INTERNATIONAL BRIEFING

Dear reader,

Welcome to our Summer 2019 edition of our International Briefing.

This briefing focuses on recent EU legislative developments and its transformation into German law that we consider of interest to our international clients.

We provide updates with respect to the EU Company Law Package, in particular on the use of digital tools and processes in company law and on the future procedures for the cross-border conversion of a German GmbH and relocation of the registered office within the EU.

We also inform on the status of the implementation of the second EU Shareholder Rights Directive with respect to the remuneration of Executive Board members in stock listed companies as well as on the ministerial draft on the transposition of the 5th Money Laundering Directive into German law.

The EU Directive on common European standards for the protection of trade secrets has also currently been implemented in Germany, and you will find an overview of the new German Trade Secrets Act herein.

From a tax perspective you should be aware of German case law on total buyout agreements regarding copyrights and last but not least we provide news on „whistleblowing“.

We hope that you will find the information provided helpful in your daily business.

Best regards,

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CONTENT

Update to the EU Company Law Package I – The EU Directive on the use of digital tools and processes in company law	Page 1
Update on the EU Company Law Package II and the future procedures for the cross-border conversion of a German GmbH and relocation of the registered office within the EU	Page 3
Executive Board renumeration: Impact of the planned implementation of the second Shareholder Rights Directive and the revision of the German Corporate Governance Codex	Page 5
Ministerial draft on the transposition of the 5th Money Laundering Directive	Page 7
The new German Trade Secrets Act in a nutshell – an overview of the new legal system	Page 8
Total buyout agreements involving copyright are subject to German withholding taxes	Page 10
When disclosure becomes legal – news on “whistleblowing”	Page 11
About the Corporate / M&A practice group	Page 13
General and legal information	Page 14

Update to the EU Company Law Package I – The EU Directive on the use of digital tools and processes in company law

On 18 April 2019, the EU Parliament approved the EU Company Law Package consisting of two parts: on the one hand the proposal amending the EU Directive on “the use of digital tools and processes in company law“ and on the other hand the Directive on cross-border conversions, mergers and divisions (for more details to the latter see the following article in our Newsletter).

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The Directive on the use of digital tools and processes in company law will revise and extend Directive (EU) 2017/1132 and seeks to establish the use of digital instruments throughout the whole life cycle of a company in all member states. The main focus is the digitalisation of processes for establishing corporate legal entities and of access to company information.

AIMS OF THE EU DIRECTIVE ON THE USE OF DIGITAL TOOLS AND PROCESSES IN COMPANY LAW

Currently, the differences between the member states in e-government services are extensive, so the aim is to harmonise the processes. The EU Directive does not seek to impose mandatory use of the digital tools though: Member states are free to choose whether other procedures may still be used in parallel with online procedures. In particular the explicit aim of the EU Directive is not to influence the national substantive legal rules for the establishment of companies. Instead, the EU Directive seeks to increase the level of digitalisation in the member states, facilitating the swift, cost-effective establishment of companies and changes within companies.

CHANGES RESULTING FROM THE EU DIRECTIVE

In the future, companies will be able to carry out a number of procedures with authorities online, e.g. it will be possible to register companies in the commercial register and establish new branches digitally. This will save costs and time, particularly those associated with having to appear personally in cross-border constellations, and national processes will be designed to be more EU-friendly. In certain exceptions, the member states may still require the founders to appear personally before the relevant authorities in order to register the company, particularly where there is a reasonable suspicion that an abuse or fraud is involved.

The information and documents required may be submitted using online forms, thus significantly speeding up the registration process. Documents should be available in an "official language of the Union, which is understood by the largest possible number of cross-border users". Documents that have already been submitted may be used again for the registration of subsidiaries, in line with the once-only principle.

Member states will share and grant each other access to the information that they have already recorded. The commercial registers of the member states will be connected on one platform, the Business Registers Interconnection System (BRIS). Until now, this platform has only been used to exchange information about companies; in the future it will also be utilised to share information about the trustworthiness of possible directors.

Depending on the administrative measure in question, costs will be based on the associated expenses, though some information must be made available for free. Until now, in Germany the only information available for free are certain basic company data (amount of the (limited) liability capital, date of establishment, etc.) and announcements in the companies' register. According to the EU Directive the amount of free information will be extended to include names and alternative names, the website, the object of the company, its legal representatives and information about subsidiaries or branches of the company in other member states.

It should be noted that in Germany, the changes from Brussels only relate to limited liability companies (GmbH) whereas other company forms are affected in other EU member states as well (a comprehensive list of the types of companies that are affected can be found in the annex to the current proposal of the EU Directive).

SUMMARY AND NEXT STEPS

The revision of the EU Directive has the potential to significantly simplify register matters within the EU for EU and non-EU companies and their stakeholders. Nevertheless, the proposal makes it absolutely clear that the corporate law traditions of the member states remain unaffected. The inclusion of short-lived information in the commercial register, such as the website address, is only a minor issue in comparison.

There are questions, for example, surrounding the position of notaries in Germany in the future – although Germany is free to define their role in the digital process. In addition to various form requirements, this role could include performing identity checks on directors and shareholders, and using notaries as a preventative filter to ease the burden on commercial registers.

The fee system could be an additional issue. The establishment of lump sums significantly simplifies the administrative work and so far has been deemed admissible. Whether this will still be the case in the future remains to be seen.

The German legislator is also aware of the challenge involved in protecting confidence in information that has been published in the commercial register and, at the same time, implementing the new requirements as soon as possible after the adoption of the EU Directive.

In addition, each member state should retain the right to assess the authenticity of any documents that were already submitted in another member state, in order to prevent misuse at this level, too.

