Furthermore, after a 2018 cycle in which they played mostly offense on a lopsided map, Republicans must defend 21 incumbents of their own, versus just 12 for Democrats, adding to Schumer’s political upper hand.



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