HEUKING KÜHN LÜER WOJTEK

How the impending Brexit impacts the legal framework of doing business with the UK

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I. Brexit – what does it involve and when could it happen?

In a referendum, held in the United Kingdom on June 23, 2016, a majority of voters decided in favor of the United Kingdom of Great Britain and Northern Ireland (UK) leaving the European Union (EU) (this exit from the EU by the UK is the so-called Brexit). The referendum is not binding. Before the UK could leave the EU, the government would have to submit a corresponding withdrawal application to the European Council. It is uncertain whether the government will take the decision for such application in its own discretion or whether it will consult or otherwise involve the parliament in its decision-making.

The new British Prime Minister Theresa May has confirmed that she will respect the Brexit vote and start withdrawal negotiations with the EU. It is therefore to be expected that the new British government will notify the European Council in the foreseeable future of the intention to withdraw in accordance with Art. 50 Subsection 2 of the EU Treaty, and will start negotiations concerning a corresponding agreement, even if comments thus far by Mrs. May indicate that this could take until the end of the year. The time-limit on the duration of the negotiations concerning the terms of the exit and the rules applicable to the subsequent relationship between the UK and the EU, is two years from receipt of the notification. This period can be extended by mutual agreement. The UK's withdrawal from the EU would not take effect until following the expiry of this period and approval of the results of the negotiations by the European Parliament and, probably, also by the lower house.

In the interim, the UK would remain a member of the EU, and there would be no changes in the UK's relationship with the EU compared to applicable law. Nevertheless, the impending exit is causing major legal uncertainty and all parties involved in business dealings with the UK must adjust to this now.

During the public debate on EU policy, sight was to a major extent lost of the fact that the EU is primarily an economic and legal community that has established uniform rules for an economic area of approx. 500 million consumers. Products approved in a member state under these rules apply as approved in every member state of the EU, and can be sold there. This is the case for example with pharmaceutical products, motor vehicles, electronic products and similarly in dealings with corresponding packaging, with the identification of ingredients in food products etc. If no successor agreement is reached with the UK in which the UK commits to maintaining uniform product standards, manufacturers and dealers outside the UK will face major burdens. They would then have to design their products to British standards and possibly have them certified accordingly. The reverse sales channel from the UK to the EU would also face new bureaucratic hurdles if future agreements do not ensure continued free movement of goods.

The same would apply as regards the other basic freedoms under the European Treaties - free movement of services and freedom of establishment. In this respect, the previous British government under David Cameron had already indicated that it wished to see restrictions, in particular as regards the influx of European workers into the UK. This will undoubtedly be a difficult aspect of negotiations concerning the future agreement between the EU and the UK, particularly as the EU is adopting the position that free movement of goods and services is not possible without free movement of labor and freedom of establishment.

The participants on both sides now have the task of negotiating an agreement regulating the future trading and economic relations between the EU on the one hand and the UK on the other hand. In addition to regulating the basic freedoms, this will in particular be a matter of the framework conditions, for example the continued application of uniform EU rules on environmental protection, competition law, capital-market law, data protection, consumer protection, as well as regulations concerning customs duties and value added tax.

The following models are currently being discussed for the post-Brexit relationship between the UK and the EU.

- The "Norwegian" model.

  The UK could remain a member of the European Economic Area (EEA). This would guarantee the UK continued access to the EU Single Market.

  Apart from the EU member states only the contracting states of the European Free Trade Association (EFTA) have access to the EEA. The UK would therefore first have to join EFTA. This would require negotiations with all EFTA states (Norway, Iceland, Switzerland and Liechtenstein).

  Given continued membership of the EEA, the UK would still be required to pay financial contributions without being able to influence the decision-making process of the EU. A further problem would be free movement of people, a basic freedom of the EEA and one which proponents of Brexit wish to restrict.

- The "Swiss" model

  Like Switzerland (which is a member of EFTA but has not ratified the EEA Treaty), the UK could enter into a number of bilateral agreements with the EU, so as to maintain direct access to important sectors of the EU Single Market (e.g. free movement of goods and capital). However, as with the "Norwegian" model, the UK would still be required to make a financial contribution without being able to influence the decision-making process of the EU. The question of free movement of people would also automatically arise in the same way as with the "Norwegian" model.

  The EU has also made it clear in the "Council Conclusions on EU Relations with EFTA Countries" dated December 20, 2012 that the Swiss model has reached the limits of its possibilities and should not be expanded further. The willingness to accept a further special case of this nature in addition to Switzerland is likely to be low.

  It should also be noted that the sectoral cooperation with Switzerland does not create complete access to all parts of the EU Single Market. In particular, restrictions apply to the financial services that are important for the London City. In contrast to companies from EEA states, Swiss service providers cannot utilize the "Passporting" instrument.

- The "Canadian" model

The UK could conclude a free trade agreement with the EU or the individual member states, similar to the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU. This would above all enable free trade in goods with the EU. Nevertheless, neither free movement of people nor free movement of services would apply to the UK. In contrast to the above models, this option would not require the UK to make financial contributions.

- The "WTO" model

  If the EU and the UK are unable to agree on any other model, future trade would be conducted under the rules of the World Trade Organization (WTO). UK access to the EU Single Market would be as restricted as for example in the case of a country like New Zealand.

Companies involved in economic dealings with the UK will have to adjust to the coming changes at an early stage. This is also the case if only indirect relationships exist, for example if financing or insurance cover is provided by a British consortium or from London. In particular, there will be a need for caution when choosing English law or English places of jurisdiction until such time as the matter is clarified in the envisaged withdrawal agreement.

The following list illustrates the many areas in which market players in economic dealings with the UK will face changes.

II. Legal areas affected

1. Choice of law clauses in existing legal relationships and the law applicable to non-contractual obligations.

The so-called ROME I Regulation creates the possibility of contract parties from different states specifying the law applicable to their contract themselves, and determines the law applicable in cases in which the parties have not made a choice of law. The so-called ROME II Regulation makes it possible to determine the applicable law for so-called non-contractual obligations, for example in cases of international product liability or for traffic accidents involving parties from differing countries. In Germany and other EU member states, these Regulations will remain applicable even after a possible Brexit.

- From a British perspective however, the ROME I and ROME II Regulations would not apply following a Brexit and would have to be replaced by national rulings in the UK, as the ROME I and ROME II Regulations constitute applicable law only in the member states of the EU. As regards the ROME I Regulation, it can however be assumed that comparable national rulings would take effect, as the UK was already a contracting state of an international agreement containing similar provisions before the said Regulation came into force. It is even conceivable that the UK could take over the rulings of the ROME I Regulation under a national law.

- The situation with the ROME II Regulation is different. For the first time, this implemented harmonized rulings for a series of legal institutions, and overruled a number of special aspects of

national legal systems. Consequently, it cannot be assumed that the national British lawmaker would introduce provisions comparable to the ROME II Regulation in all points.