The last steps in the EU legislative process are for the proposal to be adopted by the Council of the European Union and then published in the EU Official Journal. Member states will then have two years to implement the proposed EU Directive into national law.

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Update on the EU Company Law Package II and the future procedures for the cross-border conversion of a German GmbH and relocation of the registered office within the EU

COMPROMISE ADOPTED ON THE EU COMPANY LAW PACKAGE

On 18 April 2019, the European Parliament gave its consent to a compromise on the EU Company Law Package. This moves the EU legislative procedure for the proposed Directive published by the EU Commission on 25 April 2018 to the final stage, following the negotiation of amendments between the Council of Ministers and the European Parliament. The approval of the Council of Ministers is the last step and should be a mere formality as all the issues have already been negotiated in the trialogue between the institutions.

SCOPE OF THE EU COMPANY LAW PACKAGE

The EU Company Law Package is comprised of two parts, the Directive on the use of digital tools and processes in company law and the Directive on cross-border conversions, mergers and divisions.

In addition to rules designed to protect employees, creditors and shareholders within the framework of cross-border conversions, mergers and divisions of EU corporations, for the first time rules on cross-border conversions form the centrepiece of the EU Company Law Package. Consequently, there are now rules on the conversion of a German GmbH and the relocation of its registered office within the EU (known in German as the "*Herausformwechsel*"). We will look at these in more detail in this article.

PROCEDURES FOR A CONVERSION UNDER THE EU COMPANY LAW PACKAGE

This article builds on our earlier article "*The cross-border conversion of a German GmbH and relocation of its registered office within the EU – current experiences and reforms proposed by the EU Company Law Package*," which appeared in our International Newsletter of March 2019, and outlines the regulated procedures for the conversion.

As was foreseen in the EU Commission's proposal, the EU Company Law Package provides a two-step procedure for conversions.

FIRST PHASE (PROCEDURES IN THE STATE OF DEPARTURE)

a) Conversion plan

In the first phase, the managing board of the company must prepare a conversion plan. The plan must include information about the current legal form and the legal form after the conversion, as well as information about the foreseen name and location of the registered office of the company in the destination state. In addition, the conversion plan must contain rules about the cash compensation for any shareholder who are leaving the company as a result of the conversion and the effects that the conversion will have on employees.

The conversion plan must be submitted to the commercial register and disclosed at least one month before the shareholders are due to vote on a resolution about the conversion.

b) Conversion report

The managing board of the company should also prepare a conversion report for the shareholders and employees, setting out the legal and economic aspects of the conversion and the effects on employees.

Contrary to the Commission's proposal, the company may now choose whether to prepare just one report or whether separate reports should be prepared for the shareholders and for employees.

The conversion report should be made available to shareholders and employee representatives at least six weeks before the resolution of the shareholders approving the conversion.

c) Assessment of an independent expert

In contrast to the EU Commission's original proposal, which included an obligation for both the conversion plan and the conversion report to be examined by an independent expert, the EU Company Law Package now only establishes an obligation to have the conversion plan examined.

As was suggested during the EU legislative procedure, the shareholders of the company, which is about to change form, may also pass a resolution waiving the requirement for the examination of the conversion plan by an independent expert.

Originally the EU Commission proposed an indispensable obligation of an assessment by an independent expert. This was intended to allow the competent authority of the state of departure to use the expert report as a basis for their assessment of whether the planned conversion is abusive. However, the expert report, which may now be waived, will therefore no longer serve this purpose.

d) Conversion resolution

The general meeting of shareholders must subsequently adopt a resolution on whether they approve the conversion plan and the new company's articles of association, which are set out in the conversion plan.

e) Application for the issue of the pre-conversion certificate

When applying for a pre-conversion certificate, the company must submit copies of the conversion plan, the conversion report and the conversion resolution to the commercial register of the state of departure.

One consequence of the Directive on the use of digital tools and procedures in company law, which forms the second part of the EU Company Law Package, is that it should be possible to submit this application entirely online.

f) Assessment of the lawfulness or abusive nature

On the basis of the documents that are submitted, the commercial register will assess whether all of the relevant requirements for the conversion under national law are fulfilled and all of the necessary procedures and formalities in the state of departure are completed (= lawfulness assessment).

In addition, the abusive nature assessment by the commercial register of the state of departure was originally focused on preventing "artificial arrangements." After discussions in the EU legislative procedure, this assessment has been replaced by a general abusive nature assessment.

According to this general abusive nature assessment, the conversion can be prohibited when it serves abusive or fraudulent purposes, which are designed to escape national or EU legal provisions or to pursue criminal ends. The abusive nature assessment should ensure, among others, that the conversion is not being used only to circumvent the rights of employees and social security payments or tax obligations, or for criminal purposes. In particular, the assessment should crack down on "shelf" and "letterbox" companies which were established especially to escape national or EU legal provisions. If the conversion results in the company exercising its actual economic activities in the destination state, this shall be an indication that the conversion is not being used for abusive of fraudulent purposes.

The commercial register will initiate the abusive nature assessment ex officio, if the commercial register has "*serious concerns*" on the basis of the documents that were submitted for the lawfulness assessment, that the conversion is intended to be used for abusive or fraudulent purposes.

National law shall determine the exact structure of the general abusive nature assessment.

g) Pre-conversion certificate

If there are no objections following the lawfulness assessment and any general abusive nature assessment, the commercial register of the state of departure shall issue a pre-conversion certificate. This will be transferred to the relevant authority in the destination state via the European system of networked commercial registers.

SECOND PHASE (PROCEDURES IN THE DESTINATION STATE)

In the second phase, the procedure in the destination state, the central role now played by the pre-conversion certificate in the conversion becomes apparent.

