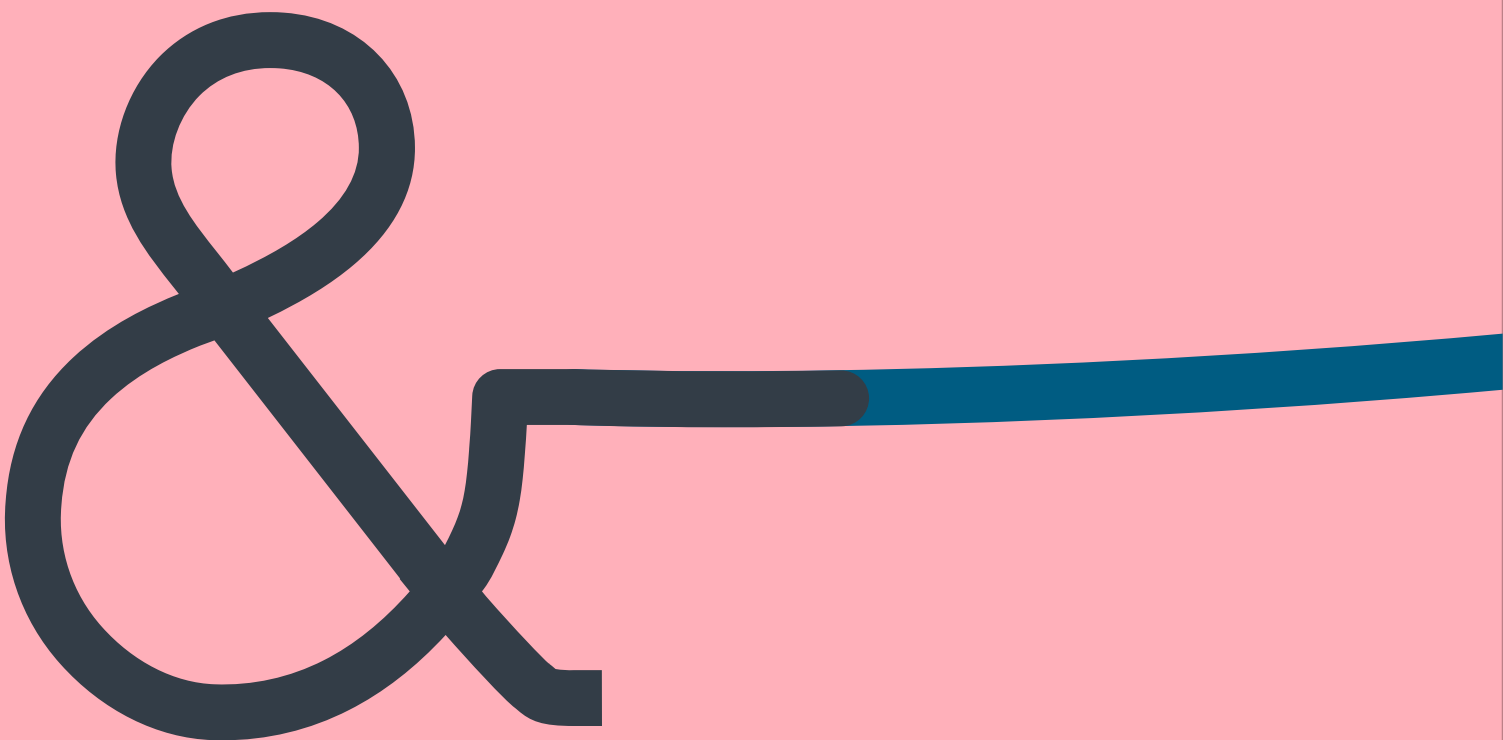


Bird & Bird

Setting up a business in Germany

2022





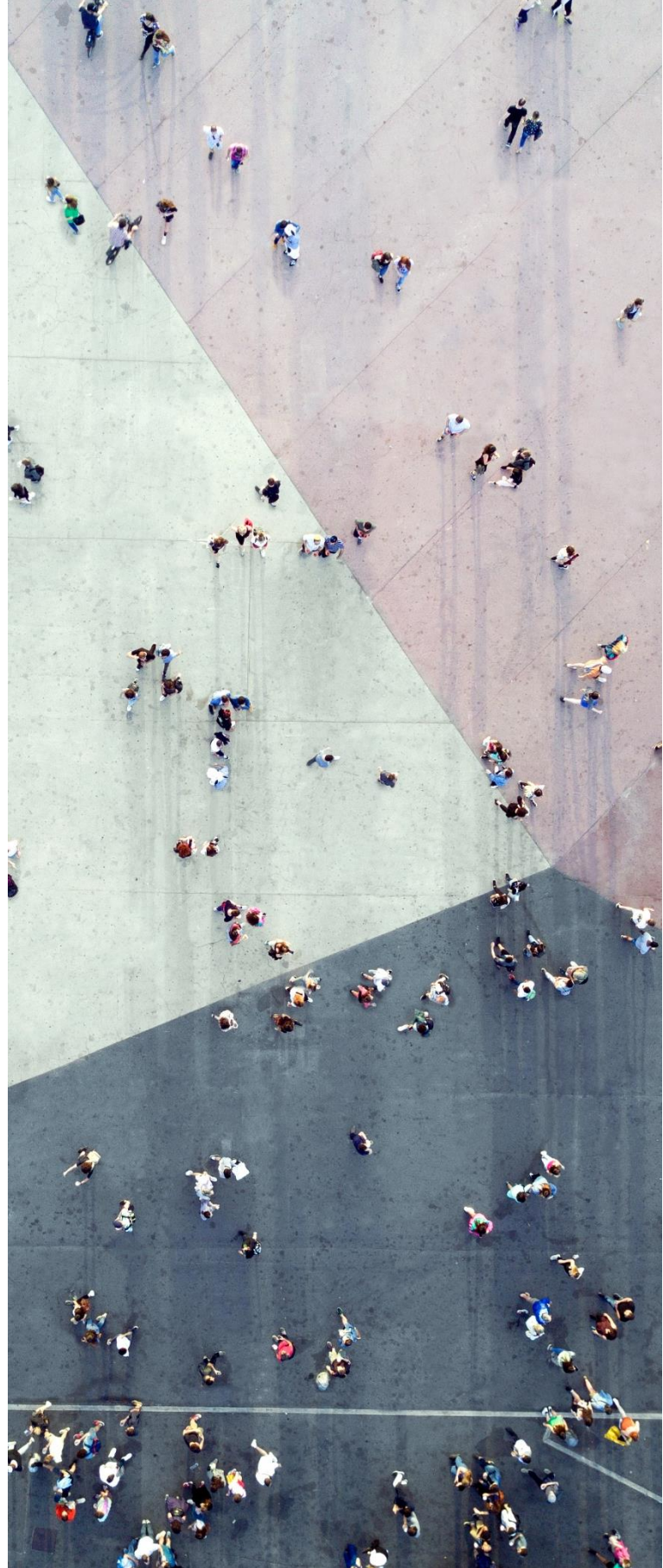
The Bird & Bird team is praised for its “ability to coordinate Europe-wide and international issues satisfactorily through single points of contact.”

Chambers Europe 2022, Germany



Setting up a business in Germany

Germany is a leading investment location with the biggest market in Europe. Bank accounts may be held in any foreign currency. There are no general laws governing the set-up of a German legal entity by a foreign company. In addition, Germany has access to the European market, a highly qualified labour force and outstanding technological know-how. It is also a world leader in the manufacturing industry, producing high level and top-quality industrial products. Overall, Germany has economic and political stability as well as a reliable legal framework, creating a highly attractive business environment.





“B&B always takes a pragmatic approach to solving problems, looking for a solution that fits our specific needs rather than forcing us down a certain path.”

Legal 500 EMEA 2022, Germany

Setting up a business in Germany

Germany – The choice of law

German laws are published in German, but for the most important ones you can find non-binding English convenience translations by the Federal Office of Justice online (www.gesetze-im-internet.de/Teilliste_translations.html). The official language of the court is German. Some district and higher district courts, however, have set up Chambers for International Commercial Affairs where proceedings are conducted in English. In arbitration, the parties can also agree to conduct the proceedings in English.