- An authoritative aspect when choosing the application of English law for a contract is the date on which a possible legal dispute is scheduled to be decided by a court, meaning that account must be taken of changes occurring before then (here: triggered by Brexit). Following a Brexit, EU Regulations - that are directly applicable law inside the EU - would therefore no longer be part of English law. By contrast, national rulings, issued in implementation of EU Directives, would remain applicable until such time as repealed or replaced by deviating regulations.

- Given the current uncertainty concerning future changes to the rulings of English law, the attraction of the English legal system in international trade is unlikely to be enhanced, at least temporarily. In many legal areas, English law will be chosen less frequently - at least temporarily.

- Changes to the legal framework conditions of an existing contract can render execution of this contractual relationship uneconomical. Whether this can be seen as a form of frustration of contract that could, for example, constitute a reason for withdrawal from the contract under German law (see Section 313 BGB (German Civil Code)), is a matter that has to be checked on a case-by-case basis.

2. Corporate law

Companies established under EU law

The legal forms available for companies in the EU and EEA states are based predominantly on the respective national legal systems. Nevertheless, the national regulations are supplemented by European law regulations that offer additional types of corporate forms. These are the European Economic Interest Grouping (EEIG), the European Public Limited Corporation (Societas Europaea or SE) and the European Cooperative (Societas Cooperativa Europaea or SCE).

A common characteristic of all European corporate forms is the possibility of transferring the registered office from one EU member state to another.

All European corporate forms are available not only within the EU but also throughout the EEA. Consequently, a Brexit under the "Norwegian" model, in which the UK would remain part of the EEA, would have no effects on companies under EU corporate law with a UK connection.

The following comments therefore apply exclusively to Brexit scenarios involving the UK leaving not only the EU but also the EEA.

- Companies with registered office in the UK (EEIG, SE and SCE)

  A Brexit also involving withdrawal from the EEA would create problems above all for companies under EU corporate law with registered office in the UK. Under the relevant provisions (of EU law), a company can only choose a registered office in an EEA country. A registered office in the UK would no longer satisfy this requirement following withdrawal of the UK from the EEA.

Under applicable provisions, the country in which the company has its registered office must work towards rectifying this deficiency and, in the most extreme case, must arrange dissolution of the company. However, the country of the registered office is precisely the UK that would no longer belong to the EEA at the relevant time under this scenario.

It is clear that the existing regulations are not tailored to a Brexit scenario involving withdrawal from the EEA, and therefore offer no leverage. The texts of the Regulations on the SE and SCE make it clear that the corresponding rulings provide only for cases in which the registered office is in the wrong EEA country, not however for cases in which the country of the registered office no longer belongs to the EEA at all.

The main requirement for action lies with the British lawmaker who has to place "its" EEIGs, SEs and SCEs (i.e. those based and registered in the UK) on a new legal fundament.

The companies concerned can themselves react through timely relocation of their registered office to another EEA country. This cross-border relocation of registered office is possible under applicable law (i.e. as long as the UK is still a member of the EEA). With SEs and SCEs however, it must be noted that the headquarters must also be relocated in addition to the registered office, as both must be in the same country (the requirements for the EEIG are somewhat less strict).

Whether a cross-border transfer of registered office from the UK to an EEA country will still be possible if the UK leaves the EEA appears doubtful, and is likely to depend on the agreements ultimately reached between the EU and the UK. It is better not to consider this possibility in the meantime.

Another possible course of action as an alternative to relocating the registered office would be to change the company into a national legal form of the - retained - country of registered office (i.e. an SE with registered office in the UK into a PLC). Under the relevant provisions of EU law, this is possible if at least two years have passed since the entry as SE/SCE. EU law does not provide for a comparable option for the EEIG.

- UK members of an EEIG

It is important to note that only nationals of an EEA country can be fully entitled members of an EEIG, irrespective of where it has its registered office. This means that, in the event of Brexit with withdrawal from the EEA, UK members would leave an EEIG (and could at most remain with a non-genuine status as "associate" member). Every EEIG - including those with their registered office outside the UK - should therefore concern itself with the effects of a Brexit on their membership, especially as an EEIG must have at least two members from two different EEA countries, meaning that if too many members leave, the worst case could be dissolution of the EEIG.

With an SE or SCE, there is no requirement stating that members must be nationals of EEA countries (except in the formation phase), with the result that there is no corresponding need for action with existing SEs and SCEs.

Cross-border mergers

The merging of companies governed by the law of different states is a legal challenge, as a procedure of this nature is only possible through interaction of the legal systems concerned, and also of the authorities or courts of the countries involved.

Cross-border mergers therefore constitute a subject where the purpose and importance of a supranational or international legal framework are clear.

In 2005, the EU created such a framework through the Directive on Cross-Border Mergers of Limited Liability Companies (Directive 2005/56/EC, the so-called Merger Directive).

The Merger Directive applies not only to the EU but also to the EEA. The participation of UK corporations in cross-border mergers under the regime created by the Merger Directive would therefore remain possible after a Brexit according to the "Norwegian" model.

However, if the UK leaves not only the EU but also the EEA, this participation would no longer be possible. Instead, it would depend on whether the national legal systems of all countries involved permit cross-border mergers, and are sufficiently coordinated to make this process practicable in the first place.

Mergers between UK and German companies would then no longer be possible, as German national law recognizes exclusively mergers within the same country.

Planned mergers involving UK companies should therefore be started soon for precautionary reasons, so that they can be concluded in sufficient time before a Brexit takes effect - taking account of the fact that the process traditionally takes a long time, at least several months.

Recognition of foreign companies, freedom of establishment

- UK companies with effective administrative headquarters in Germany

  The so-called ‘real seat’ rule is generally applicable as regards the recognition of companies with a foreign legal form in Germany. Under this rule, companies are treated in accordance with the law of the country in which their effective head office is located. If a company is set up under foreign law but has its corporate office/actual head office in Germany (for example if the company has business operations only in Germany but not in its country of formation), the foreign legal form will not be recognized. Instead - provided it is regarded as existing at all - the company will be treated as a non-registered German Civil Law Association (GbR) or Commercial Law Partnership (oHG) (with the not insignificant consequence of personal liability of the partners for all debts of the company).

  Based on a series of decisions by the European Court of Justice, this is not the case if the company concerned has been effectively formed under the law of another EU member state (or EEA contracting state). It will then enjoy European freedom of establishment, enabling it to set up branches and to do business in all EEA countries, without other member (or contracting) states being able to call the company's existence (in the chosen legal form) into question. There is no requirement of predominant activity in the country of formation (or indeed any activity at all in, or other connection to, the country of formation).

Accordingly, the UK's membership of the EU currently makes it possible to use an English (or Scottish or Northern Irish) legal form for a company that operates fully or predominantly in Germany, and this has also been the case in practice. Examples include Air Berlin (English PLC), some German law firms or German national organizations of international law firms (English LLP).

