Brexit

A SELECTION OF LEGAL QUESTIONS FOR THE PRACTICE

DLA PIPER

Contents

The consequences of Brexit for limited companies based in Germany ... 3

What the deal means for mobility ... 4

European Works Council after Brexit ... 5

Industrial products ... 7

Be well prepared in times of Brexit – Checklist for UK customs and UK import VAT ... 9

Enforcement and recognition of judicial and insolvency proceedings post-Brexit ... 11

Financial Services post-Brexit ... 13

Antitrust law and merger control ... 15

Effects of Brexit on gambling providers operating in Germany ... 16

Impact of Brexit on broadcasters licensed in the UK ... 17

Data protection ... 19

What does Brexit mean for the applicable law for IP infringements (Rome II Regulation)? ... 21

What does Brexit mean for commercial law? ... 22

What impact will Brexit have on EU trademarks? ... 23

European Domains after Brexit ... 24

What does Brexit mean for patents and supplementary protection certificates? ... 25

The consequences of Brexit for limited companies based in Germany

Although the popularity of the English limited liability company has been in significant decline since the introduction of the UG in 2008, quite a number of entrepreneurs still chose a Limited to avoid the higher administrative costs, notarial fees and the need to raise a minimum amount of capital associated with a German GmbH. The Limited's administrative seat was regularly located in Germany, while the statutory seat remained in England. Until the end of the Brexit transition period, Limiteds domiciled in Germany benefited from the European freedom of establishment, which ensured that the Limited was recognised as having full legal capacity in Germany.

As a result of Brexit, since the end of the transitional period, however, the Limited is being regarded just like any other foreign entity would be, with the result that a Limited domiciled in Germany now lacks legal capacity. This is because the German Federal Court of Justice applies the so-called seat theory to companies existing under foreign law, according to which the company statute applicable to an entity is determined by the law of the country in which the entity has its administrative seat (ie Germany). Since, in the case of Limiteds, the formation requirements for a (German) limited liability company are not met – above all, there is no entry in the commercial register – the Limited can only be treated as one of the standard legal forms available in Germany. In the case of a Limited with one shareholder, this means it is treated as a merchant, with several shareholders it is treated as a partnership, namely a GbR or an oHG.

Under civil law, this automatic reclassification of the legal form means that all assets and liabilities of an Limited with several shareholders are assumed by the absorbing partnership by way of a change of legal form that preserves the identity of the company, analogous to sec. 190 German Transformation Act (*Umwandlungsgesetz* – UmwG). In the case of a Limited with only one shareholder, all its assets and liabilities are accrued to the shareholder by way of a universal succession. Both options result in a change of the liability regime by which the limited liability of a corporation is replaced by the unlimited liability of a merchant or the partners of a GbR/oHG.

The transitional provision of sec. 122m UmwG, which was created specifically for Brexit, protects those entrepreneurs who notarised a merger of a limited company into a German corporation by 31 December 2020. Such mergers must be filed for registration in the commercial register without undue delay and within two years at the latest. Those who have initiated such an "exit before Brexit" in time will therefore escape personal liability in the German merchant or partnership legal forms.

OHG shareholders who are only now considering making a change can at least escape future personal liability by changing their legal form to that of a corporation. However, pursuant to sec. 224 (1) UmwG, the change of legal form of an oHG into a GmbH does not fully eliminate personal liability, but rather triggers a five-year period at the end of which the former oHG partners are released from liability for those obligations of the partnership that were incurred up to the registration of the change of legal form. In essence, this liability regime corresponds to the liability of a partner leaving the partnership.

Both the GbR and the sole trader do not have the option of a change of legal form. The GbR can, however, easily become an oHG by registration in the commercial register; also, GbR partners can contribute their shares in the GbR to a GmbH by way of formation in kind. If a merchant wishes to "take refuge" in the legal form of a GmbH, at least for the future, they can either achieve this by way of a formation in kind, or, provided they are registered in the commercial register, by way of spin-off pursuant to sec. 152 et seq. UmwG.

What the deal means for mobility

People who had already entered Germany before 31 December 2021

From 1 January 2021, British nationals and their third-country national family members who were previously entitled to reside or work in Germany and had exercised this right have essentially the same rights as before the withdrawal by virtue of the Withdrawal Agreement. Until 30 June 2021, British nationals who were residing in Germany on 31 December 2020 and who continue to reside in Germany must notify their residence to the Foreigners Office responsible for their place of residence to then be able to obtain a new residence document.

After 30 June 2021 at the latest, employers should require that British employees who invoke this legal status also prove it.

New entry after 1 February 2021

The EU/UK-Trade and Cooperation Agreement between the EU and the UK contains detailed provisions regarding intra-corporate transfers and short-term business trips. However, the agreement explicitly states that it is not intended to apply as directly applicable law. Moreover, the regulations on business trips and other work stays do not explicitly grant any entitlement to visa-free entry. They only stipulate that the stays are to be permitted in principle. The general visa regulations applicable in Germany to third-country nationals for stays related to gainful employment therefore apply without restriction to British nationals. This also applies to short-term business trips.

Accordingly, they need a corresponding residence permit for any kind of gainful employment.

For visits and/or business trips with a maximum duration of 90 days in a period of 180 days, however, no visa is required as long as no gainful employment is to be carried out. In this respect, the Schengen entry requirements for visa-exempt third-country nationals apply to British nationals.

It should be noted that, due to the COVID-19 pandemic, as of 11 January 2021, the visa office of the German Embassy in London and the Consulate General in Edinburgh only accepts visa applications in humanitarian emergencies. The visa acceptance centre of the external service provider Visametric has ceased operations until further notice. As newly arriving British nationals do not generally require a visa for the entry itself, even for longer-term stays in Germany for gainful employment purposes, it is also possible to apply for the necessary residence title at the foreigners authority at the future place of residence after entry. However, gainful employment is then only possible after the residence title has been issued.

Social security

For British nationals who were already living in Germany on 31 December 2020, there are in principle no changes to pensions and health insurance.

If the employee was posted to Germany before 1 January 2021, the previous social security regulations will continue to apply until the end of the posting. Proof is provided by the A1 certificate.

For British nationals who move to Germany after 1 January 2021, British or German social security law can apply in principle. The EU/UK-Trade and Cooperation Agreement contains regulations that essentially correspond to the previous provisions.

With regard to posted workers, the EU/UK-Trade and Cooperation Agreement presents Member States with a choice. Either the basic rule remains, according to which the social security obligation is in principle based on the place of employment. Or the social security law of the posting state applies, provided the expected duration of the posting does not exceed 24 months and the posted worker does not replace another posted worker.

The Federal Republic of Germany has chosen the latter option, which means that the regulations already in force within the EU states will remain. The corresponding draft law of the Federal Government was passed by the Federal Council on 4 February 2021.

European Works Council after Brexit

European Works Councils have established themselves in cross-border companies and groups of companies over the years. According to the European Works Council Database, a total of 1,011 European Works Councils were active in 2020 (last accessed 26 January 2021). In 2021, this number will most likely decrease.

- The formation of European Works Councils (EWCs) is based on EU law, namely the EWC Directive 2009/38/EC.
- The German European Works Councils Act (EBRG) transposes the Directive into German law.
- After the transition period for Brexit, there are no successor regulations for European Works Councils in the UK.

Thresholds for EWCs not met?

An EWC may be established in the case of community-wide activity of a company or group of companies. Community-wide activity is deemed to have been established if:

- at least 1,000 employees are employed in the Member States (EU and EEA); and
- at least 150 employees are employed in each of at least two Member States (EU and EEA).

A group of companies is a group consisting of a controlling company and its controlled subsidiaries.

