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BREXIT CHECK LIST

BREXIT – With the final Brexit agreement reached, it is crucial for companies to make themselves aware on legal pitfalls that might follow and affect Europe's economies. With this Brexit Check list, we provide you with some considerations on key legal aspects of Brexit.

Contents

Brexit Check List

Important aspects of legal relevance in connection with the withdrawal of the UK from the European Union are listed below as a check list for German companies.

1 End of free movement of workers

British citizens and their family members who have made use of the free movement of workers until December 31, 2020, who have established a residence in Germany and who continue to reside in Germany essentially have the same rights as before the Brexit.

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However, they must report their residence to the competent foreigner's authority by June 30, 2021 at the latest. The foreigner's authority will then issue a residence document with which the British citizen and their family members can prove that they may continue to reside in Germany. With the residence document, the British citizen and their family members are still allowed to live and work in Germany for an unlimited period. They may also, for example, change from employment to self-employment and vice versa without having to report this to the foreigner's authority or obtain permission from the foreigner's authority to do so.

There is a number of new regulations which govern the residence status of British citizens in Germany:

1. Naturalisation

An amendment to the German Nationality Act (Staatsangehörigkeitsgesetz, StAG) of April 8, 2019 allowed for the possibility that British citizens can keep their British citizenship along with their new German citizenship. However, this required an application by December 31, 2020. An application since January 1, 2021 will regularly result in the loss of the British citizenship.

2. Residence permit

Since January 1, 2021 British citizens are required to obtain a residence permit in order to be allowed to work in Germany. British citizens who intend to pick up work in Germany can obtain this permit partly under easier preconditions.

- Working without a valid residence permit would be a regulatory offence, if the case may be, even a criminal offence
- Companies may only employ so-called third-country nationals who possess a residence permit. They are required to hold a copy of their residence permit in electronic or paper form
- Companies, i.e., their managing directors or their management that fail to comply with these requirements may be subject to an administrative fine of up to EUR 500,000 or even a prison sentence
- Any failures to comply may also result in a company being excluded from public tendering

A) Permanent residence permit

British citizens who have lived in Germany for a minimum of 5 years may be granted a permanent residence permit on application pursuant to Section 9 of the German Residence Act (Aufenthaltsgesetz, AufenthG) or pursuant to Section 9a of the AufenthG, each in connection with the rule on the crediting of periods of lawful residence (Anrechnungsregel) of Section 11 (3) of the Freedom of Movement Act (Freizügigkeitsgesetz): a permanent settlement permit or an EU long term residence permit. Additional requirements are, inter alia, a secured livelihood and sufficient German language skills (level B1).

Depending on the previously existing temporary residence permit, the requirements may differ.

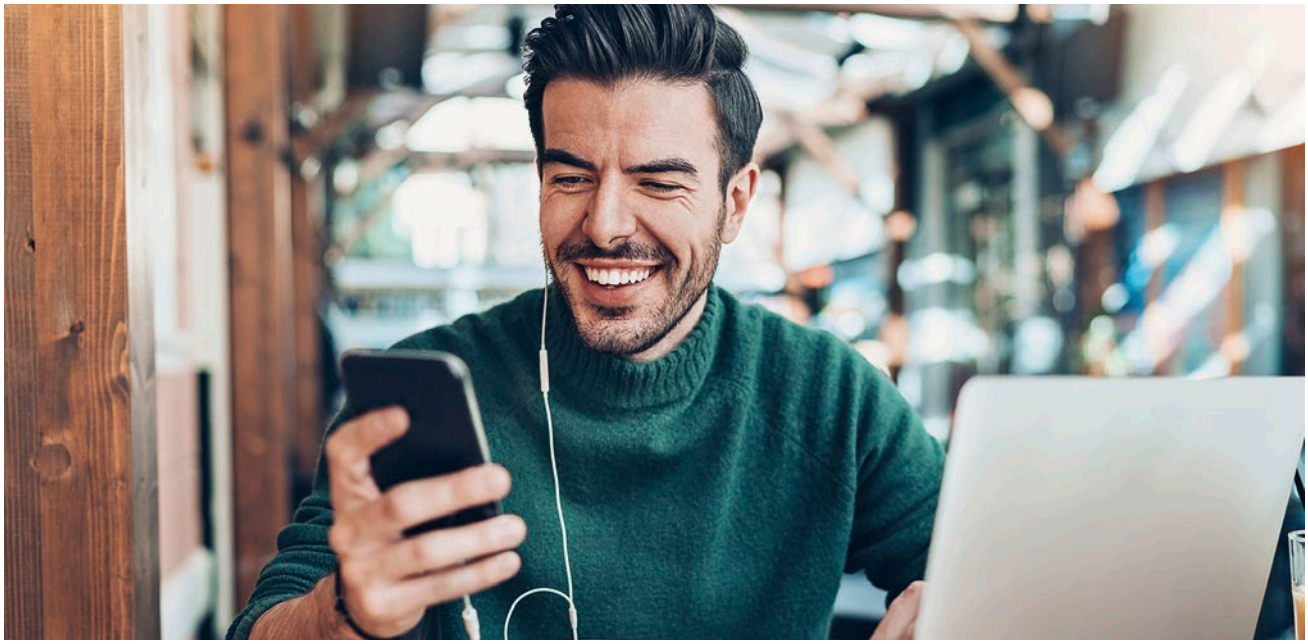
B) Temporary residence permit for workers

British citizens who do not yet live in Germany or have lived in Germany for less than 5 years have to file an application for a temporary residence permit. Depending on the professional activity, the qualification and the remuneration, there are various legal bases for such a permit, e.g. an EU Blue Card.

British citizens can apply for a residence permit for any activity. However, when applying for a residence permit for cases that are not specifically regulated, the Federal Employment Agency will examine whether privileged EU citizens are available for the job (“priority check”).

An application for a temporary residence permit for workers usually requires the following documents:

- valid passport, current biometric photo, application forms
- contract of employment
- CV, including information on professional career, qualification, university degree
- university qualifications, leaving certificates, work certificates/letters of recommendation of former employers
- health insurance for Germany
- rental agreement or proof of home ownership
- adequate pension scheme (applicable to applicants over 45 years of age)



- application processing time: approx. 4 weeks to 2 months

C) Temporary residence permit for self-employed persons

Relevant to a residence permit for self-employed persons is Section 21 (1), (5) of the AufenthG. Pursuant to this Section, a residence permit for the purpose of self-employment may be granted, if

- an economic interest or a regional need applies
- the activity is expected to have positive effects on the economy, and
- the foreigner has personal capital or an approved loan to realise the business idea

The granting of the temporary residence permit may take up to several months as the foreigner's authority must involve the competent bodies in examining the application for the planned business location, the competent trade and industry authorities, the representative bodies for publicsector professional groups and, if applicable, the authority competent for regulating professional licencing. British citizens who intend to work in Germany on a self-employed basis require in particular the following application documents:

- business plan to demonstrate the viability of the business idea
- capital requirements, financing plan, revenue forecast
- if available: orders, contracts with multiple clients
- adequate pension scheme (applicable to applicants over 45 years of age)

2 The Brexit deal & its risks for your businesses

The UKs exit from the EU and, thus, from the single market does also have considerable implications for commercial/business transactions, both in terms of civil jurisdiction and international private law. Moreover, it raises many customsrelated and taxrelated questions with respect to crossborder issues following Brexit.