Within the framework of the lawfulness assessment of the conversion in the destination state, the pre-conversion certificate will bind the relevant authority as far as possible. The pre-conversion certificate is considered conclusive evidence of due completion of the procedure and formalities in accordance with the national law of the state of departure. Without a pre-conversion certificate, the relevant authority in the destination state cannot take a decision on the lawfulness of the conversion in accordance with the rules applicable to the establishment and registration of companies in that country.

If the lawfulness assessment in the destination state is also without objections, the applicable authority in the destination state will approve the conversion.

Finally, the company will be registered in the commercial register of the destination state; the removal of the company from the commercial register of the state of departure will follow. The legal provisions of the destination state will determine the point in time in which the conversion becomes effective.

TRANSPOSITION INTO NATIONAL LAW

Once the EU legislative procedure has concluded, the member states will have 36 months in which to transpose the Directive into national law, in contrast to the EU Commission's original proposal which gave the member states only 24 months for this step. The rules will only enter into force in each member state when they have been transposed into national law.

SUMMARY

The EU Company Law Package's regulation of a cross-border conversion for the first time is very welcome. Of course, a cross-border conversion can be carried out under the current legal conditions. However, due to a lack of binding legal procedures and the differing treatment by the relevant commercial registers in each case, prior coordination with the relevant commercial registers was necessary.

It remains to be seen how the national law will regulate, in particular, the now foreseen abusive nature assessment by the commercial register and which criteria will be used for this purpose.

Until the Directive has been transposed into national law, we recommend continuing to coordinate the necessary procedural steps for a cross-border conversion with the relevant commercial register, in order to be on the safe side.

As soon as we have a copy of the draft law to amend the current provisions of the German Transformation Act (*Umwandlungsgesetz*) and to transpose the Directive into national law, we will inform you accordingly.

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Executive Board renumeration: Impact of the planned implementation of the second Shareholder Rights Directive and the revision of the German Corporate Governance Codex

Remuneration of executive board members of stock corporations is a highly sensitive topic that is hotly debated not only in the general meeting of shareholders but also by the public. The reform of the EU Shareholder Rights Directive (EU) 2017/828 and its implementation into German law, which is required by 10 June 2019, as well as the revision of the German Corporate Governance Codex (GCGC) on 9 May 2019 have once again put the spotlight on high management salaries.

On 20 March 2019, the cabinet's proposal on the law to transform the second Shareholder Rights Directive (*ARUG II*) was published and in the meantime discussed for the first time in the German Parliament (*Bundestag*) and the German Federal Council (*Bundesrat*). Following these discussions another public hearing in the Legal Committee of the German Parliament (*Rechtsausschuss des Bundestages*) took place on 5 June 2019 in which several legal experts provided their view on the cabinet's proposal.

In addition, beginning of this year, the government committee on GCGC (*Regierungskommission Deutscher Corporate Governance Kodex*) opened for consultation its proposal for the revision of the GCGC as well as the EU Commission opened for consultation a proposal for guidelines on the remuneration report for companies listed on the stock exchange.

On 9 May 2019, the new GCGC was already adopted. However, the new GCGC will only apply after ARUG II enters into force. Thus, potentially necessary amendments to the final new version of the German Stock Corporation Act (*Aktiengesetz*) – due to the ARUG II – may still be implemented to the GCGC. The new code will then come into force with the subsequent publication by the Ministry in the German Federal Gazette, thus superseding the hitherto valid Code in its current version dated 7 February 2017.

The proposals of ARUG II and the new code of the GCGC foresee significant changes with respect to the remuneration of executive board members for stock listed companies. Shareholders are granted more possibilities to participate in decisions about the remuneration of executive board members.

SIGNIFICANT CHANGES TO THE STOCK CORPORATION ACT

The ARUG II draft contains two significant changes with respect to the remuneration of executive board members. Shareholders should regularly decide about the corporation's remuneration system in the general meeting of shareholders and should vote on the remuneration report annually.

BINDING RESOLUTION OF THE GENERAL MEETING OF SHAREHOLDERS ON THE REMUNERATION SYSTEM EVERY FOUR YEARS AND IN THE CASE OF SIGNIFICANT CHANGES

§ 87a of the proposed amendments of the Stock Corporations Act foresees a requirement that the supervisory board of stock listed companies adopts a "*clear and comprehensible system*" of remuneration for executive board members. This remuneration system must show the fixed and variable remuneration components, the relative share of each of the total remuneration, as well as the performance criteria for the variable pay.

This remuneration system must then be presented to the general meeting of shareholders for approval pursuant to § 120a of the proposed amendments. The general meeting of shareholders should participate in decisions regarding the remuneration system of the executive board ("*say on pay*"). Until now, the resolution of the shareholders' meeting on the approval of the remuneration system pursuant to § 120 para. 4 of the Stock Corporation Act has been voluntary and is not subject to a fixed time period; the new § 120a of the proposed amendments specifies that the shareholders' meeting shall take a decision on the approval of the remuneration system at least once every four years and in the case of significant changes to that system. This resolution is not binding on the supervisory board, but has only advisory character. Ultimately, the supervisory board will still decide on the remuneration policy applicable to executive board members.

If the general meeting of shareholders does not approve the remuneration system, the supervisory board must review it and present a new remuneration concept within a year. The supervisory board may only deviate from a remuneration policy that has been presented to the general meeting of shareholders for approval in exceptional situations and may only do so on a temporary basis. In the case of any discrepancies, the deviations from the agreed remuneration system must be specified.

Companies must publish their remuneration system and the decision approving it on their website and ensure free access to the documents for at least ten years.

In light of the fact that the resolution is not binding, there are some doubts as to whether the approval of the general meeting of shareholders can effectively place restrictions on the level of remuneration for executive board members. The EU Directive allows the EU member states to choose whether a resolution of the general meeting of shareholders should be binding. In any case, the dualistic corporate system in Germany means that the supervisory board has intrinsic powers to decide on the remuneration policies.