After the end of the transitional period, the UK is no longer considered a Member State but a third country. As a result, employees working in the UK are no longer to be taken into account when calculating the thresholds for EWCs. It is possible that the requirements for the establishment of an EWC in the company or group of companies will no longer apply.

Example 1:

Company A previously employed a total of 1,500 employees in the EU and the EEA, 300 of them in Germany and 600 each in France and the UK.

After 1 January 2021, employees working in the UK will no longer be taken into account when calculating the thresholds. This means that the company only employs 900 employees (300 in Germany and 600 in France) in the EU and the EEA. The "Community-wide activity" requirement for the establishment of an EWC (at least 1,000 employees in Member States) is no longer met.

Example 2:

Group U with its registered office in Germany employs 2,000 employees in Germany and a further 1,000 employees in its only subsidiary in the UK.

The employees employed in the subsidiary in the UK will no longer be taken into account for the calculation of the thresholds after 1 January 2021. This means that the group of companies will no longer have "Community-wide" activities – it will only employ more than 150 employees in one Member State.

Consequences of Brexit for already established EWCs

If an EWC had been established in companies or groups of companies that were previously community-wide active, but the threshold values are no longer reached as a result of Brexit, this has a direct impact on the EWC.

- EWC by agreement: extraordinary right of termination

As the legal basis for the establishment of an EWC no longer exists, an agreement on the EWC is deprived of its basis. In the correct view, central management therefore has the right to terminate the EWC agreement without notice.

- EWC by operation of law: EWC no longer exists

The legal basis for the establishment of an EWC has ceased to exist. As a result, the EWC also ceases to exist at the same time.

New composition of EWC

If the requirements for the establishment of an EWC remain in place after Brexit, but employees from the UK were previously delegated to the EWC, the composition of the EWC needs to be adjusted.

The decisive circumstances regarding the composition of the EWC have changed as a result of Brexit. In the future, no employees from the UK will be delegated to the EWC. The distribution of EWC members from other Member States will also change.

The number of EWC members depends on the percentage of employees employed in the respective Member State. The reference figure is the total number of employees employed in the Member States. Also, for the calculation of this total number, employees employed in the UK are no longer taken into account as of 1 January 2021. The percentages of employees in other Member States will therefore change.

The recalculation must be notified to the Special Negotiating Body, which will initiate a new composition of the EWC.

Industrial products

Despite the success of a comprehensive free trade agreement, there will be extensive changes in the way manufactured goods are traded between the EU and UK after the transition period expired on 1 January 2021. This area had been largely harmonized through EU legislation. Companies will have to rethink their approach to product safety conformity and product labelling in particular.

- Companies that continue to trade across the EU-UK border need an Economic Operators Registration and Identification Number (EORI number).
- EU-based traders importing products from the UK become "importers" as the UK is now outside the EU internal market. Companies that import from non-Member States need to obey certain additional regulations.
- CE marking is gradually being replaced in the UK (with the exception of Northern Ireland, where CE continues to be valid) by the UK Conformity Assessed (UKCA) marking. The manufacturer must provide a corresponding Declaration of Conformity. Mandatory conformity certificates can now only be issued by conformity assessment bodies situated in the territory of the respective markets.
- In Northern Ireland, EU product law continues to apply. Bodies based in Northern Ireland can continue to certify products under EU law; however, these certificates are only valid in Northern Ireland. In addition to the CE marking (or other conformity markings), the words UK(NI) must be affixed in these cases.
- If products conform to certain international technical standards designated by the British government (designated standards), they are given a presumption of conformity under British law.
- The FTA aims to facilitate trade in goods and prevent unnecessary technical barriers to trade. Within the framework of the free trade agreement, special requirements have been agreed for motor vehicles and vehicle parts, pharmaceuticals, chemicals, organic products and wine.

Be well prepared in times of Brexit – Checklist for UK customs and UK import VAT

After the UK's withdrawal from the EU, many companies are faced with questions regarding customs and import VAT: what is the quickest way to get the goods through customs without any obstacles? Do certain steps or processes have to be initiated? Which documents have to be provided?

Due to the UK's exit from the EU single market, taxpayers and suppliers have to adjust to numerous new regulations in the short term. The question is: where do you start? We have compiled the most important points for you as a checklist.

1. EORI Numbers

Two EORI Numbers are required for the customs movement of goods between the UK and the EU: a UK EORI (starts with "GB") and an EORI number of an EU Member State. The application for a UK and/or an EU EORI number can be submitted online. The Brexit department of the British government has summarised the requirements for the application here. The British authorities provide further information on the subject of "Import and export: customs declarations, duties and tariffs" here.

2. Customs declarant/representation

If you are a non-UK resident taxpayer without a UK EORI, you will need to appoint someone to complete the customs formalities for you. Some business owners leave the customs declaration to their customers in the belief that this will make customs clearance easier and faster. However, customers are not always customs-savvy (nor do they want to incur the expense), so there can be obstacles to importing or exporting. Therefore, if you want to take care of the declaration yourself, you must:

- appoint a customs declarant; this can be a natural or legal person who must be resident in the recipient area UK (or EU if importing into the EU). If an EU company wishes to submit an import declaration to the British customs authorities, the customs declarant either needs a UK EORI (see above) or the customs declaration is made by a representative based in the UK who provides professional support for imports and exports, for which there are separate service providers; and
- have the necessary documents ready (see under 3.).

3. Customs documents required for release for free circulation in the UK

Documents required for release for free circulation are:

- commercial invoice or pro forma invoice (a Paperless Invoice procedure with electronic invoices is possible with various parcel service providers)
- customs declaration
- packing list
- transport documents (bill of lading or airway bill)
- in special cases, further documents may be required (eg documents for the application of preferential or special regulations, certificate of authenticity, import permit, declaration of information on excise duties)

4. Approval of a deferral account in the UK

- Advantage: Duties do not have to be paid immediately at customs clearance, but can be collected on the 15th day of the following calendar month.
- Applies to the following UK duties
    - customs duties
    - import VAT
    - excise duty (including tobacco duty)
    - levies and compensatory amounts under the Common Agricultural Policy
    - anti-dumping or countervailing duties
    - interest charges on customs debts