Whether this practice will still be possible after a Brexit depends on the withdrawal modalities. With the "Norwegian" model, i.e. continuing membership of the EEA, nothing would change, as freedom of establishment is applicable throughout the EEA and is not restricted to the EU.

With all other models however, freedom of establishment would initially cease to apply, and the 'real seat' rule outlined at the beginning would again take effect. The situation would only be different if the UK were to succeed in agreeing bilateral recognition of own companies (as is the case for example in relations between Germany and the USA - not however between Germany and Switzerland). Consequently, if it were to become apparent that the UK intended to withdraw from the EEA without express confirmation of continued freedom of establishment for British companies, the companies concerned would have to consider new organizational forms in good time, possibly through merger into a new company in another EEA country, or, in the case of a PLC, transformation into a European Company (SE) with subsequent transfer of registered office to another country (as long as these instruments remain available).

- German companies with real seat/head office in the UK

The reverse case of a corporation under German law (Aktiengesellschaft, GmbH) with actual head office/real seat in the UK is less problematic. Under current German law, corporations can have their head office abroad - in any country either inside or outside the EEA. As such, a decision by the UK to leave the EEA would be of no relevance. The only change would be that the UK would no longer be obliged to recognize such companies, as it would no longer be bound by the requirements of freedom of establishment. However, the possibility of non-recognition is unlikely. Under the various jurisdictions in the UK and in contrast to German law, companies have always (and irrespective of European requirements) been governed by the law chosen for the formation of a company and not by the law applicable at its actual head office, with the result that a company, correctly set up in the UK under German law, will automatically be recognized as such.

This leaves the question of German partnerships (in particular KGs). According to prevailing opinion, these are already required to have their actual head office in Germany. European law does not stand in the way of this, as it only obliges the EU member states to respect companies of other EU member states, but leaves them complete freedom concerning the question of which prerequisites must be satisfied for the formation and continued existence of a company under the respective own law.

German partnerships with head office in the UK are therefore problematic irrespective of Brexit, and cannot be recommended.

3. Litigation/civil proceedings

Civil proceedings in ordinary jurisdiction

The EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters would no longer be effective in the UK following a Brexit. Temporarily at least, this would complicate and delay the recognition and enforcement of German and British judgments in the respective other country. The recognition of foreign judgments is a prerequisite for their enforcement in the home country, meaning that the future ability to enforce German court judgments in the UK is questionable. One solution could be an international agreement between the EU or Germany and the UK. It is currently not possible to predict the time frame that would be required for negotiation and implementation of any such agreement.

Following a Brexit, service of statements of claim and written pleadings under the EU Regulation on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters would no longer be possible in German-British court proceedings, as the Regulation is applicable only to legal dealings between EU member states. Instead and as is the case with all other non-EU countries, the Hague Service Convention would apply, since both Germany and the UK are contracting states to this international agreement. This would probably delay service in civil matters since, in contrast to the EU Regulation on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the Hague Service Convention does not recognize any principle of expedition. As a result, waiting several months for a certificate of service from the recipient country is by all means possible. However, it is unlikely that the change of the law on service could be used for deliberate delaying tactics.

Following a Brexit, it would be questionable whether companies with an English legal form but based in Germany - e.g. Limited Company (Ltd.) or Limited Liability Partnership (LLP) - could in future be regarded as Civil Law Partnership (GbR) or Commercial Law Partnership (OHG) in Germany, with the result that their shareholders would be considered as partners and therefore unrestrictedly liable to the company's creditors. However, such companies would remain capable of being parties to legal proceedings before German courts, even in the event of a forced/deemed change of legal form.

Civil proceedings before courts of arbitration

By contrast, a possible Brexit would have no effects on current and future arbitration proceedings. The recognition and enforcement of foreign arbitration judgments is based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of which both Germany and the UK are contracting states. Accordingly, both countries are subject to internationally binding rulings that do not depend on (ongoing) UK membership of the EU.

4. Employment law

Possible employment-law consequences of Brexit could affect not only persons employed in the UK, but also companies from other EU member states and their employees.

Cross-border deployment of employees

This is particularly true with regard to cross-border deployment of employees - i.e. the posting of German workers to the UK on the one hand, and the employment of UK nationals in EU member states on the other hand. Given the free movement of workers and the free movement of services applicable in Europe, there are currently no restrictions on working throughout Europe. Free movement of workers enables all EU nationals to live in any EU member state, and to work under the same conditions of employment as nationals of the respective country. This will remain the case until such time as the UK actually leaves the EU. In view of the impending exit, companies must however adapt their contracts for postings from and to the UK, such that immediate recall is possible in the event of the posting becoming inadmissible. Whether postings to or from the UK after Brexit takes effect will require a visa, a work permit or other authorizations will depend on the results of the withdrawal negotiations.

Consequences for employee posting under social insurance law

The consequences of posting from a social insurance law perspective and what working conditions will apply in the UK after withdrawal from the EU, will then become clear. British trade unions are worried that the employee protection rights created under European law will no longer be retained at the same level after Brexit. However, as the European protection regulations, such as those on maternity leave, parental leave, equality and anti-discrimination, have been established in the UK for many years and have been implemented under national law, it is hardly conceivable that there will be any serious deviations to the detriment of employees in the near future.

Pension entitlements

Since 2004, an EU Regulation on mandatory pension payments has been applicable to employees working in different EU member states. This Regulation stipulates that mandatory pension payments should be bundled in one country if possible.

If the UK leaves the EU, the Regulation will no longer be applicable to the UK. There will then be a need for a number of bilateral regulations, if the pension payment entitlements of EU nationals working in the UK are to continue to be bundled. Conversely, this naturally also applies to UK nationals working abroad.

Co-determination

Brexit can also be of significance for corporate co-determination in groups of companies operating throughout Europe. A problem could result above all when filling specific cross-border employee bodies. The EU Works Council Directive and the EU SE Directive make it possible for British employees or their trade union representatives to participate in these cross-border bodies. Following the withdrawal of the UK from the EU, it will be necessary to create rulings to ensure that the participation rights of British employees in the SE bodies (Supervisory Board or SE Works Council)

are retained. If no rulings are made, the rights of British employees to participate in such bodies will cease to exist in future.

The same applies to employee participation in a European Works Council formed under the European Works Council Directive. In the event of the EU not agreeing a new legal fundament with the UK, British employees would no longer be able to work on the European Works Council in future. The composition of the body would change. The other members of the European Works Council would have no entitlement to information and consultation concerning measures planned by the group management in the UK. The above does not apply to companies that have exercised the option of voluntary formation of European works council bodies prior to the coming into force of the European Works Council Directive and of their national implementing laws. The agreed rulings on the European Works Council will remain applicable in these companies, with the inclusion of the UK.

According to the disputed opinion of some German civil courts, employees of German corporations working in other EU countries count towards the threshold levels for the formation of co-determined Supervisory Boards, and are entitled to vote if applicable. Following completion of Brexit, it will no longer be possible to consider staff employed in the UK.