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1. Cross-border business transactions

Although the UK plans to integrate EU law, at least in part, into national law (socalled retained EU law), it remains unclear to what extent this may take place. Furthermore, since the Court of Justice of the European Union (CJEU) does not hold the decision-making and interpreting power for retained EU law, it may lead to a "drifting apart" of retained EU law and EU law in the long run, in any case. There are currently considerable uncertainties as regards the product compliance regime, i.e. how requirements will differ from the EU-regulations when placing products on the UK market.

It is clear now that the determination of the applicable legislation and the international jurisdiction of courts will no longer be based on the EU-wide Rome- and Brussels-I-Regime. The recognition and the enforcement of judgments delivered in EU countries will take more time in the UK and be more expensive. Existing contracts should, therefore, be scrutinised for legal pitfalls and, at best, be renegotiated.

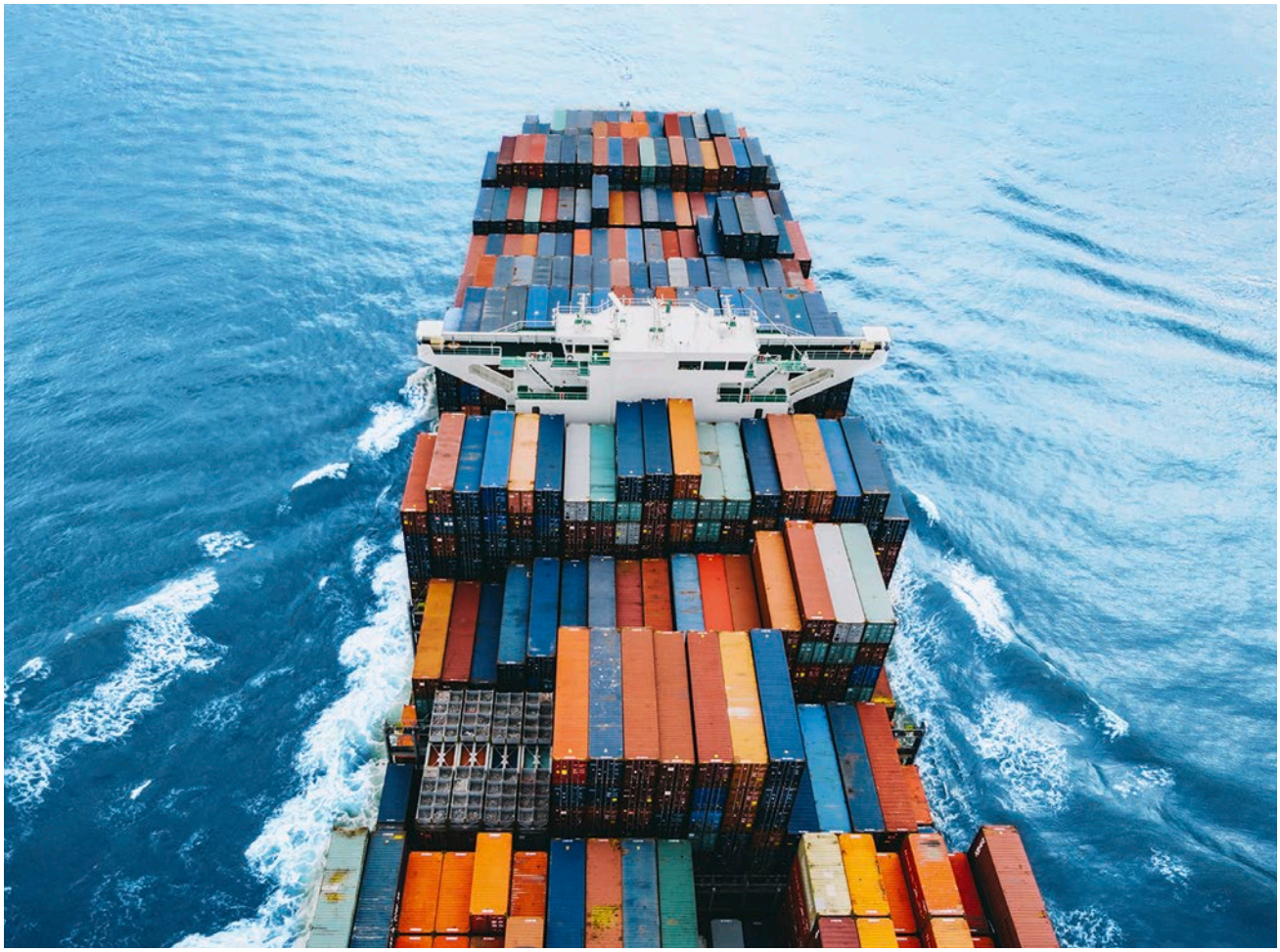
A) Applicable law

- In the EU, pursuant to the Regulation Rome I, the principle applies that the contracting parties may freely choose the legislation applicable to the contract; should such a choice of law be absent, uniform regulations for different types of contracts apply. In case of non-contractual obligations, the applicable legislation is determined on the basis of the Regulation Rome II.

- While the 2019 EU-UK Withdrawal Agreement contained certain transitional arrangements on these issues, essentially for proceedings started by the end of the implementation period 31 December 2020, the TCA does not include any long-term provision in these areas.
- For contracts entered into before the end of the implementation period, these regulations continue to apply.
- The following applies to contracts concluded after the Brexit
  - Courts in EU-member states will continue to apply Rome-I and Rome-II regulation in cross-border cases with the UK (no mutual reciprocity required),
  - UK has incorporated the provisions of the Rome I and II Regulations into national law as retained EU law,
  - at least as long as the Rome Regulations will not be amended EU member state and UK courts alike will determine the applicable law in the same way as previously,
  - note that the choice of "English law" will no longer include EU law.

B) Jurisdiction

- The jurisdiction in the EU is determined uniformly pursuant to the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation):
  - The court first seised enjoys priority as regards the determination of the jurisdiction
  - Member States of the European Union recognise judgments from other Member States without a specific recognition procedure
  - the enforcement of judgments from other Member States of the European Union takes place in separate procedures (not by means of an exequatur).
- After the Brexit, the Brussels I Regulation continues to apply to ongoing procedures, the effect of lis pendens stays applicable unlimitedly. However, the TCA does not deal with this topic. With its exit, the UK has become a member of the Hague Convention of Choice of Court Agreements ("HCCCA") in its own right so those provisions will apply to exclusive jurisdiction clauses entered into postexit day. The UK will also recognise preexisting exclusive jurisdiction clauses entered into after 1 October 2015 but prior to exit day. It is currently unclear how this will play out on the EU side, as the EU is taking the position that the UK was not an independent member of the HCCCA between 01.10.2015 and 01.01.2021, but only in its capacity as a former EU member state.
- The UK would like to join the Lugano Convention, which applies between the EU and Iceland, Norway and Switzerland and is very similar to the Brussels-I



Regulation. However, it is currently unclear whether all EU member states will give the necessary consent.

- In the case of procedures initiated after the exit date, the following applies
  - the respective national legislation in the state of the court seised
  - A separate procedure for the enforcement of judgments between the UK and the remaining Member States may be necessary again. This may entail:
    - a risk of irreconcilable judgments of UK courts and of the courts of the Member States
    - a risk of parallel procedures regarding identical matters in dispute
    - a risk of antisuit injunctions by UK courts
    - the provisions of the HCCCA will apply to the recognition and enforcement of judgments in the case of exclusive jurisdiction clauses (see comments above). In the case of

nonexclusive jurisdiction clauses and also protective measures such as interim injunctions or freezing orders the process of recognition and enforcement of judgments may be more lengthy and complicated. Local law will apply to this process and in some view cases old bilateral treaties between the UK and single EU member states.