5. Declaration of UK import VAT in the UK VAT return

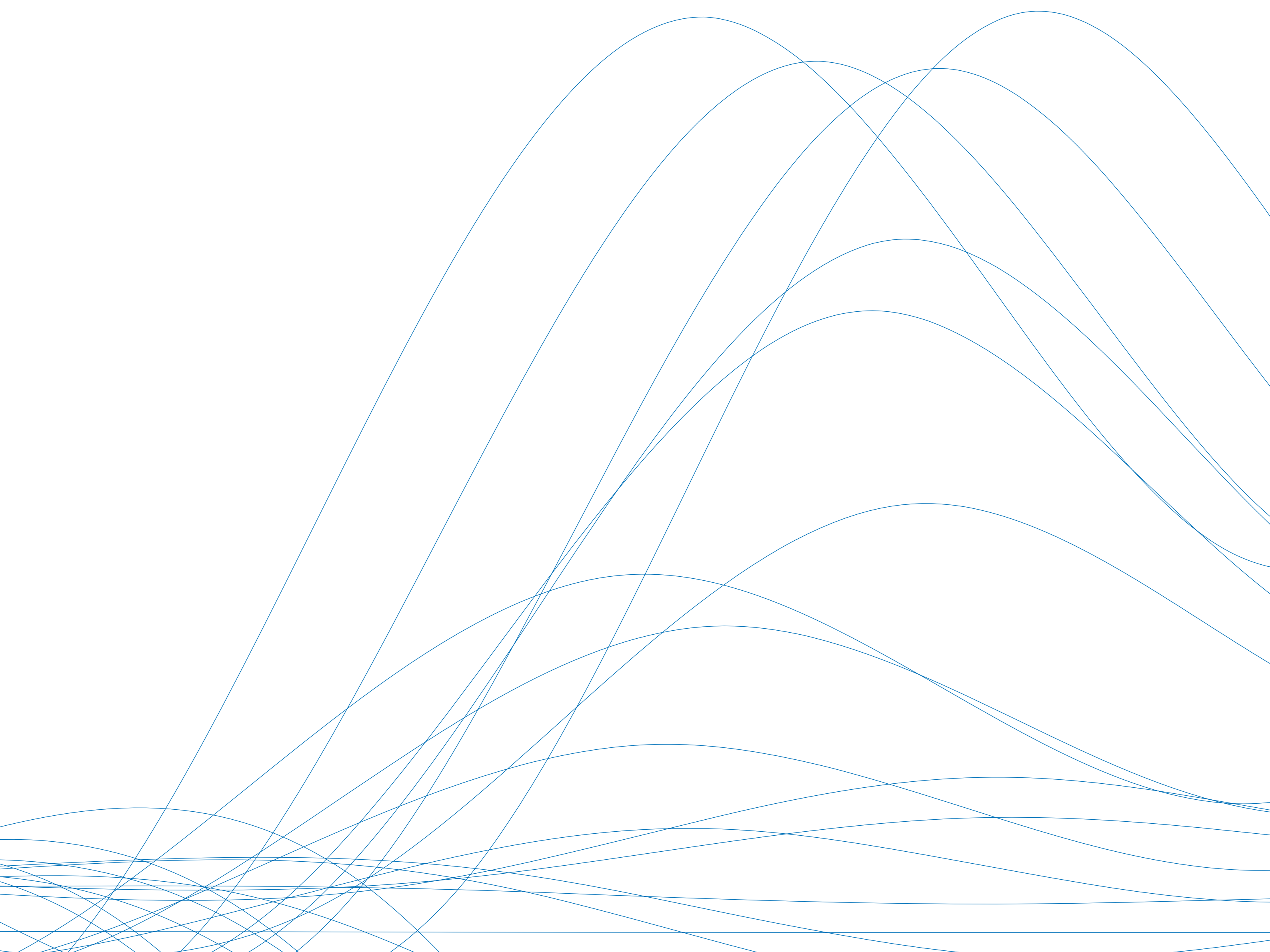
As of 1 January 2021, if your business is registered for VAT in the UK, you will be able to declare UK import VAT on your UK VAT return for movements of goods between:

- Great Britain (ie England, Scotland and Wales) and from anywhere outside of Great Britain; and
- Northern Ireland and from outside the UK and the EU.

You do not need approval to account for import VAT on your VAT return.

If you wish to account for UK import VAT on your UK VAT return, you have to instruct customs declaration service providers to select this on your customs declaration and enter your details as the recipient.

However, there are no changes in the treatment of VAT for goods movements between Northern Ireland and the EU. Thus, the procedure of intra-community deliveries and acquisitions will continue to apply in this case.



Enforcement and recognition of judicial and insolvency proceedings post-Brexit

Individual enforcement of judicial proceedings and judgments

Neither the Withdrawal Agreement nor the EU/UK-Trade and Cooperation Agreement contain specific provisions on cross-border enforcement.

The recognition of enforceable court decisions via the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments (Recast Brussels Regulation) – as before – will (for the time being) cease to exist. Currently the following applies: if the enforceable judgment is based on a choice of court agreement, recognition and enforcement will in principle be ensured in accordance with the provisions of the Hague Convention. Otherwise, recognition and enforcement will be governed by the national law of the place of enforcement, which needs to be examined on a case-by-case basis.

Exclusive choice of court agreements should therefore always be part of contracts in the future.

Conventional insolvency proceedings and Scheme of Arrangement

Conventional insolvency proceedings face the question of mutual recognition after Brexit. The relevant matters are governed by the EU Insolvency Regulation, which now loses its mutual applicability. From now on, questions of recognition will therefore be answered in accordance with local international insolvency law.

- In Germany, UK insolvency may be recognised in accordance with §§ 335 et seq. German Insolvency Code (InsO). In principle, recognition is automatic if the German court recognises the jurisdiction of the English court for the insolvency proceedings (section 343 InsO).
- Creditors' rights of companies domiciled in Germany in UK proceedings are in principle to be exercised in accordance with the local British procedural provisions as before.

Mutual recognition of conventional insolvency proceedings will therefore continue to be possible, but must be examined on a case-by-case basis.

Recognition of schemes in the EU via the Recast Brussels Regulation will no longer be possible. For schemes concluded before the end of 2020 recognition is continued to be ensured. To what extent German creditors still need to fear the scheme as a means of exerting pressure is therefore uncertain at the moment.

- Recognition of a scheme via the Rome I Regulation (as a contract) will likely be possible, but is subject to legal uncertainties. Recognition under Rome I is possible only to the extent that the rights concerned are subject to UK law. This means that the enforcement of any alterations against the will of creditors is no longer feasible if such rights are not subject to UK law.
- Accession of the UK to the Lugano Convention, which contains provisions similar to the Recast Brussels Regulation, could resolve legal uncertainties. The application for accession was submitted in April 2020; however, the necessary approval of the other Member States is still pending.

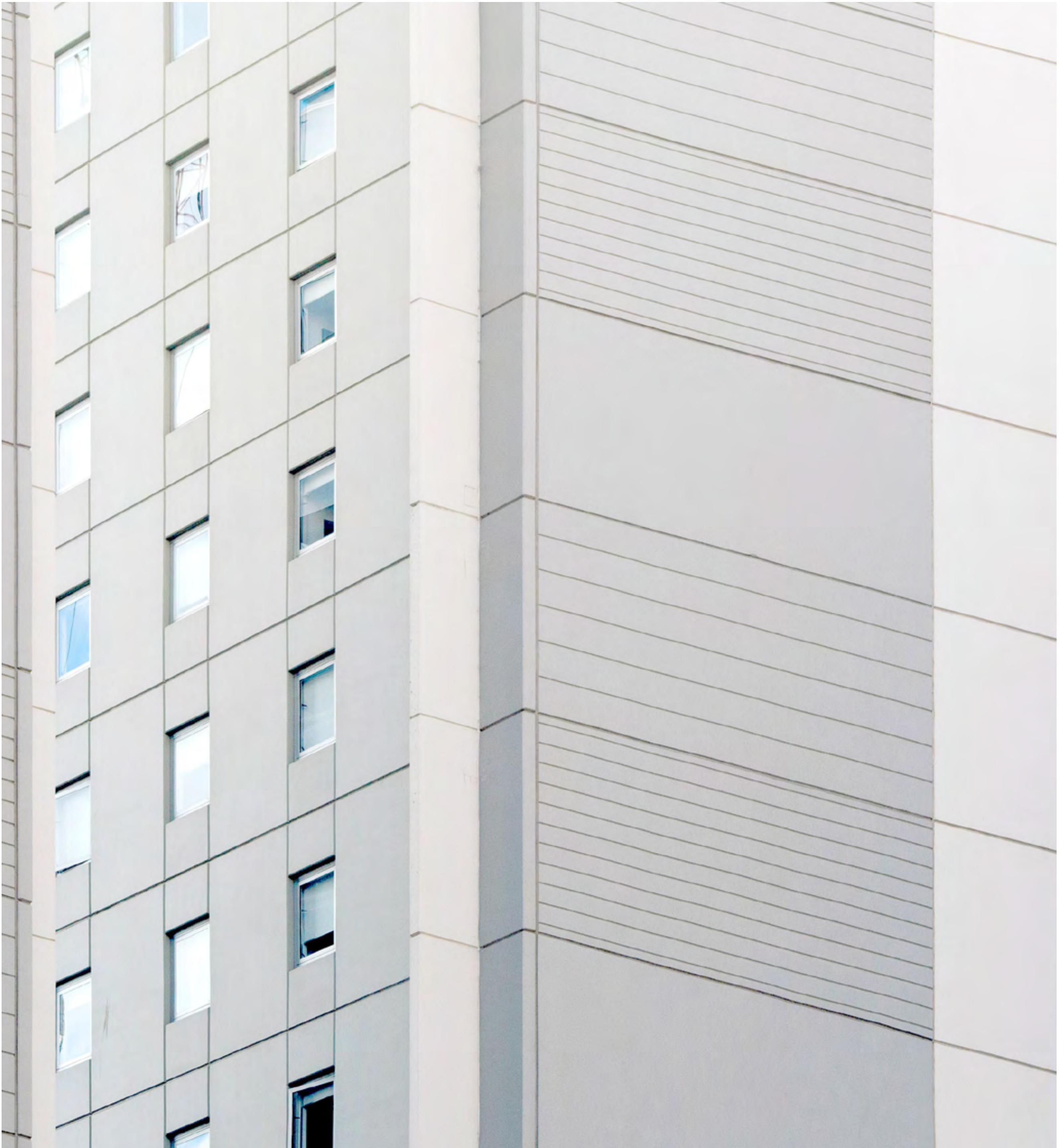
The enforcement of a scheme in the EU is therefore currently associated with considerable legal uncertainties.