Choice of legal entity

There are several options for establishing a business in Germany. Some investors use partnerships, e.g., for asset management purposes. A partnership's annual profits or losses are directly allocated and taxed in the hands of the (resident or non-resident) partners, instead of receiving dividend distributions.

Focusing on two common scenarios, a company from abroad can establish a legally independent subsidiary (e.g., a limited company – GmbH) or simply register an autonomous branch with the commercial register.

Subsidiary	Branch
Liability limited to share capital at subsidiary level.	Parent company retains direct liability.
Minimum share capital of €25,000 for GmbH; €1 for Unternehmergeellschaft (UG) (a UG, also known as “a small GmbH” among Germans can be converted into a GmbH at any point. Due to its reduced share capital a UG is considered less reputable).	No minimum share capital.
Separate legal entity, entitled to contract in its own name and on its own behalf.	Contracting in the name of the head office entity, i.e., the branch is not party to legal proceedings.
Limitation of liability is only effective upon registration of the incorporated entity, which first requires opening of a bank account (may take considerable time due to the needed KYC process). If timing is critical, acquisition of a shelf company is preferable.	Registration with the commercial register may take up to 4 weeks; registration, however, only has declaratory effect and the branch may start to operate upon establishment.
Average legal fees for incorporation or acquisition usually range from net €2,500—5,000 and exclude approximately €1,000 notary's fees as well as court costs.	Average legal fees for establishment and registration of the branch usually range from net €2,000—3,000, excluding notary's fees and court costs.
High reputation in Germany; operating as a GmbH is a strong indicator for a sustainable performance on the German market.	Less reputable as it can be easily shut down and the liability of the parent company may complicate business operations.
Directors do not need to be German nationals or German residents.	No need for German directors (law of the parent company applies here).

Subsidiary	Branch
Instruction right of shareholder towards the managing director(s) and extensive information right of shareholder.	Parent company directs decisions of the branch.
Annual tax filings and accounting requirements.	Annual tax filings and accounting requirements according to German law.
Average tax burden of approx. 15% corporate income tax and approx. 15% local trade tax, depending on the local trade tax rate. Can benefit from double tax treaties.	Average tax burden of approx. 30% on profits in Germany, depending on the local trade tax rate and on the parent company's legal form. Can benefit from double tax treaties.
Intra-group transactions require arm's length terms.	Despite being legally dependent, profits are to be allocated to the branch.
Losses can be set off against future profits and (to a certain extent) past profits. Minimum tax rules apply.	Losses can be set off against future profits and (to a certain extent) past profits. Minimum tax rules apply.
Exit: Sale of shares in subsidiary tax-exempt in Germany, if tax treaty protection available; liquidation takes approx. 12-15 months.	Exit: (sale or transfer of assets) potentially taxable in Germany; closure of branch is easy and only requires notice in the commercial register.

Corporate

A new GmbH is set up upon declaration of its shareholders. None of the shareholders need to be a German national.

The shareholders must adopt a resolution on share capital and articles of association which will have to be notarised.

Furthermore, one or several managing directors have to be appointed and must open a (preferably German) bank account into which the statutory minimum capital of €25,000 shall be paid. If at least €12,500 has been paid into the bank account, the managing directors may register the GmbH in the commercial register. Registration has to be notarized by a German notary.

Only upon registration with the commercial register will the GmbH be considered an incorporated company. The shareholders will only benefit from the limitation of liability to the registered share capital from this point on. A GmbH in formation does not provide any protection to its shareholders.

In order to significantly speed up the process of setting up a GmbH, it is also possible to acquire an already existing shelf company. However, compared with incorporating a new GmbH, estimated costs will be higher: even though articles of association already exist, these will have to be amended (e.g., business name, registered seat) and appointment of new managing directors will further be necessary.

Acquisition of the shelf company also requires notarisation. Furthermore, an additional €3,500 will be added as a purchase price.