- Arbitral decisions can, however, still be enforced on the basis of the continuing application of the New York Arbitration Convention.
- The current simplification under European law regarding the requirements for the services of statements of claim as well as the cooperation and support between the courts of the Member States in civil proceedings do not apply anymore. However, the Hague Service Convention will continue to apply which has similar provisions. There is also the option of including in contracts a provision appointing an agent for service within the jurisdiction.

C) Modification of existing contracts

- The Brexit and the end of the transitional period may have considerable implications for existing contractual relationships as it may considerably change essential conditions for initial cost calculations, for example, due to customs duties, with frequent delivery delays to be expected
- In individual cases, it must be verified whether contracts may be terminated or modified. This may include
  - frustration (Wegfall der Geschäftsgrundlage) pursuant to Section 313 of the German Civil Code (Bürgerliches Gesetzbuch, BGB)
  - impossibility pursuant to Section 275 of the BGB
  - termination of continuing obligations for good cause pursuant to Section 314 of the BGB
  - applicable rights as a result of clauses covering force majeure, hardship, and material adverse change
- However, this will only be possible in cases where the contract was concluded before the transitional period, i.e. before 31.01.2020.

D) To-Do's

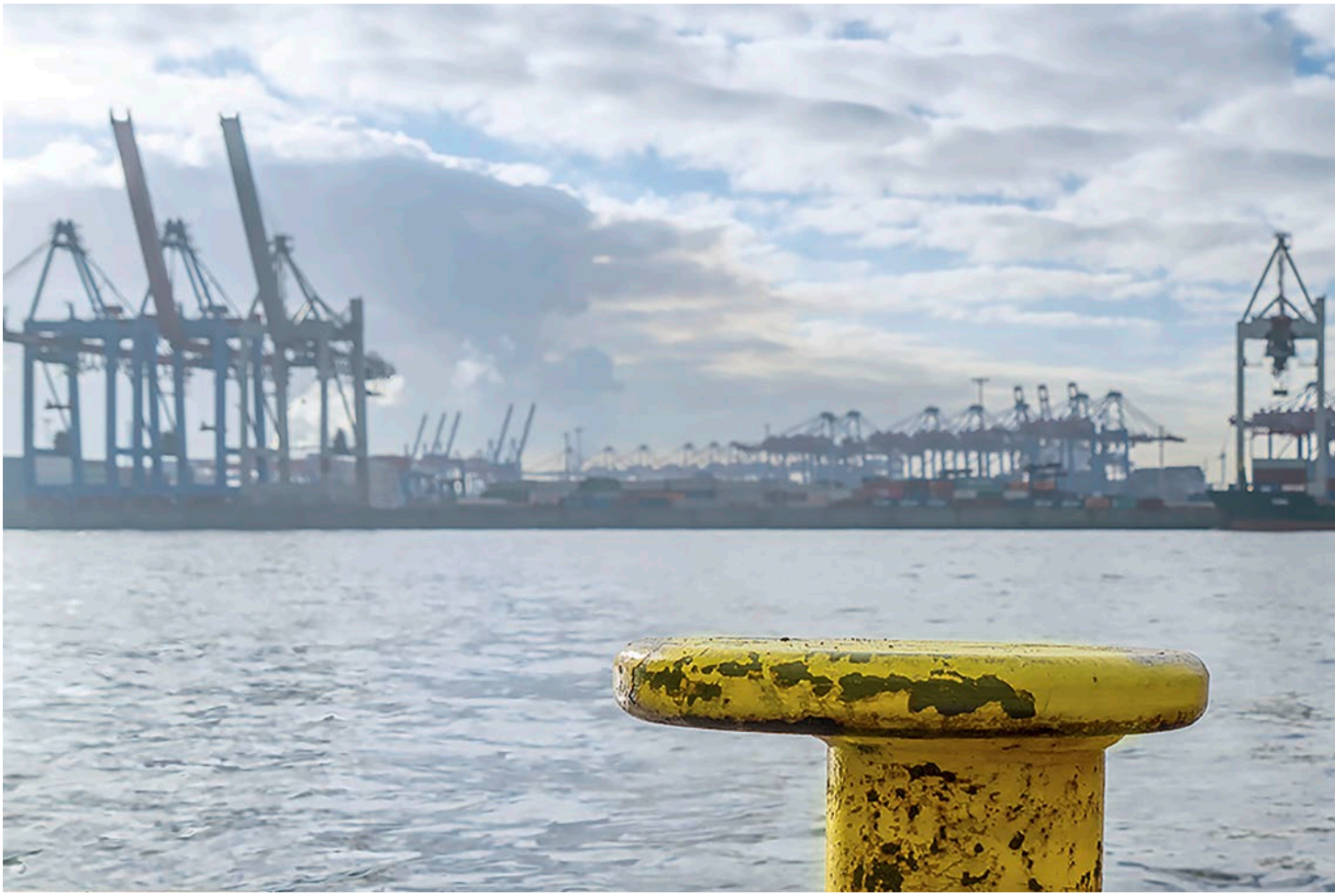
- Existing contracts should be reviewed and, if necessary, be modified with respect to the following:
  - regulations on customs duties
  - material adverse change clauses
  - clauses specifying force majeure and hardship
  - references made to the territory of the European Union, which will no longer include the UK in future (e.g., in licence or distribution agreements)
  - merchantability of products (e.g., CE marking, see below)
  - arbitration clause vs. agreements on the place of jurisdiction
- With respect to future contracts, the following should be observed/agreed:
  - Incoterms®, accurately defined clauses specifying force majeure, hardship, or material adverse changes
  - arbitration clauses
  - careful consideration before choosing English law

