

IMPLICATIONS OF BREXIT ON BRITISH INTERESTS IN SWITZERLAND

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1 INTRODUCTION

Although the United Kingdom (“UK”) left the European Union (“EU”) as of 31 January 2020, the bilateral agreements between Switzerland and the EU continued to apply to the UK during the so-called transition period having lapsed on 31 December 2020. Since 1 January 2021, these agreements have ceased to apply. The gap thus created was in part filled with a series of bilateral agreements that Switzerland negotiated with the UK during the transition period as part of its “Mind the Gap strategy”.¹

Switzerland and the UK have strived to preserve most of the previously prevailing rights and obligations, yet it has not been possible across the board.

Here are some answers to questions arising post-Brexit, for UK citizens having interests in Switzerland.

2 I WAS A SWISS RESIDENT WITH A VALID PERMIT BEFORE 31 DECEMBER 2020: CAN I STAY?

Yes, acquired rights are respected.

UK citizens holding a valid Swiss residence permit before 31 December 2020 will automatically be allowed to stay in Switzerland after 1 January 2021 without having to meet additional conditions.

¹ Mind the Gap Strategy, Foreign Department of Foreign Affairs, available at: <https://www.eda.admin.ch/missions/mission-eu-brussels/en/home/key-issues/brexit.html> (13.01.2021).

3 I WAS NOT A SWISS RESIDENT BEFORE 31 DECEMBER 2020: CAN I EASILY RELOCATE TO SWITZERLAND?

Yes, but.

UK citizens wishing to establish themselves in Switzerland as of 1 January 2021 without a prior Swiss permit will be treated as non-EU citizens.

Consequently, they will be subject to the stricter requirements set forth by the Foreign Nationals and Integration Act and the Ordinance on Admission, Period of Stay and Employment.

UK citizens contemplating moving to Switzerland **for work purposes** must in particular display special qualifications, i.e. as holders of university diploma or equivalent or having had several years of professional experience. Moreover, yearly quotas apply to the admission of foreign workers. In this last respect, the Swiss government allowed for an additional 3'500 permits to be issued to British citizens for 2021 in order to ease the transition.² This temporary arrangement will need to be renegotiated for 2022 and onwards. Finally, UK citizens will only be admitted if their prospective employer demonstrates that he could not find, despite reasonable efforts, a Swiss, EU or EFTA worker displaying the same capacities.

UK citizens wishing to establish themselves permanently in Switzerland **without working** may do so subject to first obtaining an annuitant permit, which may only be obtained provided that the applicant is (i) above 55 years old, (ii) has personal ties to Switzerland (e.g. repeated past stays for holidays), (iii) has sufficient financial means to support his/her lifestyle (until his expected passing) and (iv) does not carry out lucrative activity in Switzerland or abroad (save for managing his/her personal assets). It is noteworthy that applicants have no legal entitlement to an annuitant

² Press release from the Swiss Federal Council, available at <https://www.admin.ch/gov/fr/accueil/documentation/communiqués.msg-id-81315.html> (14.01.2021).

permit, which cantonal authorities may (refuse to) issue in their entire discretion. Moreover, the Federal authority has a veto right.

UK citizens who do not meet the above (notably the age) requirements may nevertheless receive a residence permit if “prevailing cantonal tax interest” so warrant.³ The Federal authority retains the final say in whether cantonal authorities may grant such permits in every instance.

The spouse and unmarried children below the age of eighteen of UK citizens admitted on annuitant permits or permits issued for “prevailing cantonal tax interests” may – but are not entitled to – obtain a stay or residence permit for the purpose of family reunification if they live in the same (adequate) household as their family member and do not rely on social aids. Sufficient knowledge of the local language is also required for residence permits.

UK citizens authorized to reside in Switzerland pursuant to either of the above regimes are usually eligible for taxation based on expenses (lump sum taxation), with specificities depending on the canton. It is worth noting that some cantons – notably Zurich or Basel – abolished taxation based on expenses, which is thus unavailable in these cantons for cantonal and municipal tax but remains available for federal tax.