Employment

Germany has a complex regulatory framework of employment law. The main provisions can be found in the German

Civil Code (BGB), the Collective Agreement Act (*Tarifvertragsgesetz* - TVG), the Works Constitution Act (*Betriebsverfassungsgesetz* - BetrVG), the Working Time Act (*Arbeitszeitgesetz* - ArbZG) and the Act Against Unfair Dismissal (*Kündigungsschutzgesetz* - KSchG). There are different types of contracts. Most popular are permanent and part-time contracts, as well as more flexible temporary worker contracts or supply contracts.

An important aspect of the legal framework consists of collective agreements for certain sectors or industries. These agreements are negotiated between trade unions and employers or employers' associations. A minimum wage regulation was introduced in January 2015, with a current minimum wage level of €9.35 gross per hour (2020). As of 2022 the statutory minimum wage level will rise to €9.82 (applicable until 30th of June 2022) and then from 1 July 2022 to €10.45 gross per hour. However, in some sectors minimum wage levels have been established under collective agreements (ranging up to €18.00 gross per hour) and some of them have been declared as universally applicable for all entities in a certain sector.

There is a strong tradition of workers' co-determination in companies. A works council may be established in business units of companies with five or more employees. Works councils have information and advisory rights relating to company internal policy and organisation (especially social and personal, but also economic issues).

In larger corporations with more than 500 employees, at least 1/3 of the members of the (mandatory) supervisory board must be employee representatives; in corporations with more than 2000 employees at least 1/2 of the members of the (mandatory) supervisory board must be employee representatives.

Under the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* - AGG) no person shall be discriminated against for reasons of race, ethnicity, gender, religion or ideology, disability, age, or sexual orientation.

An employer must notify the social security bodies of all the staff it has employed. This usually takes place with the registration of all new employees with the competent health insurance.

The German social security system is built on the principle of shared contributions, meaning that both the employer and the employee contribute to social insurances for the respective employee. In consequence approx. 20 % of the agreed gross salary will come on top for the company as mandatory contributions to be paid by the employer. The second half of the contributions to the social security system are paid by the respective employee. The employee's contributions have to be deducted from the gross salary by the employer and must be paid directly to the social health insurance as collecting agency together with the employer's part. Usually, payroll service providers will take care of proper registration and the deductions.

However, this also means that no further health insurances, pension insurances, accident insurances or unemployment insurances are necessary since the statutory social insurances are mandatory anyway.

Prior to working in Germany, foreigners from outside the EU and EEA need a residence and work permit granted by the immigration office and the German Agency for Labour or the German representation abroad.



Bird & Bird think quickly about issues and give valuable input, adding that “the tone is extremely pleasant, there is an atmosphere of goal-oriented problem-solving with excellent responsiveness and high level of expertise.”

Chambers Europe, 2020

Setting up a business in Germany

Commercial Contracts

Germany has a civil law system. There exists a considerable freedom for all types of collaboration, licensing, and distribution agreements. Core provisions have been established under the German Commercial Code (*Handelsgesetzbuch* - HGB) and parts of the German Civil Code (*Bürgerliches Gesetzbuch* - BGB).

EU legislation applies in Germany and regulates consumer protection, sales agents, distance selling, government procurement, direct marketing, and the privacy of personal data.

German and EU competition law prohibits anti-competitive behaviour (e.g., price fixing) where there is an appreciable effect on trade in Germany and/or between EU Member States.

To build up its “distribution” network, an investor can select from a broad range of distribution models depending on how deep the third party shall be integrated in its sales network, the depth of the cooperation with the third party and to what extent investors want to be able to give instructions and consequently gain influence on the sales entity. Moving from a small degree of control to a higher one, agreements between the principal and the intermediary can be categorised in either: (1) a supply agreement; (2) a specialist dealer agreement; (3) a distribution agreement; (4) a commission agent agreement; or (5) a commercial agents and franchise agreement. However, distinctions are often blurred.

Real Estate

Most companies setting up in Germany will lease their premises rather than buy them.

However, anyone may buy land in Germany, irrespective of nationality. Therefore, if the business operations of the company require important investment such as for industrial production sites, the acquisition of real property is also regularly practiced. As an alternative, some companies enter into a so-called heritable building right agreement that provides an ownership-like legal position to the property however for a limited period of time agreed between the parties.