2. Product compliance

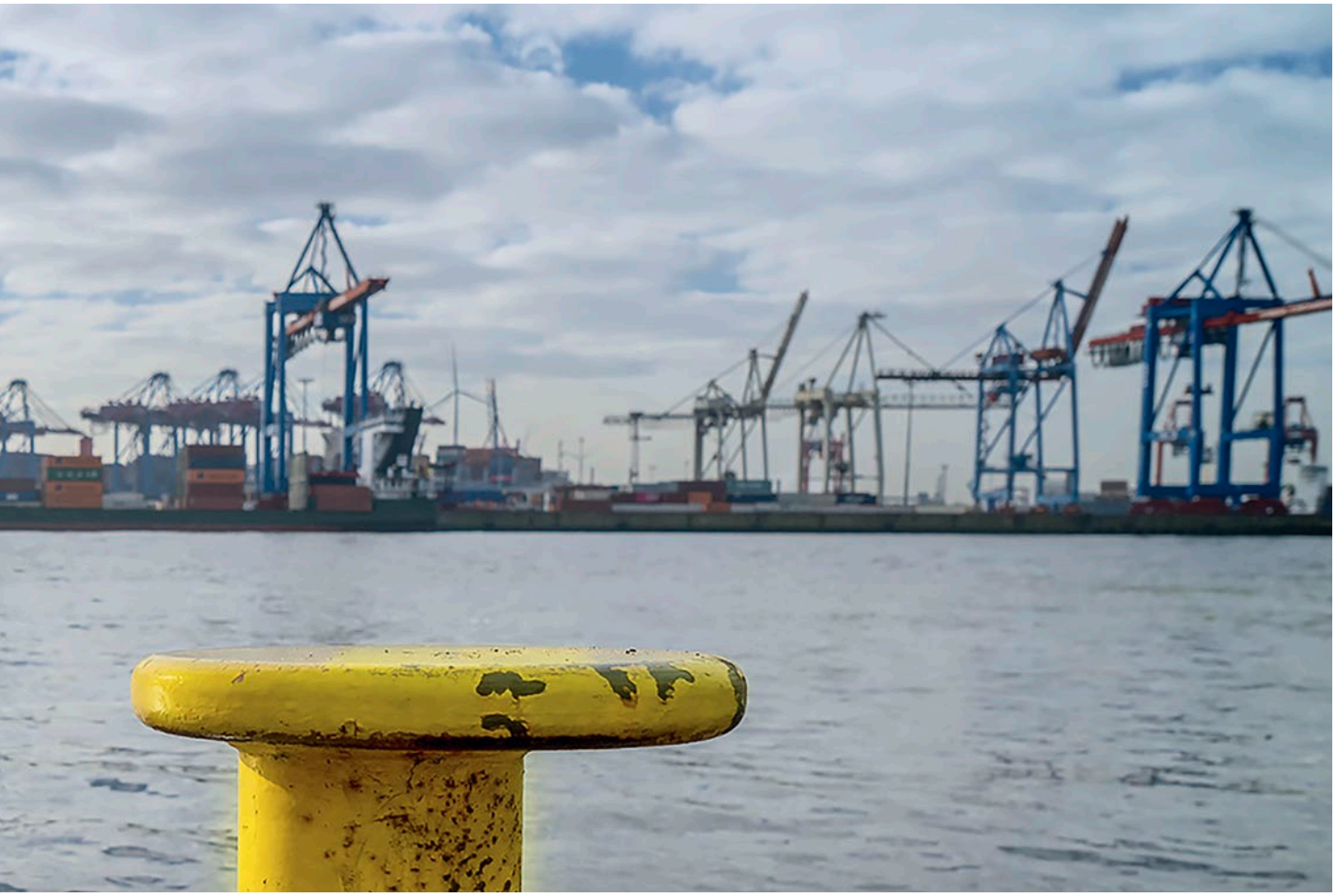
- The EU product compliance regime will remain applicable for all products placed on the market before 01.01.2021.
- After that date the product compliance regime will develop independently. Since all the EU product compliance regime is based on directives that need to be implemented in national law, UK law will for the time being not differ from the EU directives. But that will change when

either GB amends the respective laws or the EU will amend its directives (and consequently the EU member states their laws). Also, case law developed by the ECJ will no longer bind British courts.

- As of 01.01.2021 the UK Conformity Assessed marking (UKCA marking) will apply in the UK for most goods that were previously subject to CE marking.
- CE marking remains valid in GB for the time being and can be used to place certain goods on the British market until 31.12.2021.
- This, however, only applies as long as GB and EU regulations remain the same. If a product has been CE marked based on new EU regulations, the CE marking can no longer be used for distribution in the UK even before 31.12.2021.
- From 2022 on the UKCA marking will replace the CE marking in GB completely.
- Note, that UKCA marking only applies in GB. In Northern Ireland, the CE mark is to be used under the Northern Ireland Protocol.



- Technical requirements, conformity assessment processes and standards will be largely the same as they are now. However, a separate UK declaration of conformity (DOC) which references the UK legislation and standards is needed.
- This means:
  - Products placed on the UK market must in future fulfil UK specific requirement and an additional DOC and marking will become necessary.
  - Existing distributors in the UK distributing products manufactured in the EU (and vis-versa) will be seen as importers and can inherent responsibilities by default. They need to make sure that the product has the correct compliance markings, conformity assessment procedures and technical documentation.
  - Authorised representatives and responsible persons based in the EU will no longer be recognised in the UK.
  - Placing products on the EU and UK market will require compliance under both regimes and therefore increase costs.



Economic operators immediately meet the new requirements as of the entryintoforce of Brexit.

3 End of the freedom of movement of goods

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1. Whatever the agreement – the free movement of goods ends

- Brexit puts an end to the free movement of goods between the EU 27 and the UK at the end of the transition period on 1 January 2021.
- EU 27 and the UK have last minute agreed on a free trade agreement applicable since 1 January 2021. Its final effect is subject to formal ratification by the EU-Parliament and the national parliaments. In the unlikely, however theoretically not excluded, that the overall ratification fails, the unmitigated harsh consequences of a "Hard Brexit" will again be in play. The ratification process may lead to the agreement of additional changes of the trade and cooperation treaty.
- This Trade and Cooperation Agreement between the EU 27 and the UK establishes a free trade area within the meaning of the GATT. As a general rule, no quotas or tariffs apply to goods that comply with the rules of origin of the agreement. Products are covered by the rules of origin if they are produced entirely in the territory of the EU 27 or the UK, or if they are manufactured from materials originating in the territory of the EU 27 or the UK, or if they enjoy legal privileges according to the agreement. Customs formalities should be limited to the minimum necessary.
- Since 1 January 2021, customs formalities between the EU 27 and the UK will be the same as between third countries and this has lead to significant delays in the supply chain. Even the trade and cooperation agreement does not abolish border controls of goods at the common borders of EU-27 and the UK.
  The significant delays due to border controls since 1 January may therefore continue in the future can be expected to be significant. However, customs duties are not levied.
- The end of the transition period on 31 December 2020 often means that the role of a company in the supply chain has changed and with it the regulatory

requirements. EU 27 companies trading with companies in the UK have already or will become importers and exporters of products.

