Paper
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BREXIT – Challenges for the Domain Industry?

Project coordinators
Thomas Rickert & Lars Steffen

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ASSOCIATION OF THE INTERNET INDUSTY

Thomas Rickert
Attorney at Law, Director Names & Numbers
Rickert Rechtsanwaltsgesellschaft m.b.H
Kaiserplatz 7 - 9
53113 Bonn, Germany

Lars Steffen
Member Services Names & Numbers
eco — Association of the Internet Industry
Lichtstraße 43h
50825 Cologne, Germany

BREXIT – Impact on the domain industry?

A possible BREXIT is posing multiple challenges for the domain industry. Several registries on the market have local presence requirements only allowing for individuals and companies residing in the European Union or the European Economic Area to register domain names.

The eco Names & Numbers Forum hosted an inaugural remote meeting 27 July 2016 to set up a BREXIT sub-working group and address the policy and administrative questions that a BREXIT scenario poses. With this sub-working group, eco wants to make sure that no one is caught by surprise when BREXIT comes into full effect. However, it is valuable to discuss potential ways forward after a BREXIT so that those working on revised policies can take all options into account.

The comprehensive consensus among all participants on the call was that it is still too early to make any decisions. The execution of Article 50 of the EU's LisbonTreaty's has not been initiated yet. Without knowing exact dates or timelines, this is not expected to come to pass before 2017. For the moment, any final decisions stay in the hands of the European Commission (as far as .eu is concerned).

Some participants expressed concerns over what the UK is looking for in the upcoming BREXIT negotiation process. They see a conflict between the stakeholders in the UK government who are interested in getting out of the EU at all costs and those who are following a rather more thoughtful and caring approach regarding the negotiation's outcome.

The general impact of a BREXIT was evaluated against the background of the expected amount and pace of change, both of which would need to be really carefully managed. As an example of expected fundamental changes, adjustments in European VAT legislation were raised in the call. Minimizing the amount of change would clearly be desirable for any industrial sector, including the domain industry.

Referring to every option it was stated that all stakeholders involved be mindful of safeguarding consumers. So far, the European Union has established high levels of protection for consumers and is vigilant in preserving them.

BREXIT and Consequences for Taxation

Since the 1950s, the European Union we know today has been shaped by constant convergence. One of the main achievements of this ever closer relationship among the Member States are the four basic European freedoms:

- Free movement of goods (no trade restrictions between Member States)
- Free movement of persons (all EU citizens and enterprises may be active in any EU Member State and settle in that country (freedom of establishment)
- Freedom to provide services (EU citizens may provide services in each Member State)
- Free movement of capital and payments (unconditional transfer of money and securities within the EU)

The willingness to engage in collective co-operation and to develop common harmonised regulations has recently somewhat lessened in some countries in the European Union with populist calls for more national, rather than bi-lateral or multilateral, arrangements. Thus far, the peak of such national movements was the decision of the United Kingdom to leave the EU, the so-called BREXIT.

The impact of this decision on the unhindered exchange of goods and services and the people of the EU cannot yet be foreseen.

Up until recently, the UK company form "Limited Liable Company (Ltd.)" was quite popular in the Domain Industry in Germany, as German companies could also reap the benefits of this form of legal business entity. Before German corporate law introduced the entrepreneurial company with limited liability (Unternehmergesellschaft haftungsbeschränkt (UG)) as a legal business entity in 2008, the UK Ltd. was also used extensively by German entrepreneurs for German companies and business ideas. These were mostly small companies that could not, or did not want, to raise the required minimum capital for the founding of a limited liability company (GmbH), but also larger companies which wanted to avoid unfavourable German regulations (for example, co-determination rights). Despite the introduction of the German UG, many German companies continue to exist as Ltd. companies, as up until now this has worked well within the EU legal framework.

However, after BREXIT and once the United Kingdom is no longer part of the EU, non-U.K. companies with the legal business entity of an UK Ltd. will no longer be able to rely on the freedom of establishment. It is likely that the EU Member States will return to the policy of company seats again, and that the respective national corporate law is (again) applied to a domestic administrative seat. This would lead to the highly undesirable effect that an UK Ltd.

with an administrative seat in Germany would be considered to be a German company, which would result in the direct and unlimited personal liability of the shareholders. What potential further consequences BREXIT will have are still unknown.

Existing companies with the legal form of an UK Ltd. with a registered office in Germany should therefore urgently consider moving their administrative seat to England or Wales (if appropriate), or to consider changing their legal frame. If converting into a GmbH or another corporate legal entity is not an option, then the possibility of becoming an entrepreneurial company with limited liability (Unternehmergesellschaft (UG)) should be examined – as long as cross-border corporate conversion is still possible within the EU.

A BREXIT would also have a significant impact on sales tax. The value-added tax system (Mehrwertsteuersystemrichtlinie), which regulates the harmonisation of the VAT system across the EU, would no longer be binding in the United Kingdom. The UK could amend regulations such as the place of delivery or other services, the application of tax exemptions or tax rates individually and purely on a national basis. This demands close attention from companies in the Domain Industry and would inevitably entail an increase in administrative costs.

While the Domain Industry was able to adapt itself to the sales tax regulations introduced for the provision of electronic services several years ago and adapted contract conditions accordingly, this will need to be revised in the foreseeable future. In particular, the contractual relationships with customers have to be reshaped. In the transitional period up to the implementation of the BREXIT, existing contracts have to be renegotiated and newly concluded contracts will need to include a high level of flexibility.