The new EU schemes

Just in time for the end of the transition period, which ended on 31 December 2020, Germany and the Netherlands adopted new restructuring instruments, and other Member States will follow suit.

The instruments offer mechanisms comparable to the UK scheme and, through direct access to the EU single market and EU legislation, could provide debtors with an alternative to UK schemes for financial restructuring in particular.

- The German scheme (StaRUG) is open to companies that have their Centre of Main Interest (COMI) in Germany; foreign debtors are therefore only eligible to a limited extent. The Dutch scheme, however, is also open to foreign companies.
- In the UK, recognition of the EU schemes via the Cross Border Insolvency Regulation (2006) is a possibility – court decisions on this matter remain to be seen.
- This will also have an impact on the question of the extent to which a German StaRUG procedure involving creditors in the UK makes sense and whether StaRUG measures would be recognised and enforceable against the will of individual creditors in the UK. This needs to be examined on a case-by-case basis.



Financial Services post-Brexit

With the UK's withdrawal from the EU, the UK qualifies as a third country since 31 December 2020.

As a result, after the one-year transition period, requirements comparable to those of a hard Brexit scenario apply from 1 January 2021.

This affects credit institutions, financial service providers, payment service providers and e-money institutions.

No regulation within the EU/UK-Trade and Cooperation Argeement (TCA)

The arrangements made for financial services under the TCA do not replicate the broad passporting arrangements that apply to financial services firms in the EU under the EU passport. Rather, very few arrangements have been made in the agreement regarding financial services (non-discrimination obligations and obligation to implement and apply internationally agreed standards in the financial services sector). However, financial services are otherwise excluded from other arrangements concerning services made in the TCA.

No EU passport

Neither financial service providers domiciled in the UK with a view to providing services in the EU nor financial service providers domiciled in the EU with a view to providing services in the UK can rely on the so-called EU passport from 1 January 2021.

Offering services in the UK

Financial service providers based in Germany or another EU Member State can no longer easily provide financial services in the UK. Rather, service providers must ensure they fully comply with the regulations applicable in the UK and, in particular, any authorisation requirements.

Offering financial services in the EU

Without the EU passport, UK service providers will have to comply with a patchwork of host Member State regulations.

In Germany, this will mean that UK financial service providers will have to establish themselves in Germany and will require a license to conduct banking business or to provide financial services pursuant to section 32 of the German Banking Act *(Kreditwesengesetz)* or a license to provide payment services or to conduct e-money business pursuant to sections 10, 11 of the German Payment Services Supervision Act *(Zahlungsdiensteaufsichtsgesetz).*

Passive freedom to provide services

According to the current administrative practice of the German Federal Financial Supervisory Authority (BaFin), German customers will continue to be able to use the services of UK financial service providers (passive freedom to provide services or reverse solicitation).

However, it is foreseeable that these principles of passive freedom to provide services will not provide a basis for permanent and active service provision by UK financial service providers in Germany.

In its most recent opinion, the European Securities and Markets Authority (ESMA) clarified that business models with which, contrary to the factual circumstances, it is intended to feign the customer's initiative on the basis of contractual agreements, do not generally qualify as "reverse solicitation."[1]

Next steps: Memorandum of Understanding (MoU)/ equivalency decisions

In the TCA, the EU and the UK commit to putting in place a memorandum of understanding by March 2021 establishing a framework for regulatory cooperation in the area of financial services.

In contrast, the TCA does not provide for equivalency decisions. These remain a unilateral decision of the European Commission and HM Treasury. So far, only a few equivalency decisions have been taken:

- **EU**: Equivalency decision for UK central counterparties.
- **UK**: Equivalency decisions for certain intra-group transactions, regulated markets, market making exemptions from short selling restrictions, certification for credit rating agencies and under the Benchmarks Regulation.

1 ESMA public statement dated 13 January 2021 (ESMA35-43-2509) (available at: https://www.esma.europa.eu/sites/default/files/library/esma35-43-2509_statement_on_reverse_solicitation.pdf).

Antitrust law and merger control

With regard to antitrust law and merger control (competition law), the Withdrawal Agreement provides that the EU and UK will maintain a competition law that effectively addresses the following anticompetitive business practices:

- agreements and concerted practices which have as their object or effect the prevention, restriction or distortion of competition;
- abuse of a dominant position; and
- mergers which may have significant anticompetitive effects.

These requirements correspond to the rules which were in place before Brexit. Consequently, conduct that was prohibited under European competition law in the UK before Brexit will be prohibited for the time being. In the future, however, UK authorities and courts are no longer required to interpret UK competition law consistently with EU case law and may depart from EU case law where it is considered appropriate in the light of specified circumstances.

However, there will be significant changes with regard to the jurisdiction of the authorities:

- In the case of infringements of antitrust law, the Commission and the authorities in the UK (CMA) will have parallel jurisdiction if a cartel infringement affects both the EU and the UK. In the past, such a cartel infringement could have been investigated by the Commission alone. Consequently, it will, for example, be necessary to submit leniency applications to both authorities in parallel and to coordinate the proceedings.
- So far, the one-stop-shop principle has applied in merger control. According to this principle, the Commission was solely responsible for examining mergers that met the turnover-based thresholds of European merger control. In the future, the Commission will not examine the impact of proposed mergers on the competitive conditions in the UK. Both authorities will have parallel jurisdiction if the relevant thresholds are met. If a transaction has anti-competitive effects in the UK, these effects must be examined by the CMA. It should be noted that there is no obligation to notify mergers in the UK (voluntary merger control regime). However, the CMA has increasingly asked companies to notify mergers on their own initiative in recent years. The decisive criterion in this respect is a "share of supply" (this corresponds roughly to a market share) of 25%. However, the CMA often defines markets narrowly (and not only based on economic criteria) in order to have jurisdiction for a merger. Against this background, it should be analyzed whether a voluntary notification to the CMA is advisable. If the CMA decides on its own to investigate a transaction, this may lead to delays, as the CMA can order (by way of so-called initial enforcement orders) that the transaction may not be implemented until the investigation has been completed.

Effects of Brexit on gambling providers operating in Germany

Gambling providers who wish to operate in Germany require a German gambling licence. This follows from Section 4 (1) of the State Treaty on Gambling (*Glücksspielstaatsvertrag (GlüStV)*). Licences for private providers can currently be granted for the organisation and brokerage of sports betting as well as for the brokerage of lotteries (commercial gaming brokerage) among others (see below for the planned future legal situation of the GlüStV 2021).