ANNUAL APPROVAL OF THE REMUNERATION REPORT BY THE GENERAL MEETING OF SHAREHOLDERS

Pursuant to § 162 of the draft Stock Corporation Act, the supervisory and executive boards of stock listed companies must prepare a detailed remuneration report each year and present it to the general meeting of shareholders for approval pursuant to § 120a para. 4 of the draft bill. The remuneration report must contain information on all fixed and variable pay elements, as well as details of any deviations from the remuneration system that was adopted. In addition, the report must state how the remuneration of the executive board members developed in comparison to the average pay of employees over the last five years.

The remuneration report must be reviewed by an independent auditor and, like the remuneration system, must be published on the company's website for at least ten years.

The EU Commission recently published draft "Guidelines for the standardised presentation of the remuneration report" and opened consultations on the guidelines. These draft guidelines specify the requirements that the remuneration report must fulfil and provide the following structure: introduction (5.1); total remuneration for directors (5.2); share-based remuneration (5.3); any use of the right to reclaim (variable remuneration) (5.4); information on how the remuneration complies with the remuneration policy and how performance criteria were applied (5.5); derogations and deviations from the remuneration policy and from the procedure for its implementation (5.6); comparative information on the change of remuneration and company performance (5.7); and information on shareholder vote (5.8).

SIGNIFICANT CHANGES TO THE GCGC

The GCGC is a set of rules establishing recommendations and suggestions for the corporate guidance of companies listed on the stock exchange. While it is not binding, compliance with the Codex does send out a strong signal. The "*comply or explain*" principle applies to stock listed companies, so that these companies must explain whether they follow the guidance of the GCGC and, where they do not, they must explain which recommendations they have chosen not to implement and why not.

The proposed revisions are designed to make the GCGC clearer and more streamlined. We will now look at some aspects of the GCGC revision with respect to board remuneration.

PEER GROUP

The new GCGC recommends that the specific targeted total remuneration for each board member be determined, based on a suitable peer group. The total remuneration should be broken down into fixed and variable elements. The amount of the long-term variable remuneration should, if 100% of the targets are reached, exceed the amount of any short-term variable remuneration.

LONG-TERM VARIABLE SHARE-BASED REMUNERATION

Of particular note is the fact that in the future, board members shall be granted long-term variable predominatly as share-based remuneration, which they may not dispose of for at least four years. This change is designed to increase the incentive for executive board members to take economic decisions that make sense in the long term, and to participate in the further development of the company on the capital market. At the beginning it was planned to recommend that the long-term variable shall only be granted as share-based remuneration; however, due to many criticism during the public hearing, it was changed to the recommendation that the long term variable shall **predominatly** be granted as share-based remuneration. At the same time, these rules mean that the remuneration of the executive board members is dependent on the development of the capital market, which the board cannot influence. In this respect, this new approach notably raises the question of the authority of the Codex Commission to set a new standard and deviate from previous practice, especially in light of the fact that there are still numerous other possibilities with respect to long-term incentives.

CLAWBACK AND CHANGE OF CONTROL

In addition, the proposed GCGC explicitly recommends to introduce a "clawback" clause, which would allow variable remuneration components to be withheld or reclaimed under certain circumstances. Further, compensation received for non-compete restrictions can be offset against severance packages. So-called "change of control" payments should no longer be agreed, i.e. payments for the premature termination of executive board membership as a result of a change of control of the company. Until now, the maximum amount of such payments was limited.

In the future, the initial appointment of executive board members should be limited to a three-year term; until now, the rule was that the maximum term of five years should not be the general rule for initial appointments to the executive board.

OUTLOOK

Providing the amendments are adopted as proposed, it is advisable to assess and adapt the remuneration system for executive board members and to update the statements of compliance under the GCGC.

On 14 March 2019 during the first debate in the German Parliament about the rules for the remuneration of the executive board members, there were various calls for the general meeting of shareholders to have the last word on the setting of remuneration for the executive board. In this respect, any changes made to the proposal in order to adopt this position would mean a fundamental change to the dualistic board system of German stock corporations. Due to this debate the public hearing in the Legal Committee of the German Parliament was scheduled with the main topic whether the supervisory board or the general meeting should be the decisive organ to set the remuneration for the executive board.

It remains to be seen just how the discussions will develop over the next few weeks. In any case, it can be noted that the deadline for the transposition of the EU Directive into national law, i.e. 10 June 2019, is missed. It is unclear whether the German Parliament and the German Federal Council will finally resolve upon ARUG II before the summer break. Further developments should be monitored closely and taken into account.

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Ministerial draft on the transposition of the 5th Money Laundering Directive

Following publication of the 5th EU Money Laundering Directive amending the 4th EU Money Laundering Directive (EU 2018/843) in the EU Official Journal on 19 June 2018, the Federal Ministry of Finance (*Bundesfinanzministerium, BMF*) presented a ministerial draft for a law to transpose the Directive (draft bill) for consultation. The European Union gave the member states the deadline of 10 January 2020 for the transposition of the 5th EU Money Laundering Directive into national law (see our Newsletter International Briefing of December 2018 for more details on the entry into force of the EU Money Laundering Directive).