Now that the British Prime Minister Theresa May has made it clear that she wants a hard BREXIT, the uncertainty has become even greater. The above-mentioned issues, which are of great importance for the Domain Industry, are just an example of the problems ahead and the extent to which legal uncertainty has been created.

The world seems to be drifting apart and it is essential that we all deal with these problems as early as possible. BREXIT is clearly a significant and unavoidable challenge for the Domain Industry.

Egon Schmitz
Certified Tax Advisor

Felix Erler
Certified Tax Advisor

EGSZ Wirtschaftsprüfer | Steuerberater | Rechtsanwälte

EGSZ Gerow Kuhlmann Schmitz Zeiss PartmbB
Wirtschaftsprüfer, Steuerberater, Rechtsanwälte
Immermannstrasse 45
40210 Düsseldorf, Germany

BREXIT – Potential policy implications for ccTLDs & registrar policies

There are a number of top-level domains which have eligibility requirements whereby only registrants from the European Union or the European Economic Area are eligible registrants. A BREXIT would certainly have an impact on registrants based in the United Kingdom when the UK is no longer a member of the European Union.

That sheds light on the question of whether UK registrants would potentially loose their affected domain registrations in this scenario or whether alternative solutions can be found.

In addition to the eligibility criteria, there are more potentially complicated fields that need to be addressed and solved. Lists of reserved and blocked names for the UK exist for several top-level domains, for example.

Option 1: Pause for registration

A possible interim scenario might be that that the European Commission will instruct registries to stop registering domain names for UK residents. During the call, some reported that UK registrants are becoming hesitant to register domain names that might be affected by changes in their referring eligibility requirements. This scenario could include a suspension of existing domain names until a successor agreement has been reached.

Option 2: Grandfathering

An initial scenario that has been shared was the concept of a grandfathering clause. This would involve the European Commission granting the option of continuing to apply pre-BREXIT rules and regulations to domain names in the hands of UK residents, while a new after-BREXIT rule would apply to all future cases. Additionally, such an exemption may be limited; it may extend for a set time, or it may be lost under certain circumstances that would have to be defined.

Option 3: Revocation

Another scenario could be that the European Commission decides that affected registries have to revoke all domain names signed to UK residents. At this stage, this is just an intellectual exercise as the final decision is entirely in the hands of the European Commission, but it is one option that needs to discussed and hopefully refused.

Option 4: Proxy registration services

A different scenario could be to consider alternative sources of residential status. Changes to eligibility criteria for UK registrants could open the field for UK-based registrars to establish subsidiaries located within the post-BREXIT European Union to continue to maintain registrations on behalf of their UK-based entities and individuals through proxy registrations.

Option 5: UK stays in the EEA

There is another scenario under discussion, namely that a BREXIT could mean the UK leaving the European Union, but remaining in the European Economic Area (EEA). Perhaps a treaty will be negotiated that allows further access to the European Single Market; something that would limit the impact on ccTLDs & registrar policies.

It was mentioned that the UK government has previously expressed concerns about restrictions on domain name registrations within the EU when the Commission was consulting on what should be included in the current digital single market. One part of the submission by the UK was that there should not be residency requirements for any top-level domain within the single market.

Immediate action?

Different views have been shared on the point of whether the BREXIT process and all of the decision makers involved will respect adequate transition periods and give advance notice for new rules and regulations come to full effect, e.g. transferring domains from the UK to a subsidiary within the post-BREXIT EU.

Most participants do not expect decisions to be made in the afternoon and then come into force the morning after. However, other participants expressed concerns that questions regarding domain name regulations and eligibility criteria may drop quite far down the list of things that have to be negotiated between the UK and the other EU member states in terms of what the BREXIT will actually look like. So there could be a remaining risk that those questions might dealt with very superficially and in a rush, failing to find reasonable and workable solutions.

BREXIT – Potential implications on operation & administration

Potential implications for contractual terms

Participants in the call discussed the possible implications for contracts that were signed before BREXIT. It is quite common in the domain and hosting industry to have long-term contracts for both a domain name and a hosting product.

So the question was raised as to whether a BREXIT will have an impact on ongoing contracts between parties that might no longer both be under EU jurisdiction. Here the option of adding escape clauses to new contracts which would cover all potential changes imposed by a BREXIT during the duration of a contract, was discussed .

Potential implications for data privacy

If the UK were to no longer fall under EU jurisdiction after a BREXIT, some participants expressed concerns about how data privacy will be addressed in regard to registries in the UK.

Potential implications for financial transactions

If the UK does leave the European Union and the European Economic Area, some participants expressed their concerns about the consequences for financial transactions. Once the UK leaves the EU, they would not be part of the Single European Payments Area (SEPA) anymore and therefore money transfers with UK-based entities and individuals could take longer and would have to be managed differently.

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Publisher:

eco — Association of the Internet Industry
Lichtstraße 43h
50825 Cologne, Germany

Contact:

Rickert Rechtsanwaltsgesellschaft m.b.H
Thomas Rickert
Attorney at Law, Director Names & Numbers
Phone: +49 228 - 74 89 80
Fax: +49 228 - 74 89 86 6
info@rickert.net
rickert.net

eco — Association of the Internet Industry
Lars Steffen
Member Services Names & Numbers
Phone: +49 221-70 00 48-0
Fax: +49 221-70 00 48-111
lars.steffen@eco.de
numbers.eco.de