2. Which products are affected by Brexit?

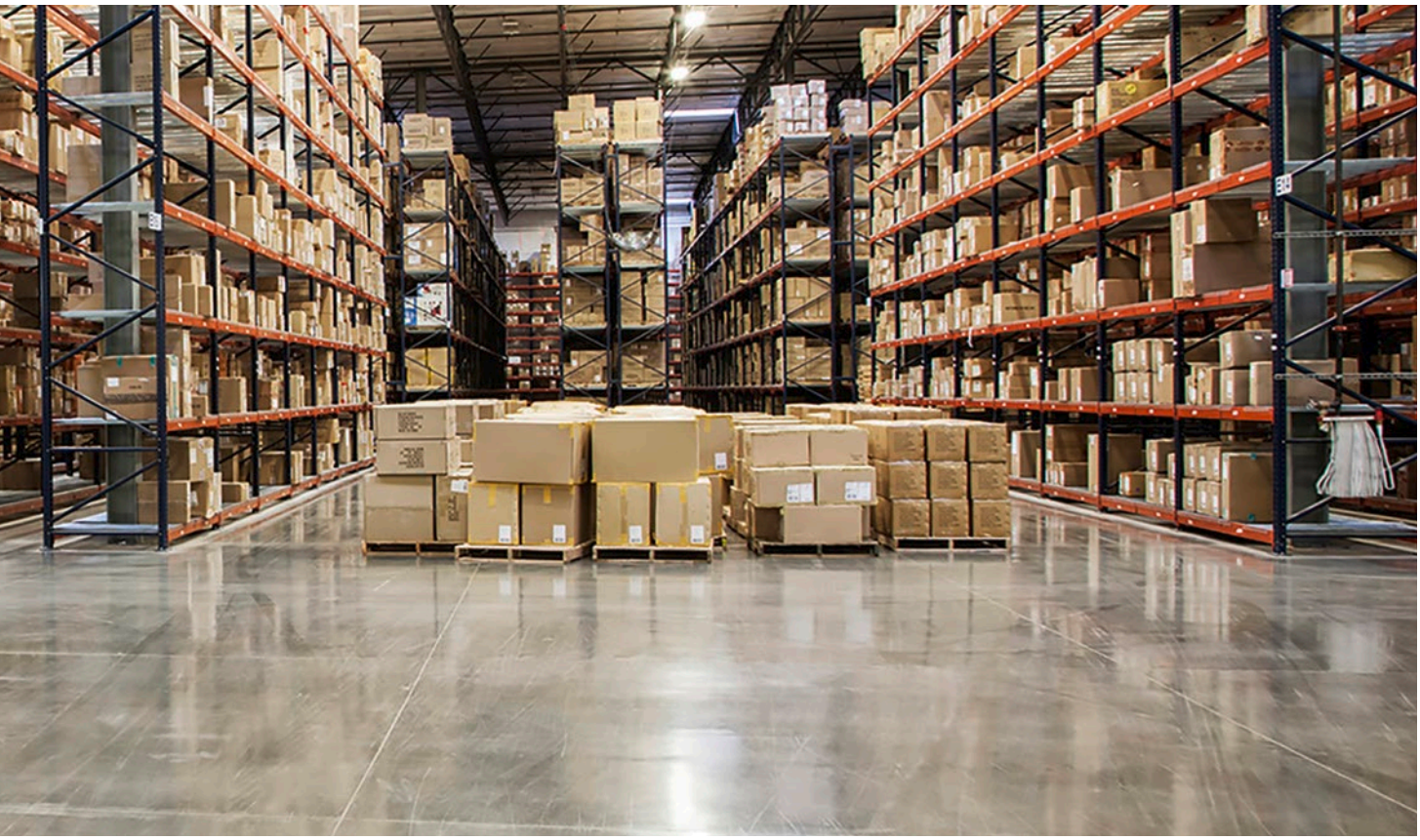
- All products that are traded between the EU 27 and the UK are affected by Brexit. If the trade and cooperation agreements remains in place, the restrictions to the cross-border trade will be mitigated for numerous goods by the rules of origin.
- However, a substantial number of goods will not profit from the rules of origin according to the agreement, specific requirements of their marketability will not be included (for the time being for example the EU 27 requirements for food).
- Products that are imported into the EU 27 will have to comply with EU 27 legislation, products exported to the UK will have to comply with UK legislation. EU 27 export restrictions may apply in addition.
  It is likely, but by no means granted, that the UK will seek the greatest possible harmonisation of regulations in order to minimise barriers to trade.
- The compliances of goods with the requirements of their legal marketability in the EU has to be granted in principle by the person that makes it available on

the EU 27 single market for the first time (the manufacturer or importer) assuming certain legal obligations. The same applies as a general rule to imports into the UK market.

- The following groups of products are especially affected by the Brexit. Eventually specific provisions under the trade and cooperation agreement may provide some comfort.

  - **Products which require an authorisation**

    Brexit automatically invalidates the UK authorisation act for goods (e.g. the registration of chemicals under REACH). Statements from bodies in the UK that have been important for the marketability of goods in the EU 72 have also been invalidated (e.g. proof of conformity from bodies certified under EU law in the UK).
    For the marketability of goods from the UK, a new approval regime for goods from third countries must be created (new approvals, new certifications, etc.)
    For the approval of goods from EU 27 on the UK market nothing else applies. Although the UK will initially transpose EU law into UK national law in many areas (retained laws), the new national acts of the UK (f.e. UK-REACH) must be observed.



- **Products that require certain markings**

  Brexit may also affect the legality of CE markings used within the EU. This is the case, for example, when, exceptionally, the required confirmation of conformity may not be established by the company itself but must be established by a so-called Notified Body (e.g. marine equipment). If this was a Notified Body in the UK before Brexit, the relevant CE markings can only be used if the products were already on the market in the EU 27 before Brexit. If they are imported into the EU 27 from the UK after the Brexit or placed on the market afterwards, a confirmation from a new Notified Body based in the EU must be provided. As the CE markings identify the Notified Body, they must be replaced.
  Conversely, it must be checked whether and what new requirements for their marking exports from EU 27 to the UK must comply with and whether transition periods apply. The CE marking is replaced in the UK by the so-called UKCA marking (United Kingdom Conformity Assessed). For many products with CE marking, a transition period until 31 December 2021 applies.

- **Products for which import requires a responsible person with a physical presence in the EU**

  The marketability of goods on the EU market is normally only ensured if a company with a real establishment in the EU is legally responsible for placing the goods on the market or importing them. While in many areas this was the case for companies based in the UK, since Brexit has become effective, there has to be a responsible person established in the EU immediately.

To-Do's

- Check whether goods are imported from or to the UK. Check in particular whether goods from other third countries are imported into the EU 27 via the UK.

- According to the specific relevant regulations, it must be determined separately for each good and each product whether and to what extent its marketability on the respective market (EU 27 or UK) is jeopardised by the effect of the Brexit; in principle, components, ingredients, etc. must also be taken into account.

- Check whether the marketability of your products is affected by Brexit's effectiveness. If the marketability of goods depends on the involvement of sovereign bodies (e.g. approvals, registrations, etc.) or private bodies authorised by sovereign bodies, it is necessary to determine for the goods concerned whether these measures will continue to apply to the other market beyond Brexit - on a transitional basis - or whether they have been effectively transferred and at what point in time - either by legal transfer or in the context of a restructuring under company law.

- For each supply relationship and goods it should be determined separately whether the legal role and the associated obligation position of the companies in the supply chain changes, in particular whether the economic operator "ascends" in the supply chain through Brexit and places the goods on the market first, i.e. becomes an importer "overnight" and is subject to other obligations and responsibilities.

- If the company becomes an importer or exporter at the external border between the EU 27 and the UK, the necessary preparations must be made in good time - in particular the IT preparations for customs clearance and customs treatment on both sides of the EU 27 - UK border, which are mutually necessary for both export and import since 1 January 2021.

- Clarify the situation with your UK counterparts.

- Contact your advisors at Taylor Wessing - we will be happy to advise you on the regulatory requirements once the Brexit has become effective on both sides of the Channel.


Besides the general requirements for the lawfulness of data processing, specific conditions in terms of data transfer with third countries have to be observed.

4 | Data protection law

The trade and cooperation agreement with the UK, which was concluded practically at the last minute, once again provides for an extension of the status quo. Regarding data transfers, it prolongs the prior Brexit withdrawal agreement for an additional four to six months.

From 1 January 2021, data transfers from and to the UK will continue not to be considered as third country transfers within the meaning of the GDPR for a further transitional period of four months, i.e. until 30 April 2021 (provided that the legal data protection situation in the UK applicable on 31 December 2020 remains unchanged). Data transfers to the UK can therefore take place as before during this period without having to comply with any additional requirements. This transitional phase may be extended once for a further two months if none of the parties objects.

The agreement also provides for the adoption of an adequacy decision by the Commission pursuant to Art. 45 GDPR for the UK during this transitional phase. This was already included in the prior Brexit withdrawal agreement. Talks and efforts in order to achieve an adequacy decision have been ongoing since March 2020, but so far there has been no result. If an adequacy decision is adopted before the expiry of the new transitional period, data transfers will

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be treated as transfers to a third country within the meaning of the GDPR. At the same time, the adequacy decision will create a basis for lawful data transfers to the UK, as is provided in Chapter V of the GDPR.

However, even in case of a timely adequacy decision, additional requirements must be observed. Companies that transfer data to the UK must, for example, refer to such third-country transfers in their data protection declarations. They must also explicitly inform about such transfers when data subjects assert their right to information pursuant to Art. 15 GDPR.