The *BMF*'s draft bill essentially takes up the changes introduced by the 5th EU Money Laundering Directive and seeks to implement them. This is particularly true for the extension of the law to cover crypto currencies and the harmonisation and strengthened due diligence obligations with respect to so-called high-risk countries. In addition to the aspects outlined in our last article on the 5th EU Money Laundering Directive (see our Newsletter International Briefing of December 2018), the following points should be emphasised:

EXTENDING THE RULES FOR THE TRANSPARENCY REGISTER

According to the draft bill the public will also be able to access the transparency register that was introduced with the transposition of the 4th EU Money Laundering Directive on 26 June 2017. Until now, the transparency register has only been accessible to a limited group (authorities for the fulfilment of their statutory duties, persons who are required to inspect the register to fulfil their due diligence obligations, and persons, who can demonstrate a legitimate interest in accessing the register), pursuant to Section 23 para. 1 no. 1 of the German Money Laundering Act (*Geldwäschegesetz*). The proposed amendments are designed to implement the stipulations of the 5th EU Money Laundering Directive with respect to access. As the brief enquiry of the German Liberal Democratic Party (*FDP*) to the German Parliament (*Bundestag*) dated 21 May 2019 shows, for example, that making the transparency register accessible to the public is likely to provide fodder for a number of discussions because the interests of the economic beneficiaries to the protection of their personal data, on the one hand, and the interest in inspection and verification, on the other, have to be weighed against each other. Both the draft bill of the *BMF* and the 5th EU Money Laundering Directive assume that all interests remain protected because the current procedures for access are retained. This is flanked by a rule in Section 23 para. 2 of the German Money Laundering Act, which will also remain in place according to the draft bill. Accordingly, there is the possibility, where the commercial beneficiary has a legitimate interest, to limit access to the transparency register. Of note is the new rule in Section 23 para. 4 of the draft bill, pursuant to which parties, that are required to register, may not be informed of the identity of anyone accessing their reported entry in the transparency register.

In addition, a further notification obligation will be established for parties that are required to register. This obligation will arise when parties accessing the register discover discrepancies between the information in the registry about the economic beneficiaries and their own information. This could lead to further administrative burdens for companies that are obliged to register. Failure to comply may result in a fine.

AMENDMENTS FOR THE GROUP OF AUTHORISED PARTIES

The draft bill also extends the catalogue of businesses to include lawyers and real estate agents with respect to real estate transactions. In the future, real estate agents will also be subject to the rules of the German Money Laundering Act, when the agent acts as a broker for rental or leasing agreements that have a monthly lease of EUR 10,000 or more, or where the agent has special reason to suspect that money laundering might be involved. For transactions involving precious metals, the threshold value is lowered from EUR 10,000 to EUR 2,000, so that notification will be required for transactions with a value above EUR 2,000. According to the *BMF*, these changes stem from a national risk analysis on combatting money laundering and terrorist financing.

It is also noteworthy that, in the case of auction sales (especially of real estate), public authorities will also be subject to the obligations under the Money Laundering Act. According to the draft bill, this is necessary because organised crime, in particular, is known to profit from foreclosure proceedings and use proceeds of crime to acquire real estate or other high-value goods in such proceedings.

Interested associations had until 31 May 2019 to issue their opinion on the draft bill during the consultation period. We will inform you about any changes to the draft bill resulting from this consultation accordingly.

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The new German Trade Secrets Act in a nutshell – an overview of the new legal system

On 26 April 2019, the German Trade Secrets Act (*Geschäftsgeheimnisschutzgesetz, GeschGehG*) entered into force in Germany. This act implements the European Union Directive (EU) 2016/943 and establishes and implements common European standards for the protection of trade secrets in Germany.

The German Trade Secrets Act (the "Trade Secrets Act") provides for a new civil law foundation for the protection of business and trade secrets. Owners of trade secrets are now awarded statutory remedies, which resemble those of the conventional IP rights, i.e. injunctive relief, delivery up and destruction of infringing goods or, where appropriate, their withdrawal from the market, as well as the right to information. Section 23 of the Trade Secrets Act also stipulates a penal provision, so that the infringement of trade secrets is subject to criminal penalties.

The Trade Secrets Act further introduces new procedural rules for trade secret infringement proceedings which facilitate bringing a trade secret infringement action while safeguarding the trade secret holder's legal interests in keeping the trade secret confidential.

TRADE SECRET – CORE TERM

The core term of the Trade Secrets Act is "trade secret", which is defined in Section 2 no. 1 of the Trade Secrets Act as any information,

a) that is not, in the precise configuration and assembly of its components, generally known or readily accessible to persons within the circles that normally deal with this kind of information so that the information therefore has commercial value; and

b) that the lawful owner has taken reasonable steps, under the circumstances, to keep secret; and

c) for which there is a legitimate interest in keeping confidential.

These three requirements must be met in order for information to be considered a trade secret and be subject to the protection of the Trade Secrets Act. Trade secrets can include technical know-how as well as other business secrets, such as customer and supplier lists, business figures, prices, etc. However, the protection does not extend to the practical experience of employees. Former employees cannot be prevented from using and thus disclosing such information; yet, contractual non-compete clauses can provide protection for a limited period of time under certain – strict – conditions.

Perhaps the most important requirement for protection under the Trade Secrets Act is that the owner of the information in question has taken reasonable steps under the circumstances to keep the information secret. What steps are considered reasonable has to be determined on a case-by-case basis. The steps must be reasonable under the respective circumstances. A decisive factor could, for example, be how important the information is for the company. For instance, construction plans for the company's most important product must be better protected than a customer list for a mass-produced article. The size of the company in question and its capabilities with respect to implementing measures to protect trade secrets should – at least according to the explanatory memorandum for the Trade Secrets Act – play a role in evaluating whether the steps taken are considered reasonable and therefore sufficient to award the information protection as a trade secret under the Trade Secrets Act. As a result, it is not only possible, but also necessary to implement a graded system of protection. This requires the identification of the information which is to be protected as a trade secret, as well as the classification of these trade secrets depending on their importance to the company, the type of use of the trade secret and the risk that it will be unintentionally disclosed to third parties, so that adequate technical and legal protective measures can be arranged.