Transfer of undertakings or businesses to another employer

The UK has implemented the Transfer of Undertakings Directive into national law through the "Transfer of Undertakings Protection of Employment Regulations” (TUPE). The UK is free to deviate from these rulings following Brexit, as it will no longer be bound by the EU Directive. Following the UK's withdrawal from the EU, there is therefore the possibility of repeal or revision - unforeseeable from a content perspective - of British regulations on the transfer of ownership of an undertaking or business to another employer. Companies planning an asset deal in the UK must take account of this uncertainty.

Employee data

The smooth transfer of employee data to and from the UK will remain absolutely essential in future.

The Data Protection Directive, currently still applicable, that enables the transfer of employee data within the EU member states, would no longer be applicable to the UK in the event of a Brexit.

Following Brexit, the UK will initially be classified as an "unsafe third country" from a data protection perspective. In this case, the UK would have to demonstrate an appropriate level of data protection. Just how high the barriers to the transport and storage of personal data are in such cases, is demonstrated by the current discussions concerning the so-called "EU-US Privacy Shield" agreement with the USA. It may have come into effect, but it is anything but certain that the agreement will last and will not be declared null and void by the European Court of Justice, as was the case with its predecessor Safe Harbor. This is because there are only a few countries that are acknowledged by the EU as having a level of data protection comparable to its own. One example is Canada.

The transport and storage of personal data could therefore result in companies relocating their European business from the UK to the EU for data protection reasons. Vodafone, Barclays and Visa have already expressed thoughts along these lines.

5. Banking and capital-market law

Reciprocal market access for financial undertakings/companies

- Brexit would initially have direct effects on the UK business of **German-based financial companies** (banks, financial service providers, investment management companies and insurance companies). At present, these financial companies can operate in the UK - either through cross-border services or via branches - on the basis of their German license, without needing a separate license in the UK. It is sufficient for the companies to notify their corresponding intention to the responsible German supervisory authority, which then informs the supervisory authorities in the UK (so-called European Passport). This option would no longer apply after the UK leaves the EU. It remains to be seen to what extent the withdrawal negotiations produce an agreement on comparable reciprocal access to the respective market for financial companies. Given this background, German financial companies should carry out a timely check on how they can structure and continue their UK business after Brexit. There are several options open to companies in this respect. They depend in particular on the scope of the business and the client group in the UK (professional or private clients).

- A Brexit would have noticeably farther-reaching consequences for **German-based branches of UK financial companies**. These branches currently operate in Germany under the European Passport, and do not therefore require a separate license in Germany. The lapsing of the European Passport would mean that the branches would no longer be authorized to conduct business in Germany. There are various options available to the branches if they wish to continue operating in Germany. For example, the branch could act purely as a representative office in Germany. In this case, however, the representative office would not be allowed to provide financial services or banking services. The branch could also apply to the German supervisory authorities for a license to offer the services previously provided, or for brokering services. Additionally, it would be possible to restructure the branch into a subsidiary of the British company, and to apply to the German supervisory authorities for a corresponding license for the subsidiary company. In this case, the German subsidiary could also engage in cross-border operations in other member states of the EU via the European Passport.

- Fundamentally speaking, **financial companies based in the UK** would no longer be able to provide cross-border banking services or financial services in Germany after Brexit, subject to possible rulings in the exit negotiations. If corresponding services are provided and completed prior to Brexit (for example awarding of a non-revolving credit facility) these will not be affected by Brexit. In the case of banking business and financial services started before Brexit and that are to be continued thereafter (for example awarding of a revolving credit facility, asset management contracts), both parties should ensure timely clarification of how these services can continue to be provided by the British company, even after a Brexit.

- Within the framework of existing business relationships between British financial companies and German clients, it will frequently be possible to continue providing the corresponding services on the basis of the passive free movement of services. However, it is not possible to actively establish new relationships with German clients in the context of the passive free movement of services. Nevertheless, British companies can apply to the Federal Financial Supervisory Authority for exemption from individual supervisory-law rulings, concerning the cross-border provision of banking and financial services to institutional clients in Germany. In this case, the British company can provide cross-border banking or financial services for German institutional clients, without the need for a separate license in Germany. Swiss banks and financial service providers frequently make use of this option. Alternatively, British companies can set up a branch or subsidiary in Germany that then works for German clients. Nevertheless, the branch or subsidiary requires a license from the Federal Financial Supervisory Authority for the provision of the respective banking or financial services in Germany.

Securities prospectuses

Brexit would also have consequences for the cross-border offering and approval of securities prospectuses. At present, a securities prospectus approved by the responsible authority in the member state of origin, can be used in all EU/EEA countries for stock-market admissions or public offers of the respective security without an additional approval procedure. This possibility would no longer apply following a Brexit. Prospectuses approved in the UK would no longer automatically be valid in the EU. An additional approval procedure could be required for stock-market admissions or public offers of the respective security as long as no other ruling has been made on equal-value recognition.

Investment funds

- **Investment management companies based in Germany** will no longer be able to sell the UCITS (Undertakings for Collective Investments in Transferable Securities) and AIF (Alternative Investment Funds) managed by them, or UCITS and AIF from other EU member states, in the UK under the European Passport after a Brexit. This will probably require application for a separate selling license in the UK, unless facilitated selling is incorporated into the withdrawal negotiations. In addition, investment management companies should check the investment conditions and investment restrictions for their funds, and possibly adjust these in terms of the admissible geographical allocation and the investment limits. A check must also be carried out on the ability to acquire any target funds, launched in the UK, after Brexit. This also applies to other companies or institutional investors who have to observe investment requirements when making their investment decisions (for example insurance companies, pension funds, foundations etc.). These companies should also carry out a timely check on the effects of a Brexit on the risk classification of individual assets held. If German investment management companies have appointed a custodian in the UK for funds managed by them, they must appoint a new custodian for these, as the custodian of AIF or UCITS must be situated in a member state of the EU.

- **Investment management companies based in the UK** will no longer be able to engage in cross-border management of UCITS or AIF from other EU member states following Brexit.

UCITS and EU AIF launched in the UK will probably lose their corresponding status as UCITS and EU AIF, as they will no longer have been launched in an EU member state. After Brexit, these funds could only be sold in the EU in accordance with the regulations for funds from third countries (for example funds launched in the USA or the Cayman Islands).

Financing

The present widespread agreement of English law for syndicated loan agreements may be called into question for the time after a Brexit, as it is currently not clear what the precise content of English law will be following a Brexit. Even the current popular use of the English "Scheme of Arrangement" for complex restructuring measures could become less important for companies and creditors outside the UK in future, at least as long as the content of the applicable English law and its recognition in the EU member state are uncertain (see Section 10, Subsection "Schemes of Arrangement").

Further aspects

Following a Brexit, EU financial institutions could be obliged to sell bonds secured through British mortgages, bank loans or credit-card claims, because these would carry a higher political risk following a Brexit, or the European financial supervisory authorities could also forbid the holding of such bonds as liquidity reserve. Overall, there would then also be a need for a new risk assessment on financial market products.