Of course, this applies just as well if the transitional phase ends without an adequacy decision. Additional safeguards must then be in place, such as standard data protection clauses (SCC) or approved binding corporate rules. In certain cases,

exceptions from the requirement of an adequacy decision or appropriate safeguards may apply; however, due to their nature as exceptions, these should be used cautiously. Data exporters should carefully consider if they should rely on such exceptions for their daily business.

In summary, the transfers to UK will become third country transfers within the meaning of the GDPR by the end of 30 June 2020 at the latest, and Art. 44 ff. GDPR will apply. In any case, this will require affected companies to consider the legal implications, both in the event of an adequacy decision and without such a decision. However, an adequacy decision would certainly make things easier.

In addition, data exporters may have to observe the UK data protection law (Data Protection Act – "DPA 2018"), which is modelled after the GDPR. International data processing may be subject to both the GDPR and the DPA 2018, burdening data exporters with more potential issue to consider.

1. Transfers on the basis of an adequacy decision – article 45 of the GDPR

The transfer of personal data to a third country is possible according to Art. 45 GDPR if the European Commission has determined by means of an adequacy decision that the third country offers an adequate level of protection.

The Trade and Cooperation Agreement with UK provides in Part 7 Art. FINPROV.10A that such a decision shall be reached during the transitional phase starting 1 January 2021. Such a decision would end this transition phase.

- The EU (Withdrawal) Act 2018 largely retains the GDPR in UK law. UK has passed the DPA 2018.
- The powers held by the secret service in the UK raise doubts as to whether the UK's data protection level can be compared with the one in place in the European Union, for the applicable legislative provisions of a country with respect to its national security have to be taken into account when examining the protection level.
- In this context, the ECJ recently ruled that the blanket and comprehensive data processing powers of British secret services were inadmissible (judgment of 6 October 2020, C-623/17), which may lead to further delays for the adequacy decision.

Advantages:

- A publicly accessible decision on a third country provides legal certainty
- A data transfer based on an adequacy decision does not require any further approval

Disadvantages:

- An adequacy decision requires a complex and time-consuming Committee procedure on the part of the European Commission.
- Such Committee procedure takes one to two years, according to the Commission.
- Since efforts and discussions on a corresponding adequacy decision for the UK have been ongoing since March 2020, a decision by the Commission in spring 2021 and, thus, within the transitional periods provided for in the agreement, is in principle possible and realistic

2. Appropriate safeguards – article 46 of the GDPR

In the absence of a decision, a data transfer to a third country pursuant to article 46 of the GDPR may take place if appropriate safeguards have been provided for the protection of personal data; these include in particular:

- SCC
- Binding corporate rules in accordance with Article 47 of the GDPR
- Approved contractual clauses pursuant to Article 46 (3) lit. a) of the GDPR
- Approved code of conduct to properly apply the GDPR
- Certified commitments pursuant to Article 42 of the GDPR

A) Standard data protection clauses – article 46 (2) lit. c) of the GDPR

The European Commission may specify SCC, on whose basis a data transfer may take place.

Advantages:

- This may directly be agreed with the contractual parties
- No need to obtain a new approval by the supervisory authorities

Disadvantages:

- SCC may only be used for a transfer between the controller and the controller and for a transfer between the controller and the processor; however, the currently as a draft available SCC 2021 also envisage the transfer of data from processor to processor, so that this constellation is likely to be covered in the future as well.
- In the case of a transfer to a dependent establishment in the UK, a contract may not be concluded as the establishment does not constitute an independent legal subject.
- With the *Schrems II* decision, ECJ clarified that SCC are no automatism for adequate data protection standards in all cases.
- Data exporter and importer remain responsible for the **actual** standard of protection and implementation/ compliance with SCC in third states; in this respect, the recommendations issued by the European Data Protection Board on the implementation of the ECJ ruling on *Schrems II* must be carefully observed.

B) Further appropriate safeguards – article 46 of the GDPR

Other safeguards mentioned in article 46 of the GDPR are, for instance, contractual clauses between the person transferring data and the recipient of the data transfer; these, however, require authorisation from the competent supervisory authority.

3. Appointment of a data protection representative

Who must appoint a representative under British law?

According to Article 27 UK-GDPR, all companies (B2C or B2B) without an establishment in the UK, which offer goods or services on the ground or observe the behavior of persons. The mere offering of a website aimed at UK citizens may trigger the obligation to install a representative. Use cases:

- Tracking of UK citizens, for example by means of cookies or device fingerprints
- UK-focused search engine advertising
- Possibility to order goods or services in UK British pound as means of payment
- Implementation of clinical studies or market research

Duties and role of the representative

The representative is the local point of contact for citizens and the British Information Commissioner's Office (ICO), the UK's data protection watchdog. Letters from the authorities can be served with legal effect for the company. The representative must:

- be established in the UK
- be named in writing
- keep a processing register (Article 30 UK GDPR) of the company
- have power of representation

4. To-Do's

- Under the new agreement, data transfers to/from the UK are provisionally not to be treated as transfers to a third country in terms of data protection law. In a first statement, the German Data Protection Conference (Datenschutzkonferenz, DSK) explicitly advises companies that for the period specified by the agreement, thus until 30 June 2021 at the most, data transfers to the UK can take place without additional requirements. However, this situation will end as soon as an adequacy decision is reached or the specified transition period expires. Consequently, companies should already align their data protection concepts to the fact that data transfers to the UK will be treated as third country transfers within the meaning of the GDPR in the near future. To the extent that the data subject's consent is required for the data transfer, the consent must include the data transfer to the UK and the data subject must be informed on the risks involved therein.
- The fact that personal data are transferred to a third country must also be made available in the Privacy Policies (information of the data subject pursuant to Articles 13, 14 of the GDPR).
- Should the data subject assert his or her right of access pursuant to Article 15 of the GDPR, the information must include the transfer of personal data to a third country.

- The records of processing activities (which is to be maintained pursuant to Article 30 of the GDPR) must include data transfer to third countries.
- Data transfer to third countries must be observed when carrying out a data protection impact assessment pursuant to Article 35 of the GDPR.
- If necessary, appoint a data protection representative for UK.