Seat in the EU

One of the central requirements for the granting such a licence is that the applicant must be domiciled in an EU Member State or an EEA state, see Section 4a (4) sentence 1 no. 3 lit. b) GlüStV. Here, Brexit has the following effects:

- After Brexit, the UK is neither an EU Member State nor an EEA Member State. Therefore, providers that previously only had a registered office in the UK must now establish a registered office in Germany or another EU Member State or EEA Member State if they want to obtain a German gambling licence.
- After Brexit, Gibraltar is also no longer an EU Member State or EEA Member State. Therefore, providers based in Gibraltar must now also establish a registered office in Germany or another EU Member State or EEA Member State if they wish to obtain a German gambling licence.
- Irrespective of Brexit, the Isle of Man and the Channel Islands (administrative districts of Guernsey and Jersey) are still neither EU Member States nor EEA Member States, so gambling providers based there must also establish a registered office in the EU or an EEA Member State if they wish to obtain a German gambling licence.
- In contrast, Malta was and is part of the EU and the EEA. The seat of a gambling provider in Malta thus fulfils the German requirements for the seat of the provider for the granting of a German gambling licence.

Further requirements

Other licence requirements also have an EU connection:

- For example, gaming-related payment transactions must be processed via an account in Germany or at a credit institution domiciled in an EU Member State (see Section 4a (4) sentence 1 no. 3 lit. e) GlüStV). In accordance with the above, a bank account in the UK or in Gibraltar no longer meets these requirements. However, a bank account with a bank in Malta would be sufficient.
- In addition, the granting of a licence requires that a bank guarantee be provided by a credit institution with its registered office in the EU or an EEA Member State (see Section 4c (3) GlüStV).

Outlook: GlüStV 2021

On 1 July 2021, the new GlüStV 2021 is to come into force and will open up new licensing possibilities, among others for online casino games in the form of virtual slots as well as for online poker (see draft in LT-Drs. NRW 17/11683).

The requirements described will continue to apply with the GlüStV 2021. This is because the current requirements from Section 4a (4) GlüStV will in future be included in Section 4a (1) GlüStV 2021.

Impact of Brexit on broadcasters licensed in the UK

Brexit has consequences for broadcasters previously licensed in the UK. As a result of Brexit, the licences of the British media supervisory authority Ofcom can no longer serve as a legal basis for European broadcasting. Legal certainty is only provided by a new licence in an EU Member State.

The country of origin principle of the AVMS Directive

Since audiovisual media services are excluded from the scope of the EU/UK-Trade and Cooperation Agreement and no other arrangement has been made, broadcasters with an Ofcom licence are now providers from a third country and no longer benefit from the country of origin principle of the European Audiovisual Media Services Directive (AVMSD). According to this principle, a licence in one EU Member State is sufficient to transmit audiovisual media services within the entire EU single market. The country of origin principle rests on minimum standards laid down in the AVMSD. Member States should ensure that the audiovisual media services under their jurisdiction meet these minimum standards as well as any (stricter) national requirements.

Since broadcasters with an Ofcom licence now no longer benefit from the country of origin principle, they are subject to the respective national media regulation in each Member State to which their programme is transmitted, including any national licensing requirements.

Re-licensing in an EU Member State

To continue to have access to the EU single market and to benefit from the country of origin principle, broadcasters must ensure that they fall within the scope of the AVMS Directive again.

- For a newly granted licence of an EU Member State to be valid throughout the single market, the media service provider must fall under the jurisdiction of precisely that Member State in the sense of the Directive.
- This is (although not exclusively) always the case if the head office is located in that Member State and the editorial decisions are also taken there. It is, however, also possible, that the head office is located in the Member State but the editorial decisions are taken in a third country or vice versa, provided that a significant part of the workforce involved in the implementation of programme-related activities operates in that Member State.
- In contrast, relying on the European Convention on Transfrontier Television does not provide legal certainty. This convention by the Council of Europe also provides for the free reception of TV broadcasts in and between the contracting states. However, (unlike Germany and the UK, for example) not all EU Member States have ratified the convention. Furthermore, the scope of the privilege is narrower than that of the country of origin principle of the AVMSD.

Licensing in Germany

Legal certainty is also provided by a licence under German law (where German law requires a licence).

- Private broadcasters generally require a licence to broadcast programmes (television or radio). This applies regardless of whether the programmes are broadcast via antenna, cable, satellite or the internet.
- The licensing requirements for nationwide broadcasts are laid down in the new Interstate Media Treaty (MStV for *Medienstaatsvertrag*), which has been in force since 7 November 2020. The new MStV replaces the Interstate Broadcasting Treaty (RStV), which has been in force since 1991, and creates new regulatory rules for the media industry – not only for television and radio, but also for new digital players. However, the MStV maintains a sector-specific regulatory approach – broadcasting therefore still holds a special regulatory position.
- Licences are granted by the state media authorities on the basis of a binding decision by the Commission for Licensing and Surveillance (ZAK), which is composed of the legal representatives of the state media authorities. The competent state media authority is limited to implementing the decisions of the ZAK by administrative act. However, the ZAK only has a limited scope for decision making. If the personal and factual requirements set out in the MStV are met, the applicant is in entitled to a licence (BVerwG, Urt. v. 15.7.2020 – 6 C 25.19, in a decision obtained by DLA Piper).

Data protection

Data protection is another topic that has been affected by Brexit. The focus in this regard are issues surrounding the transfer of personal data (such as HR data of employees or customer data) to the UK. This and other selected data protection topics in the context of Brexit will be addressed here.

Transfers of personal data to the UK

Transfers of personal data from the EU and the EEA to countries where the General Data Protection Regulation (GDPR) does not apply (so-called third countries) are only lawful if an adequate level of data protection can be guaranteed for the data in the destination country. This is the case, among others, if an adequacy decision of the European Commission exists for the respective country (a list of these decisions can be found here) or standard contractual clauses of the Commission (SCCs) are agreed and complied with. The UK left the EU on 31 January 2020, hence the following applies:

- In the transitional phase until the end of 31 December 2020, the GDPR still covered the UK despite Brexit. Only since the end of this phase has the UK now become a third country within the meaning of the GDPR.
- The EU/UK-Trade and Cooperation Agreement has *de facto* extended this phase. This is because the agreement provides for a period of up to six months, starting on 1 January 2021, during which the transfer of personal data from the EU to the UK is not considered a transfer to a third country within the meaning of the GDPR. During this period, data transfers can therefore continue as before, subject to the rules for intra-European transfers.
- The joint declaration between the EU and the UK published alongside the EU/UK-Trade and Cooperation Agreement explicitly – albeit without binding effect – refers to the European Commission's intention to initiate the procedure for adopting an adequacy decision with regard to the UK without delay.
- If the European Commission issues such a decision, data transfers to the UK can continue on this basis as before. If, on the other hand, such a decision is not issued, an adequate level of data protection must be guaranteed otherwise, (eg through the agreement of SCCs). Against the background of the decision of the European Court of Justice in the Schrems II case, it would have to be reviewed whether the SCCs are sufficient to guarantee an adequate level of data protection for the data transferred to the UK in each specific case, or whether supplementary measures have to be implemented.

Data protection requirements

Businesses may be subject to the scope of the GDPR and the data protection law of the UK at the same time. This may lead, for example, to:

- an obligation to register with the ICO;
- an obligation to appoint separate data protection officers for the EU and the UK; and
- an obligation to appoint a representative (Art. 27 GDPR) in the EU/UK where personal data from outside the respective jurisdiction is processed domestically but no establishment exists in the jurisdiction from which the data originates.

It is also important to note that data protection infringements in relation to cross-border processing activities risk being sanctioned under both the GDPR and data protection law of the UK.