The acquisition of real property or of an heritable building right triggers certain costs in addition to the purchase price, in particular real estate transfer tax and notarisation fees.

The lease of office space mostly occurs under a lease agreement that generally provides for an (initial) fixed term, as the case may be followed by an optional extension period for the tenant. The initial fixed term requested by landlords very much varies depending on the local market conditions existing at the location of the office premises, but initial fixed terms of 3, 5, 7 or 10 years are common in the German market. A break option can be agreed with the landlord that is, however, generally combined with a penalty payment by the tenant.

The renting of serviced offices is an alternative to classical office lease that is growing in the German market.

Such leases are generally more flexible, operational on day 1, and can be concluded for short periods. The rent, however, may be higher than in a classical lease scenario.

It is common market practice for commercial leases in Germany that the tenant, in addition to the monthly rent, bears the ancillary costs for the operation of the premises such as utilities and to a certain extent also for maintenance and repairs. Tenants are generally requested to provide a rent security, either in cash or through bank guarantee, of an amount between 3 to 6 months of rent.

The conclusion of lease agreements with a fixed term exceeding 1 year is subject to strict written form requirements under German law. Typically, excerpts from the commercial register are required to demonstrate the power of representation of the persons acting for the legal entity when concluding a lease agreement.

Within office lease agreements concluded for an unlimited period, there is a statutory term of notice of 6 months, admissible at the latest on the third working day of a calendar quarter to the end of the next calendar quarter. The parties can however, to a certain extent, agree on a different notice period.

Setting up a business in Germany

Data Protection/Data Privacy

Companies that operate in Germany and collect, store, and manage personal data in this context need to comply with the General Data Protection Regulation (EU) 2016/679 (GDPR), the German Federal Data Protection Act (*Datenschutz-Grundverordnung* - DSGVO) and other applicable data protection laws. The respective obligations are far-reaching and include a wide range of measures inter alia in the area of accountability, lawfulness, accuracy, transparency, integrity, and confidentiality as well as data minimisation, purpose, and storage limitation.

In terms of accountability, companies need to be able to demonstrate their compliance with data protection obligations, including preparing records of processing activities as well as data protection impact assessments, conducting audits and (potentially) appointing a data protection officer. Under the DSGVO, the controller and processor shall designate a data protection officer if they constantly employ as a rule at least 20 persons dealing with the automated processing of personal data.

In addition, companies should ensure that they have a legal basis to process personal data for a certain purpose. This might be the data subject's consent, a statutory justification such as a "legitimate interest" — which must be carefully assessed on a case-by-case basis — or other specific provisions of law. Hereby, the German specifics with respect to processing of employee data and sensitive data need to be considered. Companies must further provide their employees and, if required, other individuals with transparent information on the processing of individuals' personal data and implement and document appropriate technical and organisational measures to ensure a level of security appropriate to the risk, as well as consider "privacy by design" as part of its product development.

Another very important point are international transfers outside the EU/EAA which continue to be regulated and restricted in certain circumstances. Data transfers to so-called third countries are permissible only if certain safeguards are implemented to ensure an adequate level of data protection in the country of the data importer. Companies, thus, need to undertake a mapping of international data transfers and identify appropriate safeguards as well as supplementary measures which might need to be implemented depending on the outcome of the transfer impact assessment.

All in all, companies doing business in Germany must be aware of the high level of administrative fines for not complying with the aforementioned and other requirements in this area as well as constantly growing level of attention that consumers, corporate customers, and data protection authorities are paying to data protection compliance. Against this background, GDPR-readiness and a robust data protection governance are indispensable prerequisites for doing business in Germany and participating in the digital transformation of the German economy.

German Law on general terms and conditions

A somewhat German peculiarity is the law on general terms and conditions (*Allgemeine Geschäftsbedingungen* -AGB). The content of B2B contracts is subject to the statutory control if, inter alia, the contract was not negotiated between the parties, but one party set the conditions. To protect the weaker party that could not gain influence on the contract, the contract is subject to be reviewed by this special law. In case of conflict, courts have the power to review single provisions with respect to their reasonableness.