In addition, UK CCPs (Central Counter Parties) would require formal recognition under EMIR, in order to be able to continue working in the EU Single Market in future. A CCP based outside the EU can only provide corresponding services if it has previously been recognized by ESMA as supervisory authority.

6. Intellectual property rights

Effects on harmonized European protected privileges

- EU trademarks

  EU trademarks are harmonized protected privileges that are directly applicable in all EU member states on the basis of the EU Trademark Regulation. It is currently not clear what will happen to the "UK part" of these trademarks. In the event of the withdrawal negotiations not producing an agreement under which the EU trademark system continues with regard to the UK, the question will arise of whether, when and to what extent the limitation of the territorial scope of protection of the EU trademark could be compensated for through the simultaneous creation of a corresponding national protected privilege in the UK. Even if experience following the break-up of the USSR and Yugoslavia currently does much to suggest that there will be priority-safeguarding conversion into a UK trademark with retention of the EU trademark then covering 27 EU member states, the possibility of loss of the trademark rights in the UK cannot be fully excluded as "worst case" scenario.

Parties registering EU trademarks, for whom the UK represents an important market, should therefore consider registering UK trademarks in addition now, if applicable by way of international protective cover under the Madrid System - possibly intended anyway. The resulting additional expense is unlikely to differ significantly from any possible conversion fee.

- Community designs

  In principle, the above considerations concerning EU trademarks apply accordingly to community designs.

  In contrast to trademarks that can be extended time and time again, the period of protection for community designs is however limited from the outset to 25 years (registered community design) or three years (non-registered community design). This situation could encourage a solution in the interests of the continuity of existing designs, in particular since, in view of the preconditions for protection of newness and uniqueness, the new registration of national designs outside of the so-called period of grace could not be considered.

  Other than under the Madrid System for international registrations applicable to trademarks, an international design registration is not possible, because the UK is as yet not a member of the Hague Convention. The flanking registration of national designs in the UK may appear advisable here.

Consequences for IP portfolio management

With regard to the management of EU trademark portfolios, it should be noted that persons with neither a place of residence nor a commercial or trading establishment in the EEA, are subject to compulsory representation before the European Union Intellectual Property Office (EUIPO), with the exception of when registering an EU trademark. If the UK does not remain in the EEA under the "Norwegian" model, trademark owners based in the UK would therefore have to appoint a lawyer, admitted and based in an EEA country, or other admitted representative, to be able to act before the EUIPO.

Irrespective of whether the UK remains in the EEA, the appointment of a representative, admitted and based in the EU, or of another admitted representative, would certainly be necessary in the area of the Community Design Regulation given the current legal situation, since, other than the recently reformed Art. 92 Subsection 2 of the European Trademark Regulation, Art. 77 Subsection 2 of the Community Design Regulation is not based on the EEA but rather on the "community".

With international trademark registrations, it must be noted that the registrant or owner of the base trademark must either be a national of the country of registration or be domiciled there, or must have an actual commercial or trading establishment there that does not exist just for sham purposes. For registrants from the UK with no such establishment in the EU, the choice of an EU trademark as base trademark is therefore not possible in the event of effective withdrawal, seen from the current perspective. With regard to the five-year binding of the international trademark to the continued existence of the base trademark, it is currently not clear whether and under what pre-

conditions existing international registrations, submitted by registrants from the UK on the basis of European base trademarks, will last in future. Here too, transition rulings can be expected.

Enforcement of IP rights

A consequence of limiting the territorial scope of protection of EU trademarks and community designs would be that an injunction, granted by a court for the entire EU, would no longer suffice for forbidding infringements of rights in the UK following a Brexit. Instead, the holder of the rights would have to file separate legal action in the UK, in order to also prohibit the infringements of the rights there. Any such legal action could then only be successful on the basis of a national UK law.

Whether titles, previously issued by UK courts with EU-wide effect, would continue to be recognized by courts in the EU member states following withdrawal of the UK, is as difficult to forecast as it is to answer the question of how the UK will handle court titles with only a national effect, but obtained on the basis of EU rights. In each of these cases, the parties are therefore faced with the risk of disputes, already decided by a court, being "rekindled".

Also uncertain is whether and to what extent reasons for cancellation, relevant to a specific territory and with no effect thus far based on the principle of uniformity of the EU trademark, could "infect" the EU trademark (and vice versa), even given simultaneous creation of a national UK trademark. Thus for example, the use of an EU trademark in the UK will no longer be able to constitute rights-maintaining use five years after the date of withdrawal; the trademark would become due for cancellation. Owners of EU trademarks who have thus far operated mainly in the UK with their trademark, should consider starting use measures in (other) EU member states or registering new EU trademarks at an early stage.

If the UK does not remain in the EEA, the consequence would be that imports of goods from the UK to the EEA would no longer be covered by the principle of exhaustion, i.e. holders of rights could oppose the import of such products into the EU and their sale there if these were first marketed in the UK.

For holders of rights taking measures against product piracy with the help of the customs, it is likely to be worthwhile also submitting a national application for border seizure to the UK customs authority Border Force in future.

License agreements and delimitation agreements

The EU should not be chosen unguardedly as territory when concluding future license agreements and delimitation agreements. Clarification is recommended concerning the UK. Rulings should also be considered that oblige the registration of new national protected privileges in the UK.

In terms of existing, long-term oriented contracts, a check should be made on whether the desired effects can still be achieved following the UK's withdrawal, or whether there is a need for renegotiation.

Effects on patent law

It is highly likely that the planned European Unified Patent will fail as a result of Brexit, as it appears inconceivable for the central division of the Unified Patent Court to be based in London and thus outside the EU. This means that new negotiations would be required in order to save the EU Patent. Matters to be clarified include where the central division should be located instead of London as previously planned. A decision would also be required on whether the annual fees would have to be lowered, given the reduced territorial scope of application. Whether these negotiations will be successful, whether the idea of a European Uniform Patent will be called completely into question or whether a genuine community patent will be introduced in its place, is something that remains to be seen. The negotiations would certainly need time, and the EU Patent could not become reality in 2017.

By contrast, European Patents (EP Patents) can still be registered with the European Patent Office and validated in the United Kingdom. The European Patent Office and the EP Patent issued by it have nothing to do with the EU, and are therefore not affected by Brexit.

7. M&A

When processing an M&A transaction, a Brexit will affect both general subjects that require regulation in any contractual relationship (e.g. choice of applicable law, place of jurisdiction - see Sections 1 and 3) - as well as the specific subjects that have to be regulated when acquiring or selling a company, because, as a market player, the target company is exposed in many ways to the economic and political changes caused by Brexit.