Next steps

Consideration should be given to whether decisions, contracts and documentation relating to data transfers to the UK require updating as a result of Brexit, in particular it is recommended to:

- identify a new lead supervisory EU authority, if this was previously the ICO; review appointments of data protection officers and representatives; update records of processing activities, privacy notices, data processing agreements, joint controller arrangements and data protection impact assessments as necessary to reflect the changed circumstances; and
- observe whether an adequacy decision for the UK is issued before the expiry of the current period of up to six months and – if not – agree on alternative arrangements for data transfers (or even do so before as a precautionary measure).

What does Brexit mean for the applicable law for IP infringements (Rome II Regulation)?

The Rome II Regulation which stipulates the applicable law in regard to infringements of intellectual property rights does not apply in the UK as of the UK's exit from the EU. However, Art. 66 lit. b of the EU/UK Withdrawal Agreement provides that the Rome II Regulation applies to events giving rise to damage before the end of the transition period (31 December 2020).

Consequently, the applicable law for infringements of intellectual property rights before 31 December 2020 will be determined on the basis of the Rome II Regulation. The UK has also transposed these provisions into national law, based on which they will continue to apply as national law even after the end of the transition period.

In practice this can nevertheless lead to the following differences and problems in the future:

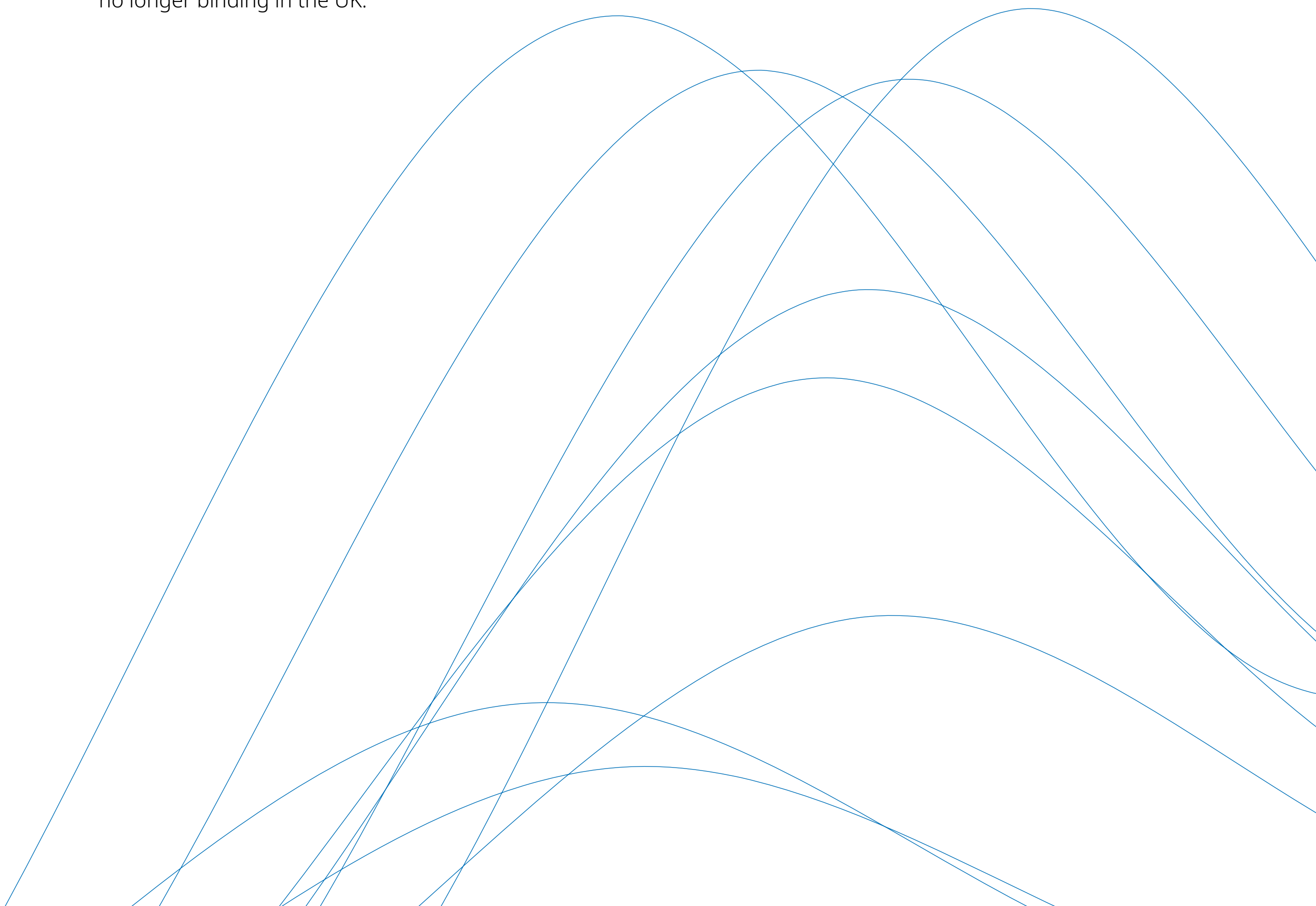
- The national laws can be amended by the UK anytime.
- Amendments to the Rome II Regulation do not necessarily need to be adopted by the UK.
- The interpretation of these provisions by the courts in the UK may be different as the rulings of the CJEU are no longer binding in the UK.

What does Brexit mean for trade secrets?

The EU/UK Cooperation Agreement, which has been in force since 1 January 2021, provides for the protection of trade secrets in Art. IP.34.

These provisions provide for a minimum protection of trade secrets. Especially, it is defined what a trade secret is and examples of conducts that are (or are not) required to be considered as contrary to "honest commercial practices" are set out.

The protection of trade secrets was governed by national laws before the EU/UK Cooperation Agreement. Minimum requirements are set out in the Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. The provisions now agreed on are largely reflected in the Directive (EU) 2016/943.



What does Brexit mean for commercial law?

- Pursuant to Art. 66 of the Withdrawal Agreement, Brexit has no direct impact on the applicable law for contracts concluded before 31 December 2020. In addition, the British legislator has implemented the content of the Rome I Regulation into national law. At least in the near future, the same conflict of laws rules will therefore apply to the contract law in the EU and the UK. However, the rules will likely diverge in the future.
- It is unlikely that the German courts will allow a general possibility of contract adjustment or dissolution solely on the basis of Brexit. This possibility will depend on the individual case, provided that no special agreements (ie a Brexit clause) have been made in a contract.
- Modifications may be necessary in relation to territorial agreements for the European area. Depending on the wording of the field of operation (eg of a commercial agent), the question may arise as to whether a European field of operation also includes the UK in the future.
- New possibilities of contractual modifications may arise with regard to the indemnity claim of commercial agents (*Handelsvertreter*) – as well as distributors (*Vertragshändler*) – operating in the UK.

The indemnity claim of the commercial agent is an internationally mandatory claim based on an EU Directive. According to German case law, such claim also applies to distributors *mutatis mutandis*. Provided that the contract is governed by German law, the claim can only be excluded in advance – for both commercial agents as well as distributors – if the contract does not set out that the respective partner shall carry out its activities for the principal within the territory of the EU or of other EEA states.

After Brexit, the UK is neither part of the EU nor the EEA. Thus, the indemnity claim may now be excluded under German law and no longer constitutes mandatory law for commercial agents and distributors that are active (exclusively) in the UK, unless the UK decides to re-join the EEA. From the perspective of the Rome I Regulation, the claim may validly be excluded even if the UK retains its own rules on the (mandatory) indemnity claim.

What impact will Brexit have on EU trademarks?

Union trademarks apply exclusively to the territory of the EU. As a result of Brexit, EU trademarks will therefore no longer enjoy protection in the UK.