4 I AM A UK CITIZEN AND WANT TO ACQUIRE RESIDENTIAL REAL ESTATE IN SWITZERLAND. IS IT POSSIBLE?

4.1 In general

Yes, but.

The Act on Acquisition of Real Estate by Persons Abroad (“LFAIE”) limits the acquisition of Swiss real estate by non-Swiss citizens domiciled abroad. It should be noted that the “domicile” pursuant to Swiss law does not entirely coincide with the “domicile” as defined by British law. Under

³ To be eligible in Geneva or Zug, the minimum amount of yearly tax to be paid is typically around CHF 250'000 for a person living alone; in Schwyz, the minimum amount is CHF 500'000. In any case, applicants may not pursue any gainful activities, in Switzerland or abroad, other than managing their own assets.

Swiss law, and in this article, “domicile” broadly refers to the place where a person lives with the intention to stay permanently and indefinitely.

In very general terms and as of 1 January 2021, UK citizens are only authorized to acquire residential real estate in Switzerland provided that they (i) hold Swiss nationality or, if not, (ii) take domicile in Switzerland beforehand and obtain a settlement permit (“C”) – which may, save for exceptional circumstances, only be granted after having spent ten years in Switzerland on a residence permit, the last five without interruption – or (iii) apply for and obtain an *ad hoc* authorization from the local authority. Such *ad hoc* authorizations are only granted very restrictively. Acquiring holiday residences moreover requires complying with limitative quotas set by the Federal Government pursuant to Art. 11 LFAIE.⁴

By contrast, UE/EFTA citizens may freely acquire Swiss real estate as soon as they are domiciled in Switzerland, regardless of their permit status (i.e. also for foreigners having just relocated to Switzerland).

Switzerland and the UK concluded a treaty on 25 February 2019,⁵ which was approved by the Swiss parliament on 25 September 2020 and is applicable since 1 January 2021, providing for the following rules for the transition phase⁶:

- i) Acquired rights on Swiss real estate by UK citizens as of 31 December 2020 will be respected.
- ii) UK citizens with legal and factual domicile in Switzerland on 1 January 2021 are allowed to acquire Swiss residential real estate provided that they do not break residence until the acquisition is complete. This means that such UK citizens shall continue to be treated as EU/EFTA citizens for the purpose of acquiring real estate.

⁴ Supplemented by Art. 9 of the Ordinance on Acquisition of Real Estate by Persons Abroad and its Annex 1.

⁵ Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on Citizens’ Rights following the Withdrawal of the United Kingdom from the European Union and the Free Movement of Persons Agreement of 15 February 2019, available at: <https://www.fedlex.admin.ch/eli/cc/2020/1059/fr>.

⁶ For more detail, see the *Lettre d’information sur la LFAIE et Brexit* from the Federal Office of Justice of 4 April 2019, available at: <https://www.bj.admin.ch/bj/fr/home/wirtschaft/grundstueckerwerb.html> (03.02.2021).

4.2 I inherited a Swiss holiday residence: am I free to keep it?

Yes, if you are a legal heir (pursuant to Swiss law) or a parent of the deceased in ascending or descending line.

No, in other cases unless you qualify for an *ad hoc* authorization. As a rule, the non-legal heir still acquires ownership of the Swiss real estate however with strings attached, i.e. the obligation to sell the same within two years. However, acquisition is unencumbered and hence final when the non-legal heir can show that he/she had “close ties worthy of being respected” to the property, e.g. either (i) when he/she has lived there permanently or regularly on week-ends with the deceased, (ii) has regularly spent holidays there with the deceased for numerous years or (iii) has lived there numerous years as a lessee.

4.3 I was designated as a beneficiary of a trust owning Swiss real estate. Do the above limitations apply?

Yes, but.

According to the Federal Office of Justice, irrevocable trusts shall be treated as persons abroad (and hence be subject to limitations deriving from the LFAIE) as soon as either of the trustee-s or beneficiary-ies qualify-ies as such. This position is disputed by Swiss scholars who advocate for a case by case analysis, which should in general lead to considering the status of the trustee only (for lack of actionable claim to the trust assets from the beneficiary-ies). If one follows this more permissive opinion, having a Swiss trustee should allow for the unrestricted acquisition of real estate, irrespective of the nationality of its beneficiary-ies.