PERMITTED AND PROHIBITED ACTS AND EXCEPTIONS THEREOF

The Trade Secrets Act contains a non-exhaustive list of possible actions that can result in the legitimate obtaining of a trade secret. Naturally, independent parallel or in-house development or creation is permitted. An important change with respect to the legal situation prior to the Trade Secrets Act is that reverse engineering is now generally allowed, when the holder of the trade secret placed the product in question on the market, thus making it available to the public, or when it is lawfully owned by the person who is performing the reverse engineering, provided that no restrictions, such as through a relevant contractual provision, have been placed on such a lawful owner.

Further, the Trade Secrets Act makes it clear that trade secrets may not be obtained, disclosed or used against the will of the trade secret holder or in violation of a contractual obligation. This includes acts such as unauthorized copying of documents, articles or materials. Those who receive trade secrets from third parties may not use or disclose these secrets, if it is evident that the third party obtained the trade secret without authorisation.

These prohibitions, however, do not apply when, for example, they impede the freedom of expression, the work of the press or the detection of criminal offences. Accordingly, the protection of trade secrets is subsidiary to the ordre public.

RIGHTS OF TRADE SECRET HOLDERS IN CASE OF INFRINGEMENT

The Trade Secrets Act provides trade secret holders with comprehensive and wide-reaching possibilities to prohibit the distribution of infringing products and claim compensation for damages suffered as a result of the infringement of a trade secret. Therefore, the Trade Secrets Act deliberately defines “infringing goods” very broadly. Section 2 para. 3 of the Trade Secrets Act establishes that such infringing goods are those for which the conception, features, functioning, production process or marketing is based, to a considerable extent, on a trade secret, which has been unlawfully obtained, used or disclosed.

To prevent future infringements, the trade secret holder is entitled to injunctive relief against infringers, in accordance with the rights, which apply to other intellectual property rights such as patents, trademarks, or copyrights.

Further, the trade secret holder has a right to request the destruction or return of documents or objects, which contain the trade secret, and to the recall, removal and withdrawal from the market and the destruction of infringing goods. In order to enable trade secret holders to expose infringements, the Trade Secrets Act grants trade secret holders a comprehensive right to information from infringers.

For culpable infringements, the Trade Secrets Act grants trade secret holders a right to claim damages from infringers. To calculate how much should be paid in damages, the injured trade secret holder may choose between three methods of calculation and select the one that is most favourable to him. These methods include compensation for lost profits of the trade secret holder, damages based on a fictitious, reasonable license fee, or claiming the profits of the infringer.

PROTECTION OF TRADE SECRETS DURING INFRINGEMENT PROCEEDINGS

Before the Trade Secrets Act came into force, bringing an action before the courts for the infringement of a trade secret brought with it the risk that the trade secret would have to be disclosed in order to win the case. The Trade Secrets Act addresses these concerns and provides for a number of protective measures available to trade secret holders in trade secret infringement proceedings.

In trade secret infringement proceedings, either party can file a request that the court treat certain information as confidential. The party applying for this treatment must credibly demonstrate that the information in question is a trade secret. If the court recognizes a trade secret, it will instruct the parties, their lawyers, witnesses and experts to treat this information as confidential. In addition, this information may not be used or disclosed outside of the court proceedings. Fines of up to EUR 100,000 can be imposed for failure to comply with these requirements. Further, it is possible to limit access to documents and oral hearings to a set number of trustworthy persons from both parties. Third parties will only be able to access redacted documents.

CONCLUSION

The Trade Secrets Act upgrades the protection of trade secrets, bringing it into line with the special German laws that provide for the protection of intellectual property rights, such as patents, trademarks and copyrights, especially with respect to the rights of trade secret holders against infringers. As a result, trade secret holders now have comprehensive statutory rights under the Trade Secrets Act, allowing them to take action against infringers and recover any damages suffered.

In order to qualify for protection under the Trade Secrets Act, the trade secret holder must carefully handle any information, which contains trade secrets. It is advisable to implement a graded protection scheme, which is tailored to the individual circumstances, and to seek to secure trade secrets against third party use or disclosure through the adoption of detailed confidentiality and use restriction agreements, which have been adapted to the case in question.

The new rules on the protection of trade secrets during infringement proceedings serve to assure trade secret holders that taking legal action against an infringer will not lead to the loss of the trade secret through its disclosure to the infringer and the public.

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Total buyout agreements involving copyright are subject to German withholding taxes

THE FACTS OF THE CASE

In two cases of "total buyouts", the German Federal Fiscal Court (*Bundesfinanzhof, BFH*) was asked to decide whether the contractual transfer of rights to a work protected by copyright in exchange for a lump-sum royalty payment is to be seen as a divestment of the rights from a tax perspective, so that the obligation to deduct tax for the temporarily restricted assignment of rights within the meaning of Section 50a para. 1 no. 3 German Income Tax Act (*Einkommensteuergesetz*) is avoided.

In the first case, a German GmbH had concluded an agreement with a limited company based in the UK and two authors. This agreement granted an irrevocable, exclusive, worldwide right to use the work, which was not limited geographically or in time or scope (*BFH* judgment dated 24 October 2018 in Case No. I R 69/16). The agreement explicitly ruled out withdrawal, termination and other similar forms of rescission. Consequently, a flat fee was agreed as remuneration.

In the second case (*BFH* judgment dated 24 October 2018 in Case No. I R 83/16), a German GmbH concluded an agreement with an Australian producer on the assignment of intellectual property rights for productions, reports and reporter services with regard to Australia. The producer committed to transfer to the GmbH, by way of the total buyout, all copyright-protected rights of use and ancillary copyrights and other rights, without any geographic restrictions or restrictions as to time or content, in exchange for a flatrate payment.

In both cases, the parties agreed that German law would apply.