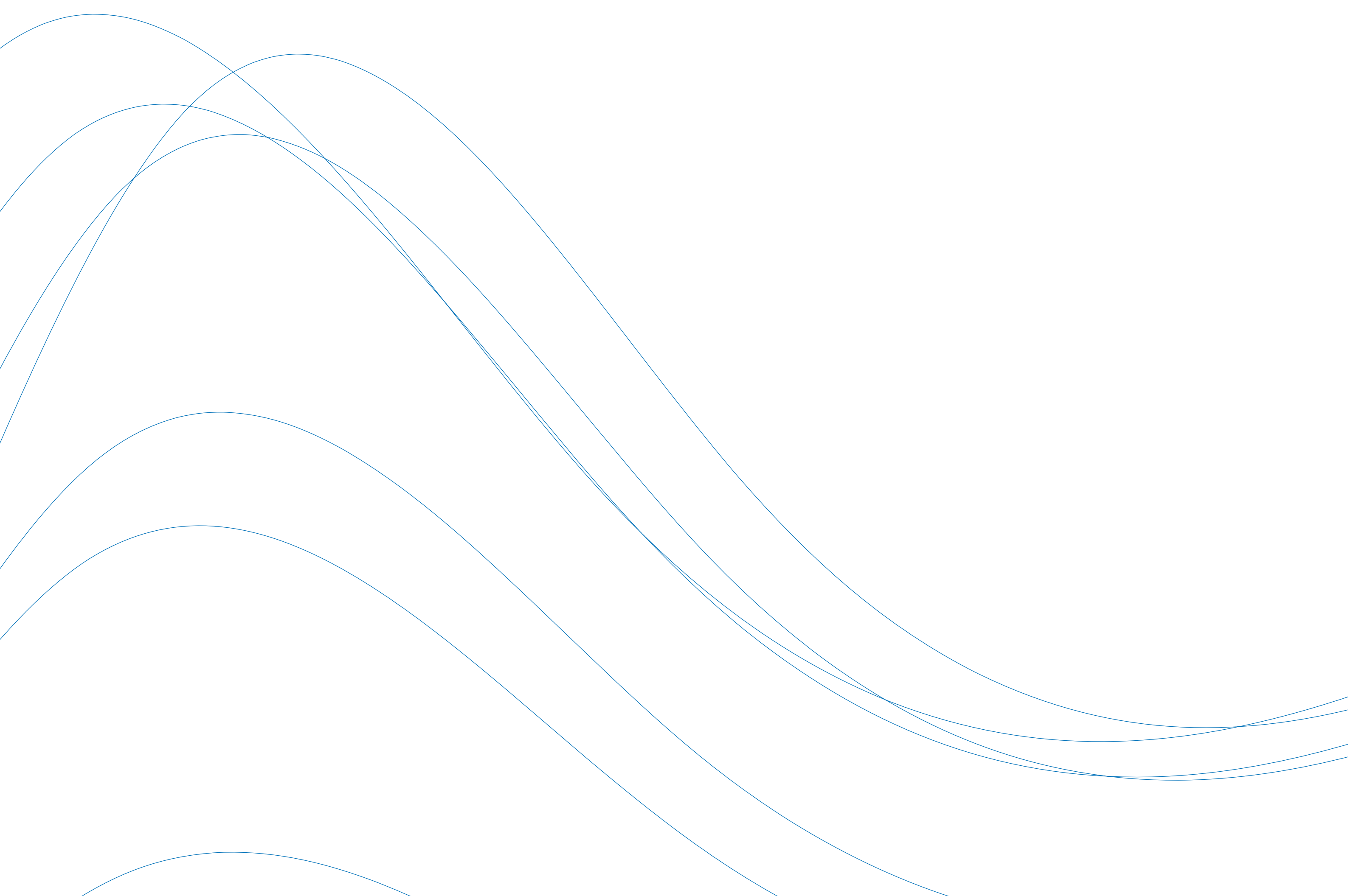
However, EU trademarks registered with the EUIPO on 31 December 2020 will automatically be converted into a corresponding UK trademark free of charge. A separate application for this conversion is not required.

The situation is different if a trademark has been applied for but not yet registered as of the cut-off date of 31 December 2020. In this case, there is no automatic conversion into a British trademark application. However, from 1 January 2021 until 9 September 2021, it is possible to re-file the European trademark application as a British trademark while maintaining priority in the UK. This UK trademark application will incur the usual fees applicable in the UK.

What is the impact of Brexit on licensing agreements?

The territorial scope of license agreements for an EU trademark already concluded by 31 December 2020 will have to be determined by interpretation. Legal clarity can be created here for the parties of a license agreement by concluding a supplemental agreement by which the UK is expressly declared to be part of the license territory and any national British trademark that may arise as a result of Brexit is added to the license.

When entering into future license agreements for EU trademarks, it is advisable to expressly state whether the license shall cover the territory of the UK.



European Domains after Brexit

Brexit does not only affect the .eu Top Level Domains (TLDs), but also other European country-specific TLDs which carry eligibility requirements related to the location or geographical presence of the domain owner. Thus, UK domain owners are not the only ones affected. Many owners based outside the EU used a UK subsidiary or other UK-based entity for the purposes of registering certain European TLDs to meet the eligibility requirements.

Impact of Brexit on .eu TLDs

Existing .eu domains registered to UK holders (about 80,000), have been "suspended" since 1 January 2021 and are therefore inaccessible. Under the amended eligibility rules in Regulation (EU) 2019/517, domain owners had until the end of 2020 to show that they were either an EU citizen (regardless of their address), resident of a Member State or an organisation established in the EU, Iceland, Liechtenstein or Norway and to update their registration data with EURid (European Registry Body) before 31 December 2020, so as not to lose their access and usage rights.

However, domain holders still have three months (until 31 March 2021) to clarify the status of their .eu domain and show that they meet the eligibility criteria. After that, the domain name will be moved to the "withdrawn" status and the owner loses all rights in and to the domain. Twelve months after the end of the transition period (ie on 1 January 2022), the domains will be made available for registration.

Accordingly, new registrations by persons domiciled in the UK are not possible as of 1 January 2021; however, such domains may be registered, for example, to a subsidiary or other affiliate company domiciled in the EU. Alternatively, the domain name may be held by another company that may hold it on behalf of the trademark owner, or by a law firm the trademark owner is working with.

Impact on country-specific European TLDs

It should also be noted that, while not a direct requirement for the domain owner, the rules (eg for .de domains) require an address for service in the EU/EEA to be provided if requested by the Registry.

On the contrary, the country-code specific .co.uk, .uk and .org.uk TLDs (ccTLDs) are not affected by Brexit. These domains continue to welcome registrations and holders from anyone, anywhere in the world without territorial or other restrictions.

What does Brexit mean for patents and supplementary protection certificates?

1. Brexit has no impact on European patents granted by the European Patent Office (EPO) on the basis of the European Patent Convention of 5. October 1973 (EPC). The reason for this is that the EPC is a treaty under international law which continues to exist despite Brexit. European patents therefore remain valid.

2. Special features apply to supplementary protection certificates (SPCs) for medicinal products and plant protection products, the conditions for which are regulated in two EU regulations (EC No. 469/2009 and EC No. 1610/96). Due to Brexit, these regulations no longer apply in the UK after 31 December 2020. However, the UK/EU-Trade and Cooperation Agreement (TCA) contains provisions on this area.

- The TCA stipulates in Article IP33 (2) that both the UK and the EU shall continue to provide for an extension of the term of protection granted by a patent for medicinal products and plant protection products to compensate patent holders for a reduction in the term of protection of the patent caused by regulatory approval procedures. SPCs to European patents that already exist or have been applied for will therefore remain in place or be continued. In addition, from 1 January 2021 it will be possible to apply for new SPCs in the UK.