As far as revocable trusts are concerned, their status as foreign or non-foreign person for the purpose of acquiring Swiss real estate shall follow that of the settlor.

Careful planning and advanced discussion with the relevant authorities is strongly recommended.

5 WE ARE A MARRIED COUPLE MOVING TO SWITZERLAND, ONE OR BOTH OF US BEING A UK CITIZEN: WHICH LAW APPLIES TO OUR MARRIAGE/MATRIMONIAL PROPERTY REGIME?

The legal framework for marriages with links to both Switzerland and the UK remains the same as before Brexit. From a Swiss law perspective, jurisdiction for and the law applicable to questions arising in connection with such marriages are determined by the Private International Law Act (“PILA”).

If both spouses, one or both being UK citizens, are domiciled in Switzerland, pursuant to the PILA Switzerland has jurisdiction *inter alia* for questions/disputes concerning the rights and obligations arising out of the marriage as well as in connection with divorce. By default, Swiss law then applies to the matrimonial property regime, maintenance obligations and related matters.

Alternatively, the spouses may choose the law of one of their states of origin to apply to their matrimonial property regime. Therefore, if one or both spouses are UK nationals, they may opt for British law by including a corresponding choice of law clause in the wedding contract or by signing a written choice of law contract (the validity of which is then governed by British law). However, the law applicable to marriage related issues other than the matrimonial property regime is not subject to party disposition.

If the spouses have already concluded a wedding contract before moving to Switzerland, the formerly applicable law will continue to apply after relocation, and the contract will be recognised in Switzerland if it is valid pursuant to the law applicable before relocation. Hence, if a couple relocates from the UK to Switzerland, their pre-existing wedding contract formerly governed by, for example, British law will be recognised in Switzerland and continue to be effective, provided it is valid pursuant to British law.

6 I AM A UK CITIZEN DOMICILED IN SWITZERLAND AND WISH TO PLAN MY ESTATE IN CASE I PASS AWAY: WHICH LAW APPLIES AND WHAT ARE MY OPTIONS?

The legal framework for (international) estate planning remains the same as before Brexit. From a Swiss law perspective, jurisdiction for and the law applicable to estates are determined by the Private International Law Act (“PILA”).

Based on the PILA, Switzerland has jurisdiction *inter alia* over estates of both Swiss and/or UK citizens domiciled in Switzerland at the time of death. Jurisdiction is global in the sense that it extends to assets located in Switzerland and abroad, subject to the mandatory jurisdiction other states may assert for real estate within their territory, as is the case in the UK (probate proceedings for real estate located in the UK). Although it is not explicitly stipulated in the PILA, it is accepted that testators with foreign citizenship (however, not Swiss dual citizens, e.g. Swiss-British citizens) may instead opt for jurisdiction of their country of origin, provided such a choice of jurisdiction meets the formal requirements of a will or inheritance contract.

As for the applicable law, Swiss law applies to estates of Swiss and/or UK citizens domiciled in Switzerland at the time of death to determine matters such as (i) the scope of the estate as well as (ii) the rights and obligations of the heirs and of an executor appointed in the will. Non-Swiss nationals may opt for the application of the law of their country of origin by virtue of a choice of law clause in their will or inheritance contract, while Swiss dual citizens are currently precluded from such choice. This distinction may, however, change with the pending revision of the PILA. Currently, UK citizens who are not also Swiss nationals can therefore choose that English law shall apply to their estate. This might be of relevance, given that Swiss law provides for important forced heirship rules which could be opted out by a choice of law clause.

It should be noted that under Swiss law the division of assets between the surviving spouse and the deceased spouse is always the first step in determining the scope of the estate. The PILA provides for separate rules applicable to the matrimonial property of the deceased spouse on the one

hand (cf. section 5 above) and the estate on the other hand. For married couples it may therefore be advisable to harmonize the law applicable to the matrimonial property with the law applicable to the estate by including a corresponding choice of law clause in the nuptial agreement or, alternatively, by signing a written choice of law contract. However, international estate planning is in general rather complex, which is why each individual case requires careful analysis.

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