The First Senate of the Federal Fiscal Court rejected the tax evaluations of the total buyouts as sales in both cases, based on an assessment of German copyright law.

THE BACKGROUND

In certain cases of persons with limited tax liability, such as in the case of payments for the assignment of intellectual property rights that are registered in a German public register or used in a domestic business, income tax is levied by way of a withholding tax. The tax arises at the point in time in which the payment flows to the creditor and the tax is to be withheld on payment by the payment debtor for the account of the creditor. The payment debtor has to pay the withholding tax to the tax office and provide the creditor with confirmation of the payment and amount of the withholding tax. The creditor can obtain a (full or part) refund of the withholding tax if the German right to tax the person is limited, e.g. on the basis of a double taxation treaty or the EU Directive on interest and royalties.

In the two cases before the Federal Fiscal Court, the question was whether a lump-sum payment in the case of a contractual "total buyout" was paid for the grant of the rights or for the purchase of the rights, because payments made to purchase rights are not subject to withholding tax.

THE JUDGMENT

In the view of the Federal Fiscal Court and based on its former case law, the right will only be deemed to be divested when the right of use given to a party under the agreement remains permanently with that party and the right may not revert back to the original owner under the agreement, or when a right has been economically exhausted during use.

In assessing these exemptions, the Federal Fiscal Court relied on the legal requirements of German copyright law because the parties had agreed that German law would apply to their agreements.

Under German law, copyright includes both personal copyright aspects and exploitation right aspects and protects the author in its intellectual and personal relationship to the work and in the use of the work. The exploitation rights include, among others, the right of reproduction, the right to make it available to the public and to distribute it, the right to public performance and second window rights. Personal copyright laws include the right to publish, control over derivative works and the right of recall. Personal and exploitation copyrights are not, as such, transferrable to third parties. However, they may be licenced to granting rights of use.

German copyright law specifies that the sublicense of rights of use and the grant of further rights of use by the licensee require the approval of the author. Further, the author has a right to claim reasonable remuneration, which includes a retrospective fairness settlement, which cannot be waived by the author in advance. This latter rule includes the right to a contractual amendment when there is an imbalance in the so-called equivalence discrepancy, which occurs when the performance and consideration are strikingly disproportionate.

In addition to the recall right, which is a personal copyright, the right to a retrospective fairness settlement led the Federal Fiscal Court to hold that the right to the copyright protected work is not entirely transferred, despite the "total buyout". To this extent, the surviving statutory copyright determines the content of the contractually agreed right of use and differentiates the transfer of use from the (legal or economic) sale of rights. In contrast to the valuations for the accounting of rights of use, the Federal Fiscal Court held that a distinction should not be made between a right of use and a master right (*Stammrecht* – right giving rise to an underlying right or property) based on the wording of Section 50a para. 1 no. 3 of the German Income Tax Act.

In both judgments, the Federal Fiscal Court thus bases its position strongly on the legal specifications of German copyright law and concludes that there is also an obligation to deduct withholding tax when, in line with a "total buyout", the payment creditor with restricted tax liability grants the payment debtor a right for every known type of use to a work protected by copyright in exchange for a lump-sum payment.

CONCLUSION

The Federal Fiscal Court delved into the “total buyout” of rights to works protected by copyright and based its judgments on the special features of German copyright and contract law. Agreements for other technical intellectual property rights and know-how are not affected.

Nevertheless, the judgments are of paramount importance for practice. If rights to copyright protected works are transferred as part of a “total buyout”, the payment debtor must deduct the withholding tax pursuant to Section 50a para. 1 no. 3 of the German Income Tax Act. This applies regardless of whether the payment is agreed as a lump-sum payment or an ongoing fee. If the payment debtor infringes its obligation to deduct withholding tax, it is liable for the tax that was not withheld and paid. In light of these judgments, foreign authors and German payment debtors are well advised to review their tax relationships for the past. In fact, proceedings have come to the light in which criminal or fine proceedings have been initiated against payment debtors for failure to pay withholding tax. Foreign authors should also review whether the prerequisites for the refund or reduction of withholding tax are fulfilled and possibly also prepare an application to the Federal Central Tax Office (the competent authority) in order to avoid the expiry of the statute of limitations for the assessment. If it is not possible to refund or reduce the withholding tax based on the current contractual situation, one might consider whether it is possible to amend the licence structure in order to achieve a reduction or refund.

The rules on the retroactive fairness settlement under German copyright law are generally also applicable in international cases. Specific agreements should be reviewed in order to ascertain whether the agreement is sufficient for a foreign law to apply and to treat the sale of rights as a sale from a tax perspective.

In any case, the two judgments confirm the need to take the obligation to deduct withholding tax into account when negotiating contracts on intangible assets.

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When disclosure becomes legal – news on “whistleblowing”

The legal protection for whistleblowers is moderate. Until now, this protection has been based on various selective statutory provisions, which do not apply in all cases and do not provide any systematic protection (e.g. § 138 of the German Penal Code (*Strafgesetzbuch*)), § 17 of the Occupational Health and Safety Act (*Arbeitsschutzgesetz*), § 84 et seq. Works Council Constitution Act (*Betriebsverfassungsgesetz*), §§ 12 and 27 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*)). However, new European provisions provide hope for improvement in the future.

WHISTLEBLOWING – THE TERMINOLOGY

Whistleblowing is the disclosure of actual or alleged misconduct and wrongdoing within the company through the making of critical statements, complaints or criminal complaints, in particular by employees. A distinction must be made between internal and external whistleblowing. Internal whistleblowing is when the information is provided to superiors, the compliance officer or to employee representatives. External whistleblowing is when the informant goes public with the information either immediately or after an unsuccessful attempt to solve the issue internally, e.g. providing the information to the public prosecutor or the press. From a legal perspective, external whistleblowing is particularly problematic due to the whistleblower’s justified fear of labour law consequences, such as written warnings and/or termination of the employment contract based on conduct.