The choice of the legal system to be applied to a transaction

The criterion for the choice of the applicable legal system is that the chosen legal system must be the most favorable at the time of occurrence of a future legal dispute. With M&A transactions, disputes frequently do not arise until years after conclusion of the contract, e.g. in connection with the assertion of warranty claims by the acquirer. By contrast, differences concerning the valuation of the object of purchase as at an agreed cut-off date arise just weeks or months following closing. The parties must keep an eye on these respective periods when choosing the legal system. If English law is agreed - a widespread choice in international corporate transactions - uncertainty will prevail up until Brexit concerning which standards, of relevance for a future legal dispute, will be part of the English legal system following a Brexit. Because, for example, all EU Regulations that are directly applicable law within the EU will no longer automatically be part of English law post-Brexit, and further standards, previously based on EU law, may be altered by the English lawmaker. This uncertainty should be taken into account when choosing the legal system for transaction contracts to be concluded before Brexit, and regulated specifically where possible.

It remains to be noted that the area of in-rem consummation of an M&A transaction cannot be part of an agreement on choice of law. As a rule for example, the transfer of company shares is normally governed by the company statute (the law applicable at the head office/real seat of the target company or the law chosen at the time of its formation), and the transfer of movable or immovable assets is governed by the law of the place at which they are located. In the case of target compa-

nies with registered office in the UK, the transfer processes, as well as any subsequent restructuring measures, are therefore mandatorily governed by the (English) law applicable there. This means that they will be burdened with the said uncertainties post-Brexit.

Material Adverse Change (MAC) clauses

Seen from the perspective of the acquirer, negative changes can occur in the target company or its market environment during the - frequently months-long - period between agreement of a transaction and its execution. So-called MAC clauses grant the acquirer the right to withdraw from or renegotiate the contract in the event of a more or less precisely defined Material Adverse Change prior to execution.

In view of the uncertainties triggered by the Brexit referendum, every acquirer of a company should agree a withdrawal option in the form of an MAC clause, if they believe that the target company could be noticeably exposed to the consequences of a Brexit, and will therefore also be impaired by ongoing developments up until a future Brexit. This will also make it possible to take account of major changes in the value of the GBP compared to the EUR or USD. This type of withdrawal option is, by its nature, of lesser importance in cases in which the period up until consummation of the transaction is manageably short, i.e. just a few days or weeks.

Due diligence examinations

Acquirers are of course well advised to take account of the status of UK negotiations concerning leaving the EU when conducting a due diligence examination on the target company, and also when formulating the warranty and indemnification obligations of the seller. Depending on how strongly the target company will be affected by Brexit, the acquirer should pay attention not only to the potential effects of Brexit on the business model of the target company as well as on the legal framework of the target company, but should also check possible MAC clauses in the main contracts, or even check and evaluate the internal Brexit preparations of the target company.

Merger control

The amalgamation of companies with registered office in different EU member states requires anti-trust approval by the EU Commission if the market importance of the companies involved exceeds a specific limit. There is no need for further approval by the respective national authorities of the parties involved. This "one-stop-shop" principle has resulted in major practical facilitation of cross-border amalgamation projects within the EU.

Post-Brexit, the amalgamation of companies with registered office in the UK and in the EU will require anti-trust approval by the EU Commission and by the UK Competition and Market Authority. This will presumably increase the time and financial burden, and reduce the security of the transactions accordingly. On top of this, the shifting of the approval decision from the supranational EU level to the national level in the UK can make the approval decision more exposed to political influences than has previously been the case with the EU Commission. This too can reduce the securi-

ty of the transactions, and increase the burden on the parties involved in terms of the political preparations for the transaction.

Transfer of undertakings or businesses to another employer

As already mentioned in Section 4 above, UK withdrawal from the EU could result in repeal - or renegotiation with unforeseeable content - of the British regulations on transfer of undertakings or businesses to another employer based on the Transfer of Undertakings Directive. Companies planning an asset deal in the UK must take account of this uncertainty.

8. Anti-trust law/law on state aid

The field of anti-trust law is traditionally characterized by a strong interaction between national law and EU competition rules, between national case law and the jurisdiction of the European courts, between the administrative practices of national anti-trust authorities and those of the European Commission. At the same time, the English legal tradition of Common Law, with its strong orientation towards case law, has had a major influence on anti-trust law - previously oriented towards both German and French dogma - since the UK joined the EU on January 1, 1973. This makes Brexit a challenge in logical thinking for experts in anti-trust law. It is hardly conceivable that EU anti-trust law will continue to function in future without the contribution of British colleagues. On top of this is the fact that a major part of all communication in the field of anti-trust law is now conducted in English, and most of the literature is written in English.

In the short term, the consequences of a Brexit for anti-trust practice are likely to be somewhat unclear. However, if one visualizes the medium to long-term consequences of a Brexit, the potential difficulties for continental European and British companies appear very serious.

Consequences in the field of merger control

A future withdrawal of the UK from the EEA will initially end the application of EU merger control with regard to the UK. The big advantage of the "one-stop-shop" principle of obtaining a uniform approval decision from Brussels given exceeding of the merger-control thresholds as per Art. 1 Regulation 139/2004 (Merger Regulation), will therefore be nullified in terms of the economic activity of the amalgamation parties in the UK. Nevertheless, the fact must not be overlooked that the merger control system in the UK does not have any mandatory registration requirement, but rather is designed as voluntary merger control. The UK therefore already has a significant special role in the field of merger control in the context of the European merger control regime. If this makes the consequences in terms of registration requirements in the UK clear given continued existence of the British voluntary system, there may be significant consequences for the application of the EU merger control thresholds under Art. 1 Merger Regulation, as sales of the amalgamating parties in the UK will no longer have to be included following a Brexit. This can result not only in the advantage of the "one-stop-shop" principle disappearing with regard to the UK, but can also mean that the sales thresholds of the EU merger control are not achieved overall, with the result that merger control registrations will be mandatory in a whole series of EU member states.

Scope of application of the ban on restrictive practices (cartels)

At first glance, the least noticeable consequences of a Brexit can be expected with regard to the ban on restrictive practices (cartels). Thus far, the prohibition areas of Art. 101 EU Treaty, of the ban on restrictive practices under EU anti-trust law and of the UK Competition Act 1998 have existed parallel to one another, and describe an almost identical area of prohibition. However, while the ban on restrictive practices under Art 101 EU Treaty refers to agreements, coordinated conduct and/or decisions by associations of undertakings that are designed to limit international trade, the national anti-trust regulations are applicable especially to corresponding forms of conduct below the threshold of international dealings. Nevertheless, sounding the all-clear concerning the areas of application of the EU ban on restrictive practices and of the ban on restrictive practices under British law would be premature. In practice, the areas of prohibition are defined to a very great extent in accordance with the block exemption regulations as well as with the guidelines and announcements of the EU Commission. In so far as the block exemption regulations, guidelines and announcements have thus far come about with British involvement, we see only a manageable risk of the UK automatically leaving the scope of application of these rulings following a Brexit. However, whether London will automatically take over the rulings approved in the EU after a Brexit takes effect, is a matter of doubt. This would result in forfeiting of the advantage of the harmonized ban on restrictive practices. The consequences for execution of the ban on restrictive practices affect both British as well as continental European companies. If British companies operate in continental Europe following a Brexit and restrictions on competition in the EU Single Market apply, British companies will also be subject to the executive power of the European Commission following Brexit, and can be fined for their violations of EU anti-trust law as a standard procedure. Following a Brexit, continental European companies will have to pay attention to ensuring that they observe British anti-trust rules that potentially deviate from EU anti-trust law, if their conduct has an effect on the British market. This is not exactly facilitated above all by the strong orientation of Common Law towards case law.