- For pending applications for SPCs in the UK (as well as for applications to extend the duration of such certificates), the relevant EU regulations will continue to apply in accordance with Article 60 of the UK/EU-Withdrawal Agreement. Pending applications are those that were submitted to the UK authorities before the end of the transitional period (31 December 2020) and for which the administrative procedure had not been completed at the end of the transitional period. A certificate granted by the UK on the basis of these applications will provide the same level of protection as that provided for in the EU regulations.

For more information

If you would like to know more about the topics mentioned above or about other aspects of Brexit, please contact us directly:

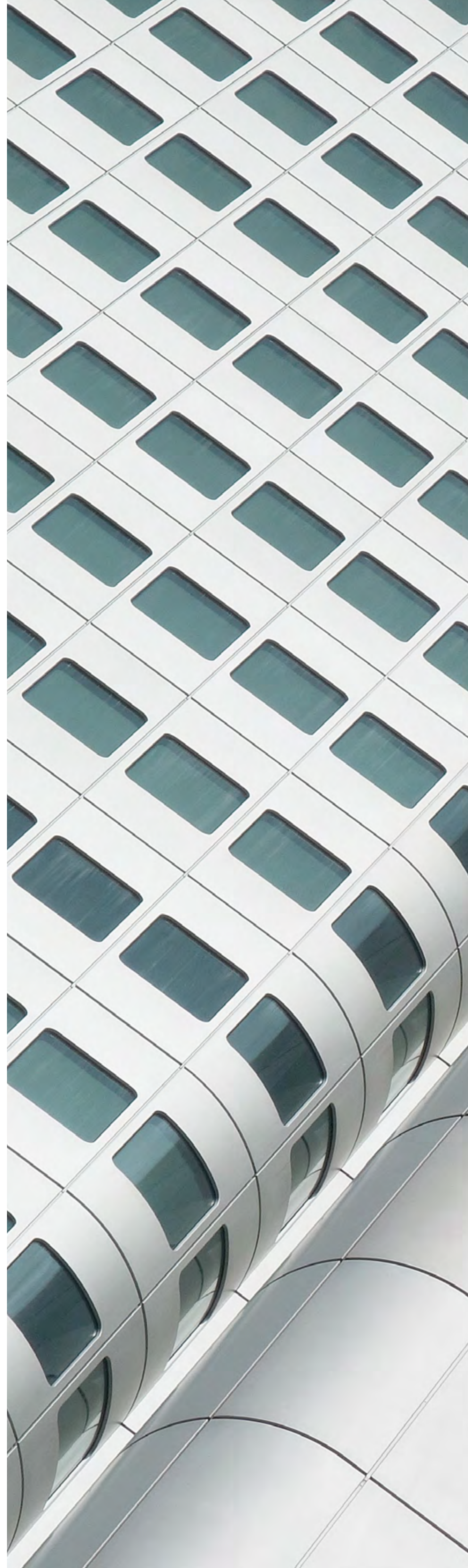
Cologne
DLA Piper
Augustinerstrasse 10
50667 Cologne
Germany
T +49 221 277 277 0
F +49 221 277 277 111

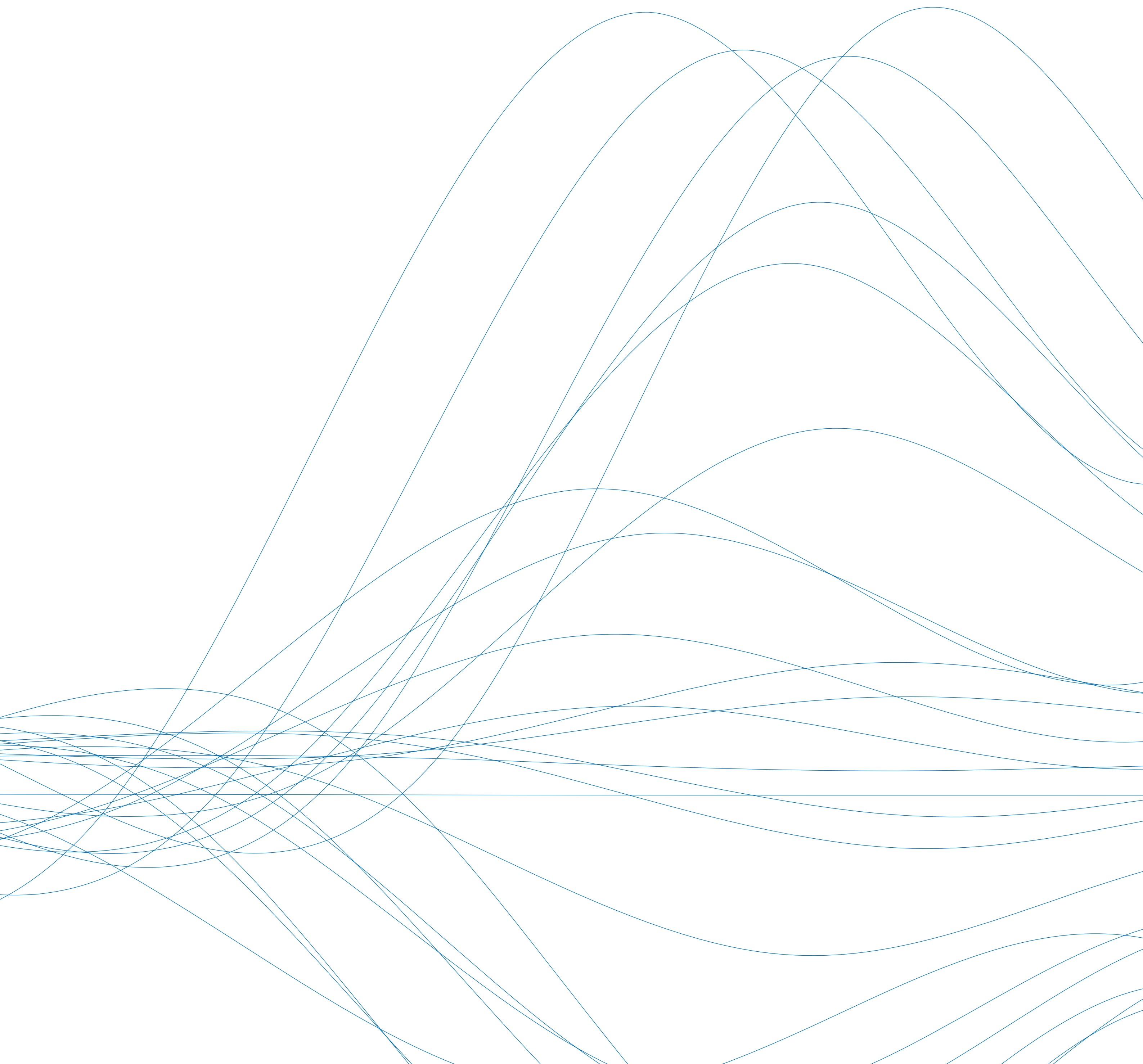
Hamburg
DLA Piper
Alter Wall 4
20457 Hamburg
Germany
T +49 40 188 88 0
F +49 40 188 88 111

Frankfurt
DLA Piper
Neue Mainzer Strasse 6-10
60311 Frankfurt
Germany
T +49 69 271 33 0
F +49 69 271 33 100

Munich
DLA Piper
Maximilianstrasse 2
80539 Munich
Germany
T +49 89 23 23 72 0
F +49 89 23 23 72 100

For more information please visit www.dlapiper.com





DLA Piper is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at dlapiper.com.
This publication is intended as a general overview and discussion of the subjects dealt with, and does not create a lawyer-client relationship. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication. This may qualify as "Lawyer Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.
Copyright © 2021 DLA Piper. All rights reserved. | 17 Feb 2021 | A08741-8