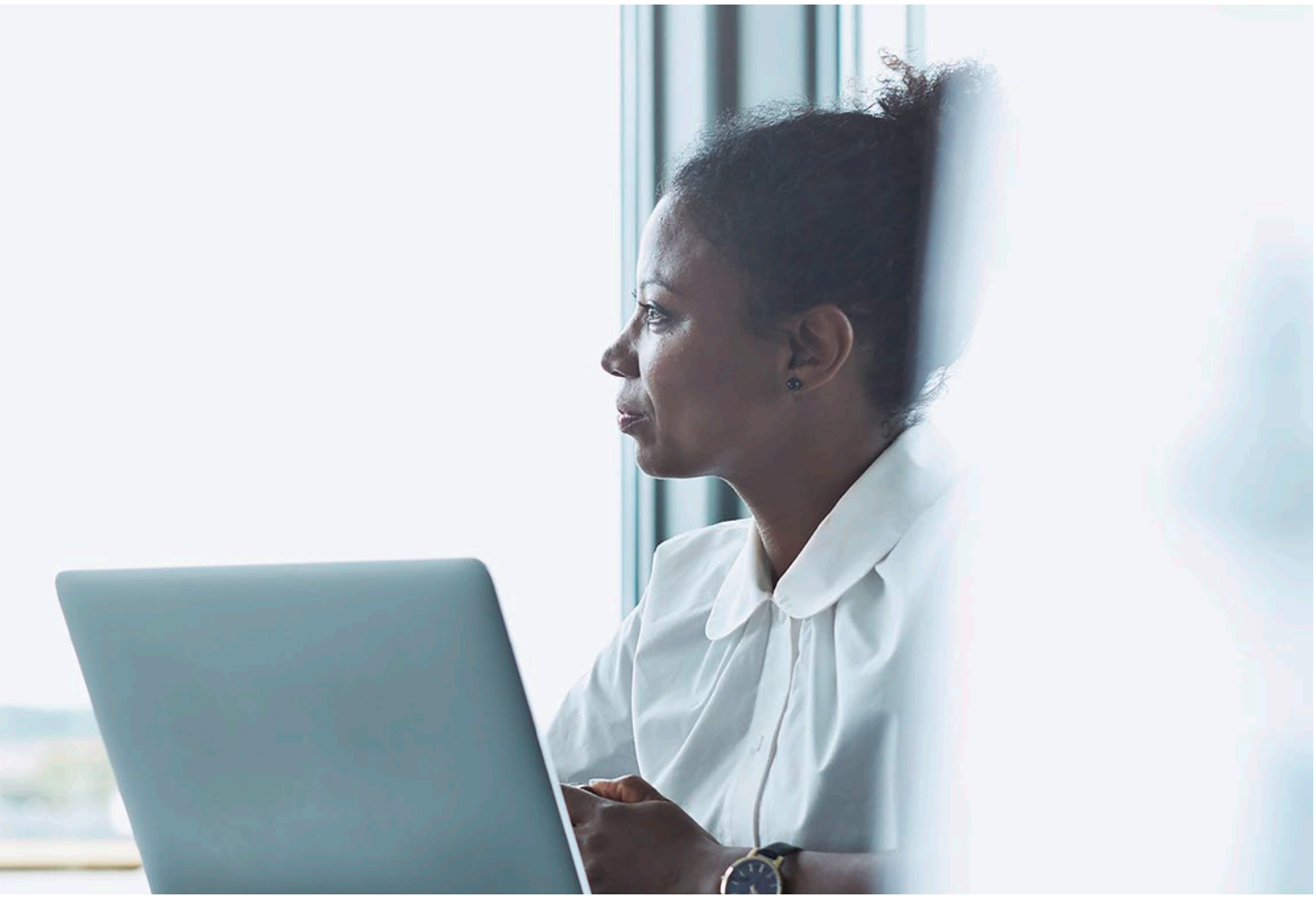
5. Outlook

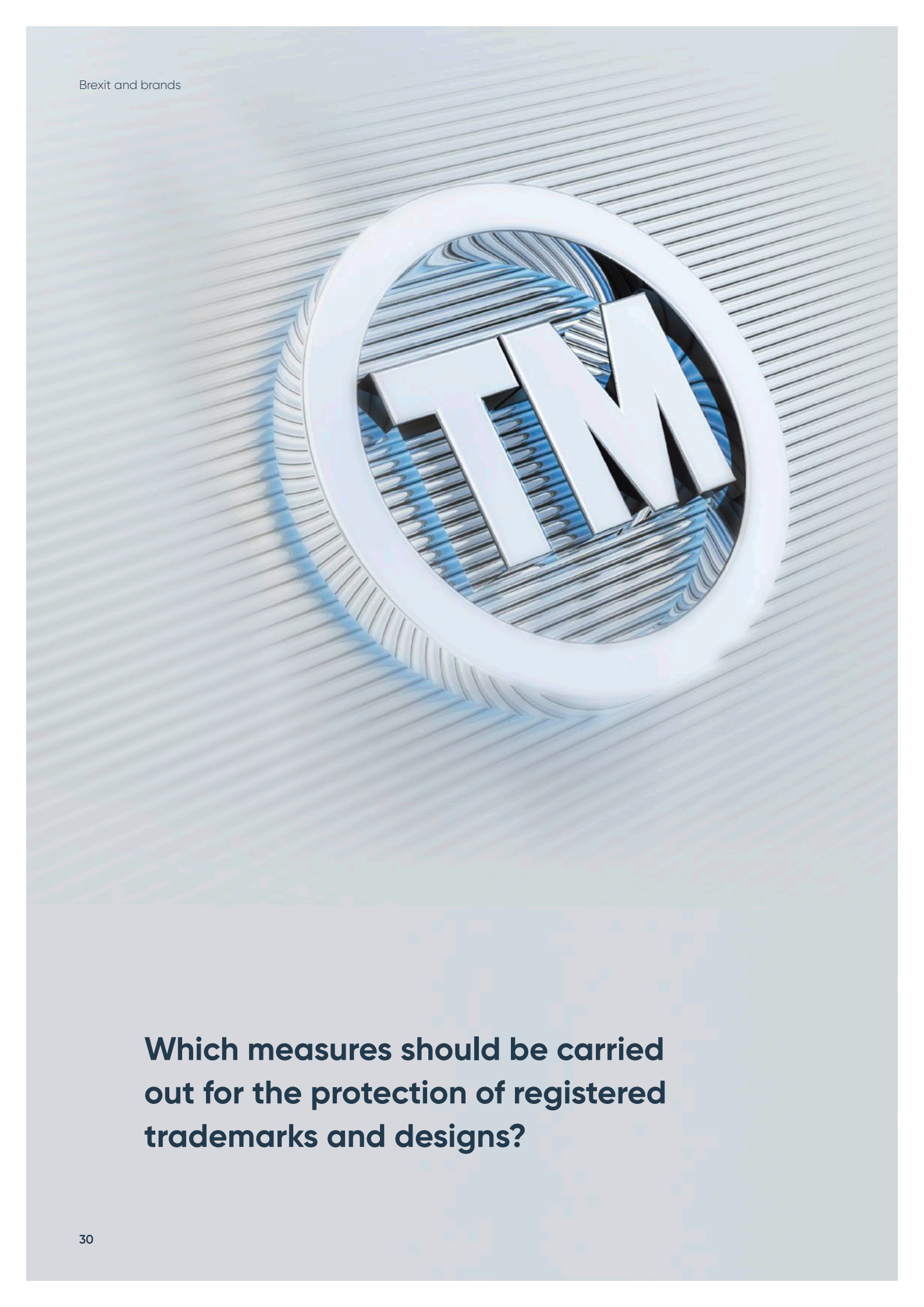
- Even though we expect an adequacy decision before 30 June 2021, companies should also be prepared for the possibility of failing negotiations or for the case that an issued decision by the Commission might be challenged retrospectively and reviewed accordingly by the ECJ.

  In the absence of an adequacy decision data transfers would have to be based on other safeguards, such as SCC. However, it will no longer be possible to use the SCC by way of "copy/paste",

as it has been common practice so far. Instead, the current SCC will have to be drafted and negotiated for each individual case in accordance with the recommendations of the European Data Protection Board on *Schrems II*; alternatively, the revised SCC that are available in draft form and planned for Q1 2021 may be helpful, as these already take into account the special features of *Schrems II* and, thus, demonstrate a significantly higher level of complexity. It can be observed that in case of failure of an adequacy decision, the difficulties of data transfers to the UK are comparable to the current challenges of data transfers to the USA.

- With respect to "unlawful" data transfers, i.e., if the principles and, in particular, the general principles for transfers pursuant to Article 44 of the GDPR are not complied with, any infringements may be imposed with administrative fines pursuant to Article 83 of the GDPR; the authorities generally do not have much discretionary leeway as far as the imposition of administrative fines is concerned.





Which measures should be carried out for the protection of registered trademarks and designs?