The effects of Brexit on enforcement of the ban on restrictive practices at administrative level appear to be far more serious than the consequences in the substantive area. While companies inside the EU Single Market are protected against parallel investigations by the European Commission and the national anti-trust authorities, and double fines are not possible within the EEA based on the "ne bis in idem" principle, this benefit will cease to apply to the UK following withdrawal from the EEA. This will create more than just the possibility of double fines. Companies will also be faced with time-consuming and expensive investigations by the UK Competition and Markets Authority (CMA) on the one hand, and national continental European authorities or the European Commission on the other hand. British companies may of course consider it an advantage if the European Commission is no longer able to carry out dawn raids in the UK in future. Conversely however, British anti-trust law practice must live with the fact that the CMA will no longer be a member of the European network of anti-trust authorities ECN - at least given the complete Brexit notionally presupposed here. It remains to be seen whether the attraction of the UK or England as place of jurisdiction for follow-on damages claims can ultimately be maintained in cases of violation of the ban on restrictive practices under EU law. The enforceability of UK court decisions in the EU will play a decisive role in this respect. Conversely, it is unclear to what extent British courts will

take decisions of the European Commission, or of the continental European national anti-trust authorities, as binding in their follow-on damages proceedings. Against this background, there is a certain irony in the fact that the EU Anti-Trust Damages Directive, approved in 2014 after long discussions, facilitates British procedural ideas to a significant extent.

Consequences in the field of the law on state aid

Following withdrawal from the EU, the UK will no longer be subject to the ban on state aid under Art. 107 of the EU Treaty. This ban on state aid is intended to prevent that competition between companies or entire branches of industry being impaired or even distorted through state privileges. From the perspective of the law on state aid, withdrawal from the EU could therefore create greater freedom for the British government in terms of financially subsidizing home-based companies, and thus increasing the attraction of the country. However, in the event of an association model based on the Norwegian or Swiss example, it is more likely that the binding to EU law on state aid will remain to a major extent, even following completion of Brexit. Nevertheless, the UK government would then have to allow the question of whether Brexit would then actually achieve the politically intended greater flexibility.

9. Data protection law

To date, regulations in the EU and in the UK are governed by the harmonized requirements of the EU Data Protection Directive 95/46. When the EU General Data Protection Regulation comes into force in May 2018, it will strengthen the harmonization of data protection law in the EU on a high level. This will enable the transfer of personal data within the EU Single Market in the same way as within the home country.

This procedure would no longer apply if the UK leaves the EU. The UK would then generally apply as a third country, with a potentially unsafe level of data protection.

From a data protection perspective, the UK would therefore have a similar position to the USA. Data transfers to the USA are subject to strict requirements. The end of the Safe Harbor mechanism following a judgment by the European Court of Justice in October 2015, has further aggravated the situation for companies.

The successor to the Safe Harbor mechanism, the so-called "EU-US Privacy Shield" agreement with the USA, was approved by the European Commission in July 2016 and can therefore be applied. However, it remains to be seen whether this agreement also satisfies the requirements, established by the European Court of Justice, for the protection of European data.

It is possible that the transfer of data to the UK will in future become more difficult in a similar manner to data transfers to the USA. In particular, this would affect the commonplace instrument of order data processing that enables the forwarding of data without the consent of the parties involved. The following are examples of questions that could arise for companies with branches in the UK, that are themselves the branch of a UK company, that work with companies in the UK or that transfer data to the UK in another way.

- How can company-wide central storage of data in the UK be structured?
- How can contracts with service providers in the UK, who receive data or view it via remote access (e.g. within the scope of maintenance agreements), be designed?
- Do data flows have to be diverted to other EU countries and new data storage set up there?
- What protection measures must EU subsidiaries of UK companies take against data access by UK parent companies?
- How can due diligence processes be structured during cross-border company acquisitions?

Ultimately, the deciding factor will be what level of data protection the UK arranges, and what agreements are made when withdrawing from the EU. If the UK maintains data protection laws as per the EU model, it is conceivable that the European Commission will grant the UK the status of a third country with an appropriate level of data protection, similar to the case with other European non-EU member states. If this is delayed until after a Brexit takes effect, it may create a dangerous data protection gap for companies.

Much remains unclear here, all the more so as the EU General Data Protection Regulation for the year 2018 is likely to throw up new questions even within the EU.

10. Restructuring/cross-border insolvency proceedings

Cross-border insolvency proceedings involving the UK

The question of which law is applicable to cross-border insolvency proceedings within the EU and which court has jurisdiction over the opening, monitoring or conducting of the insolvency proceedings, is regulated by Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings (Insolvency Regulation) that is directly applicable in all EU member states, with the exception of Denmark.

The most important practical consequence of application of the Insolvency Regulation is that the opening of insolvency proceedings by a responsible court in an EU member state, as well as the measures taken for the conducting of these insolvency proceedings, are automatically recognized in all other EU member states, thus preventing the opening of further insolvency proceedings in another EU member state.

The applicability of the rulings of the Insolvency Regulation to insolvency proceedings presupposes that the focal point of the debtor's main interests (Centre of Main Interests, COMI) is situated in an EU member state (with the exception of Denmark), and that the insolvency proceedings are based on cross-border circumstances - i.e. either the debtor has assets in other EU member states and/or legal relationships have been created with a connection to another EU member state.

Accordingly, the Insolvency Regulation is not applicable to proceedings in an EU member state with no connection whatsoever to cross-border circumstances or only to third countries (i.e. non-EU member states or Denmark).

With effect from the date on which the UK leaves the EU, the Insolvency Regulation would cease to apply in the UK, and would likewise no longer be applied to the EU member states in relation to the UK.

The possible consequences of this depend on whether and what agreements are made between the UK and the EU.

- The EU and the UK could agree on continued application of the Insolvency Regulation between the UK and the EU member states. This would mean that cross-border insolvency proceedings opened in the UK would continue to enjoy automatic recognition in the respective member state.

- If the EU and the UK make no agreement, the following consequences would have to be reckoned with.

  On the one hand, there would be the possibility of competing insolvency proceedings being opened parallel to one another - in the UK and in the respective EU member state.

  On the other hand, automatic recognition of the cross-border insolvency proceedings, opened in the UK, in the respective EU member state and vice versa would no longer be guaranteed; rather, these would be based on the national law of the UK or of the respective EU member state as a fundamental rule.