Single provisions or parts of them could be held invalid if one party carries an excessive burden or if a provision is found to be "intransparent". Comparing this with the law in other countries, German courts review the contracts more extensively. They also tend to apply those statutory provisions that normally only apply between consumers and entrepreneurs to B2B contracts.

Intellectual Property

The central authority dealing with industrial property rights is the German Patent and Trademark Office (*Deutsche Patent- und Markenamt* - DPMA). Applicants can apply for protection of trademarks, patents, utility models and design patents at DPMA. In order to ensure broader geographical protection, it might be advisable to seek protection within a European scheme.

Trademarks can also be protected under a Community Trademark. With one registration, a trademark can be protected in all member states of the EU. The Community Intellectual Property Office (EUIPO) is located in Alicante, Spain.

European patents can also be granted under the European Patent Convention (EPC). The applicant can apply for protection in several EPC contracting states in one procedure before the European Patent Office (EPO) in Munich. European patents have the same effect as a national patent and are thus considered a bundle of nationally enforceable patents in the chosen states. In case of an alleged patent infringement in Germany, proprietors can turn to one of the several specialist civil courts, whose expertise is highly recognised worldwide. Regarding validity, European patents may be challenged before the EPO or, – after termination of EPO opposition proceedings- before the Federal Patent Court (*Bundespapentgericht*) and at second instance the Federal Court of Justice (*Bundesgerichtshof*).

Apart from the “traditional” German and” European patents, it will soon be possible to apply for a European Patent with Unitary Effect (Unitary Patent) with a single request to the EPO. The Unitary Patent will be immediately effective in all of the (now) 26 participating EU states.

The ratification of the Unitary Patent system by Germany is being finalized after a delay caused by a constitutional complaint before the German Federal Constitutional Court (*Bundesverfassungsgericht*). After the ratification of the Unitary Patent system by Germany a separate Court system will be implemented, in which issues of patent infringement and validity may be asserted. This Unified Patent Court (UPC) is expected to start operating mid-2022. It will consist of a Court of First Instance and a Court of Appeal. The Court of First Instance will be composed of a central division (with one seat in Munich, Germany) and several local and regional divisions in the respective Member States (there will be three local divisions in Germany). The Court of Appeal will be in Luxembourg. The UPC will

have jurisdiction over Unitary Patents and European patents. Prior to the UPC commencing its work, there will be an option to register opt-outs of traditional European patents during a sunrise period. Due to the Brexit, the UK withdrew from the UPC.

Business Model Design

Alongside legal challenges, regardless of the nature of your international ambitions, the planning process requires some key questions to be addressed:

- Is internationalisation a feasible option, and are you ready for it?
- What is your internationalisation strategy, and how will you prioritise which markets to target?
- What business model will be most effective for driving profitable growth?
- Will you require business partners, and how do you plan to find them?
- What will your penetration strategy be for your selected markets?
- How will you build the infrastructure and operating model required to support your move into the new markets?
- How will you execute the plan and implement the business model?

Wherever your starting point, our consultancy arm OXYGY can help you answer these questions and create a fit-for-purpose roadmap to guide your business through its internationalisation journey.

State Subsidy

Germany welcomes and supports investors – irrespective of whether they are domestic or foreign – with a large variety of incentives programmes. Such programmes may be divided into two main clusters: (i) investment incentives such as investment subsidies, promotional loans, or public guarantees and (ii) operational incentives, which are designed to subsidise the company's running costs. For instance, there is a cash incentive programme to reimburse up to 45% of the investment costs (depending on company size and selected region) if the investor decides to settle down in a structurally less developed region. Operational incentives may be labour related (e.g., recruitment support, wage subsidies with regard to long-term unemployed people etc.) or allocated to research and development work.

Contact us

If you would like further information on setting up business in Germany, please e-mail our Set up Desk at new.company@twobirds.com and we will contact you within 24 hours.

This summary gives general information only as of May 2022 and is not intended to give a comprehensive analysis. It should not be used as a substitute for legal or other professional advice, which should be obtained in specific circumstances.



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