5 | Brexit and brands

Brexit will also have considerable implications for intellectual property, in particular, pan-European registered protective rights such as trademarks and registered designs will be affected, as their currently territorial application will concern two different judicial areas after Brexit, the EU on the one side and the UK on the other.

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1. Trademark protection after Brexit

- After Brexit panEuropean intellectual property rights in the UK will be treated in accordance with "The Trade Marks (Amendment etc.) (EU Exit) Regulations 2018". Right holders of an existing EUTM in the UK will be granted a new UK equivalent right, which will automatically be registered in the UK trademark register from 1. January 2021.

2. Contracts related to IP

- The following applies to licences for the use of intangible property rights granted with effect before or on 31 December 2021 in the UK, which generally fall within the scope of protection of a EU trademark:
  - the licence will remain valid for the UK, its territorial protection will be covered by the new UK equivalent right
  - the scope of the licence will be based on the licence agreement
  - licensor and licensee may reach modifying agreements in that respect as to the extent they regard necessary to continue to use the licence under these changed circumstances in the UK
- references to an EU trademark in any document that was drawn up before the exit date will be interpreted in a way that the references made to the EU trademark will be understood as references to the respective Comparable Right under UK law; this does not apply if there are any indications that the agreement made in this document will not have effect in the UK.

- any contracts and other agreements should also be modified, if necessary, depending on how they were drawn up and should be examined on aspects such as the applicable legislation, the place of jurisdiction and, if applicable, regarding any contractually agreed non-compete covenants.

3. To-Do's

- Renewal dates of registered EU trademarks should also be noted and monitored for the Comparable Right in the UK, as in case of renewal of the trademark you will have to decide if only the EU mark or also the Comparable Right shall be renewed.
- should it not be possible to obtain pan-European trademark protection from a registered EU trademark before 31 December 2021, the option exists to use the EU trade mark's priority for the application of a national trademark in the UK within a period of 9 months; should the protection in the UK be obtained rather quickly, it is recommended to immediately apply for a national trademark.
- all registered intellectual property rights in the UK should be extended, unless these are obviously irrelevant to the company
- the advantages and disadvantages of a rapid resolution of all existing legal disputes regarding intellectual property rights relating to the UK or the EU should be weighed up.
- contracts and agreements should be revised (in particular so-called co-existence agreements under trademark law).
- licences should be registered with the Intellectual Property Office UK.
- higher costs should be budgeted for additionally required trademark applications or legal disputes, if applicable.

6 Judicial cooperation in civil and commercial matters. A hard Brexit after all

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1. No Agreement on Judicial Cooperation in Civil Matters and the Lugano Convention

The Trade and Cooperation Agreement does contain, in Part 3, detailed provisions on Judicial Cooperation in Criminal Matters, down to the level of time limits for traffic offences. But the Agreement neither addresses judicial cooperation in civil matters in general nor the United Kingdom's request to re-access the Lugano Convention specifically:

As a result, all provisions governing cross-border litigation between the EU and the UK have ceased to apply. The key element of the EU judicial cooperation regime was the Brussels I regulation on jurisdiction of courts within the EU and the recognition and enforcement of judgments. It was complemented by regulations, inter alia, on service of documents and the taking of evidence. They all fall away without any replacement or substitute.

2. Sectoral Hard Brexit

The EU and the UK were unable to reach agreement on judicial cooperation in civil and commercial matters.

The EU could of course grant its consent to the United Kingdom joining the Lugano Convention at any time, even if it has not committed to granting the consent in the Trade and Cooperation Agreement. But this is unlikely to happen any time soon, as the political decision appears to have been taken by the EU Commission not to allow the UK into the Lugano regime if it stays out of the Single Market.

Practically speaking, we appear to have a "sectoral hard Brexit". As of 1 January 2021, there is no specific treaty basis for judicial cooperation in civil matters between the UK and the European Union. The Trade and Cooperation Agreement does neither provide for expiration periods or for new provisions for that sector, unlike it does for other business sectors. Parties in EU member states will have to rely mainly on the various Hague Conventions, as discussed in more detail on 31 January 2020, on Brexit Day and the transitional provisions in the Withdrawal Agreement.

3. To-Do's

Parties are well-advised to carefully review any choice of law and choice of court agreements in contracts with counterparts in the UK, in particular with a view to compliance with the 2005 Hague Choice of Court Convention. And more than ever, parties should consider arbitration as an alternative when doing business between the United Kingdom and Europe.

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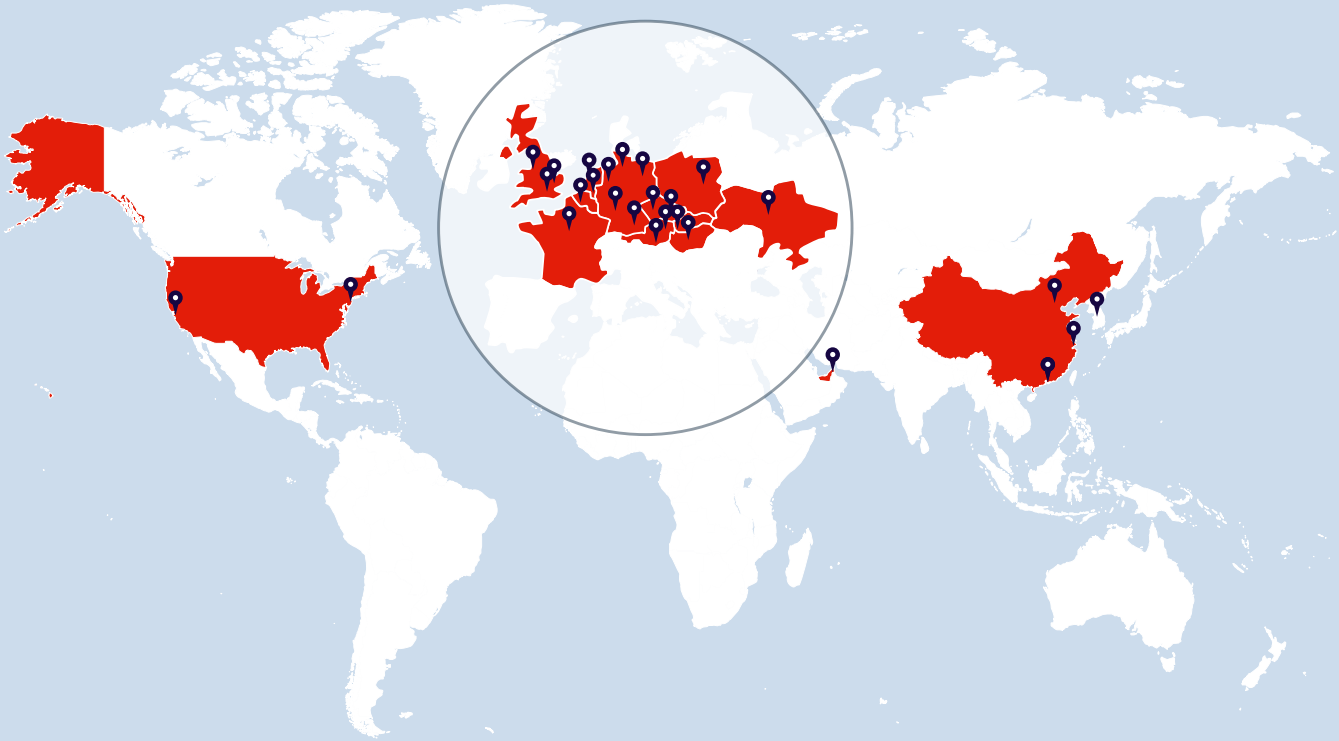

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