  Nevertheless, the UK has adopted the UNCITRAL model law that aims to develop a global standard for cooperation in cross-border insolvency proceedings. In particular, this standard ensures harmonized criteria for the recognition of foreign insolvency proceedings, irrespective of whether the foreign country concerned has implemented the UNCITRAL model law. In contrast to the situation under the Insolvency Regulation, the recognition of foreign insolvency proceedings under the UNCITRAL model law is not automatic, but rather depends on formal recognition.

Schemes of Arrangement

German companies have also made isolated use of the Scheme of Arrangement (SoA) under the English Companies Act 2006 for restructuring measures on the liabilities side, e.g. TeleColumbus, Primacom and Rodenstock.

The reason for the implementation of an SoA in these cases was the fact that the SoA enables the company to restructure its debts by way of a majority resolution of the creditors against an opposing minority (agreement disrupters), whilst at the same time avoiding extensive insolvency proceedings.

Companies with their registered office outside the UK can implement an SoA in the UK if they have a sufficiently close connection to the UK. As a rule it is sufficient in this respect if the company concerned has assets in England, or if the material contract documentation is governed by English law and the parties have agreed to an English place of jurisdiction.

However, the courts in the UK impose a further precondition for the implementation of an SoA in the form of confirmation that the SoA will be recognized in the country in which the company has its registered office, and in the other countries in which the company holds relevant assets (so-called recognition option).

The EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters currently ensures direct recognition and enforceability of an SoA in the other EU member state, in which the relevant company has its registered office and/or assets.

Following withdrawal of the UK from the EU, the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters will no longer be applicable in relation to the UK. The recognition of an SoA in Germany or in another EU member state will then be based on the respective national law.

If the UK remains a member of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the SoA could be capable of similar recognition in the EU member states via this convention as under the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

The possibility must by all means be reckoned with of the uncertainty concerning the legal recognition of an SoA in the EU member states resulting in increased expense - a fact that can reduce the attraction of the SoA. Given the ongoing need for a solution to the problem of the agreement disrupters when restructuring complex corporate financing arrangements, there will be an increased search for other, more legally secure instruments in practice.

11. Tax law

A Brexit would have consequences in almost all areas of tax law. In many areas, it will be a question of whether the UK has at least the status of an EEA country in future. Below is an illustration of some fundamental effects.

First of all, the existing EU Directives will no longer be applicable to the UK following a Brexit. This will result in additional tax burdens as well as in the disappearance of tax privileges.

In particular, the Parent-Subsidiary Directive which provides for complete exemption from taxes at source on dividends and comparable payments will no longer be applicable. Instead the tax at source can at best be reduced to 5% on the basis of the existing double taxation treaty.

Subject to certain preconditions, the Interest and Royalties Directive has thus far granted exemption from the deduction of taxes at source on interest and royalty fees with cross-border payments. Although taxes at source to be withheld are liable to subsequent refund on the basis of the double taxation agreement, there may be a higher administrative workload and time shifts here in affiliated companies, given the future non-applicability of the Directive.

If the UK does not have the status of an EEA country after leaving the EU, the UK will also cease to be in the area of application of the Transformation Tax Act after Brexit, with the result that tax-neutral restructuring measures involving UK companies will no longer be possible in this way. Transformation processes already carried out can be affected to the extent that periods of absten-

tion, that have not yet ended at the time of Brexit, can result in retrospective taxation of the restructuring process.

If assets of a German company were transferred to a place of business in the UK in the past, it was possible to avoid taxation of the hidden reserves through the recognition of a compensatory item. De-recognition of this would be mandatory upon withdrawal from the EU, and would therefore result in taxation.

If a German corporation relocates its registered office or its management to a country outside the EU or the EEA, it will be considered liquidated with resulting taxation on all hidden reserves, meaning that a move to the UK by German corporations can lead to this type of liquidation taxation in future.

A move to the UK by natural persons holding at least 1% of the shares in a corporation, can in future result in departure taxation under the Foreign Tax Relations Act, if the UK is neither an EU member state nor an EEA country. In the case of moves to the UK, already carried out in the past and for which the tax on departure was deferred interest-free, the deferral would then be revoked.

There will be major administrative changes in particular in the field of value added tax. In future, deliveries between Germany and the UK will no longer be tax-free intra-community deliveries for the supplier, but rather (likewise tax-free) export deliveries, which however require other evidence and a different declaration. Applications from UK-based companies for reimbursement of input tax within the scope of the input-tax compensation procedure, will be subject to a shorter application deadline in future (June 30, instead of September 30, of the following year).

Shareholdings of more than 25% in corporations are part of the tax-privileged assets for purposes of inheritance and gift tax. However, this is only the case if they have their real seat or management in an EU or EEA country. As a result, this privileged treatment would no longer be granted in future.

Other aspects that would no longer apply include the privileges envisaged only for EU and EEA countries, such as the cross-border joint assessment of spouses (spouse splitting) and the deductibility of donations to recipients in the UK. Additionally, it may no longer be possible to claim support payments for study and training in the UK against tax in Germany, if the UK is not an EEA country.

12. Customs law

Under Art. 28 Subsection 1 of the EU Treaty, the customs union within the EU includes a ban on the levying between member states of import/export duties and charges with the same effect. This ban on customs duties within the EU ensures that the free movement of goods between the EU member states is not restricted by any form of financial burdens and the related administrative barriers when the goods cross the border. Accordingly, the entire territory of the EU constitutes a uniform customs territory with the exception of a few special aspects. All countries outside this customs territory are considered third states. As a result, import charges (customs duties, consumption taxes and VAT on imports) are levied on imports into the customs territory as a general rule. The fundamental legal bases for this result directly from EU law.

With effect from the date of withdrawal from the EU, the ban on customs duties would no longer apply in dealings with the UK.

The possible consequences of this depend on whether and what agreements are made between the EU and the UK.

- It is conceivable that the EU and the UK will conclude an agreement comparable to that between the EU and Norway. The consequence of this would be that neither import/export duties nor charges with the same effect could be levied on goods with origin in the EU or in the other partner state to the agreement.

- A further possibility would be the conclusion of an agreement comparable to that between the EU and Turkey. The consequence of this would be that neither import/export duties nor charges with the same effect could be levied on goods in free circulation in the EU or Turkey, irrespective of their origin.

- If the EU and the UK do not enter into an agreement, the UK would have to be treated as a third country from the perspective of the EU. The consequence of this would be that movements of goods between the EU and the UK would be subject to customs-law declaration and notification requirements that would make exports more bureaucratic. It is also conceivable that the UK would introduce customs duties on exports from the EU. Conversely, exports from the UK to the EU would be subject to the normal third-country customs duties also applicable to other third countries.

It therefore remains to be seen how the situation develops. The possibility must however be reckoned with that trade barriers will result in both directions as from the time of leaving the EU, thus leading to a higher administrative workload and additional charges on movements of goods between the EU and the UK.

* * *

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Introduction
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