COURT RULINGS IN EMPLOYMENT LAW

The rules of the Federal Labour Court (*Bundesarbeitsgericht*) on whistleblowing are primarily based on the jurisprudence of the European Court of Human Rights (ECHR judgment of 21 July 2011 – 28274/08). According to the ECHR case law, whistleblowing is generally covered by the freedom of expression pursuant to Article 10 of the European Convention on Human Rights. In any case, there must be a weighing up of the conflicting interests, whereby the whistleblower should first try to clarify the issue internally; making the information public may only be a last resort. The question of whether disclosure was made in good faith and in the conviction that the information is true and disclosure was in the interest of the public, or whether the information was only disclosed “out of revenge”, will be considered under a proportionality test.

EU TRADE SECRETS DIRECTIVE

On 5 July 2016 the “Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure” (EU Trade Secrets Directive) entered into force. The primary aim is to establish effective protection for trade secrets throughout the EU. The Directive contains only one rule on whistleblowing, according to which disclosure of trade secrets in the case of whistleblowing is an exemption to the duty to maintain confidentiality of trade secrets.

GERMAN TRADE SECRETS ACT

On 29 April 2019, the German “Law on the transposition into national law of Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure”, which is based on and implements the EU Trade Secrets Directive, entered into force. This also includes the German Trade Secrets Act (*Geschäftsgeheimnisgesetz*). For more details see the article on “The new German Trade Secrets Act in a nutshell” in this Newsletter. This Trade Secrets Act primarily protects trade secrets against unlawful acquisition, use and disclosure. The Trade Secrets Act is not without some controversy, and much criticism was

voiced during the legislative procedure. Many found that the protection of whistleblowers did not go far enough. This criticism resulted in amendments to the draft bill, including modifications to the (sole) provision on whistleblowing.

In order to avoid the impression that a whistleblower was primary acting unlawfully, the provision, which was previously framed as a grounds for justification, was changed to an exemption, pursuant to which whistleblowing does not constitute unlawful conduct under the Trade Secrets Act in certain cases. While the draft bill also required the whistleblower to have the intention of protecting the general public interest, under the adopted Trade Secrets Act the actions only have to be "appropriate" to protecting the general public interest. These changes aim to avoid the need to test the attitude of the whistleblower, but at the same time ensure that good intentions alone are not sufficient; instead, the whistleblower must at least have sufficient cause for such conduct to be acceptable.

The weighing of interests required under the case law of the Federal Labour Court and the ECMR still continues to apply. In addition, the law clarifies that the rights and obligations under the employment relationship remain unaffected; the Trade Secrets Act in particular should not serve to circumvent understandings in the employment contract. In addition, former employers can continue to use their honestly acquired experience after they leave the company, even where this knowledge overlaps with the employer's trade secrets.

NEW EU DIRECTIVE FOR THE PROTECTION OF WHISTLEBLOWERS

In addition, on 16 April 2019, the European Parliament adopted a Directive on the protection of persons, who report breaches of Union law (2018/0106/COD). Germany now has two years to transpose this "Whistleblower Directive" into national law. This Directive is designed to generate secure means for infringements to be reported and to make it more complicated for retaliatory measures to be brought against whistleblowers. The protection only applies when the whistleblowers uncovers an infringement of EU law, such as tax fraud, money laundering, or offences in connection with public procurement contracts and infringements of the European rules on product safety and placing products on the market, on environmental protection, on public health or on consumer and data protection. EU Member States may decide to extend the scope of protection to cover infringements of national law as well.

Under this directive, whistleblowers may choose how to disclose an infringement: they may report the infringement via internal or external channels. The three-step notification system generally applies (first company, second the authorities, third the public). Depending on the circumstances of the case, the whistleblower may skip a step: whistleblowers will not be penalised, for example, if they make their criticism public after the company failed to react when the information was originally reported internally. It is also possible to make the information public without suffering any penalty and without notifying the information internally, if there is a direct threat to the public, when there is expected to be retaliation against the whistleblower or where notifying the authorities is not an option because, for example, the authorities cannot issue any relief.

Companies with more than 50 employees have to take measures to protect whistleblowers and establish secure channels and clear notification procedures for the reporting of irregularities. Harassment is explicitly forbidden and protective measures must be adopted to ensure that whistleblowers are not unlawfully laid off, demoted, intimidated or even actually attacked. Those who provide whistleblowers with support are also protected, such as intermediaries, colleagues or relatives. EU Member States must make comprehensive and independent information on reporting channels and alternative proceedings available to whistleblowers, as well as free advice and legal, financial and psychological support.

OUTLOOK / PRACTICAL ADVICE

Unfortunately, the new Trade Secrets Act does not give any guidance about the pivotal legal issues related to the protection of whistleblowers (e.g. the design of secure notification channels within the company and the scope of notifications that may be made by employees). Companies should nevertheless adopt appropriate measures to protect trade secrets because this is the only way that trade secrets will have appropriate protection; this should include specific confidentiality and non-disclosure clauses, for example.

It is hoped that the "Whistleblowing Directive" will improve the legal position, particularly with respect to the design of the reporting system, even if the Directive still has to be transposed into German law. One issue that remains exciting is the question of whether Germany will chose to extend the protection of the Directive to also cover infringements of national law. In light of this Directive, companies should prepare to establish internal whistleblower systems and review existing internal notification systems. Such systems are the only way to avoid the risk that the whistleblower will – lawfully – disclose information directly to the public. Accordingly, you should carefully follow the implementation of the Directive in Germany over the next few years in order to be able to make any necessary appropriate adjustments to your internal procedures.

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