INTERNATIONAL BRIEFING

Dear reader,

We are very pleased to present the September edition of our International Briefing in a new design and with our new logo.

This briefing focusses on recent legislative developments that we consider of interest to international business, ranging from new developments and trends relating to foreign direct investment to Germany, proposals to amend German real estate transfer tax rules, to new legislative projects like geo-blocking in the EU and the extension of tax liability to B2B digital services in Russia.

We also inform on rapid developments in Corporate Social Responsibility, the data protection since May 2018 with a specific focus on the energy sector and we give an update of the transparency requirements for German companies after the 5th European Money Laundering Directive entered into force.

Last but not least we are proud to announce that the leading German economy weekly *Wirtschaftswoche* ranked BEITEN BURKHARDT in the top tier of the best legal firms in the field of Mergers & Acquisitions for 2018.

We already look forward to seeing many of you at the different upcoming events, such as the ABA in California, the IBA Annual Conference in Rome and the Expo Real in Munich!

Best regards,

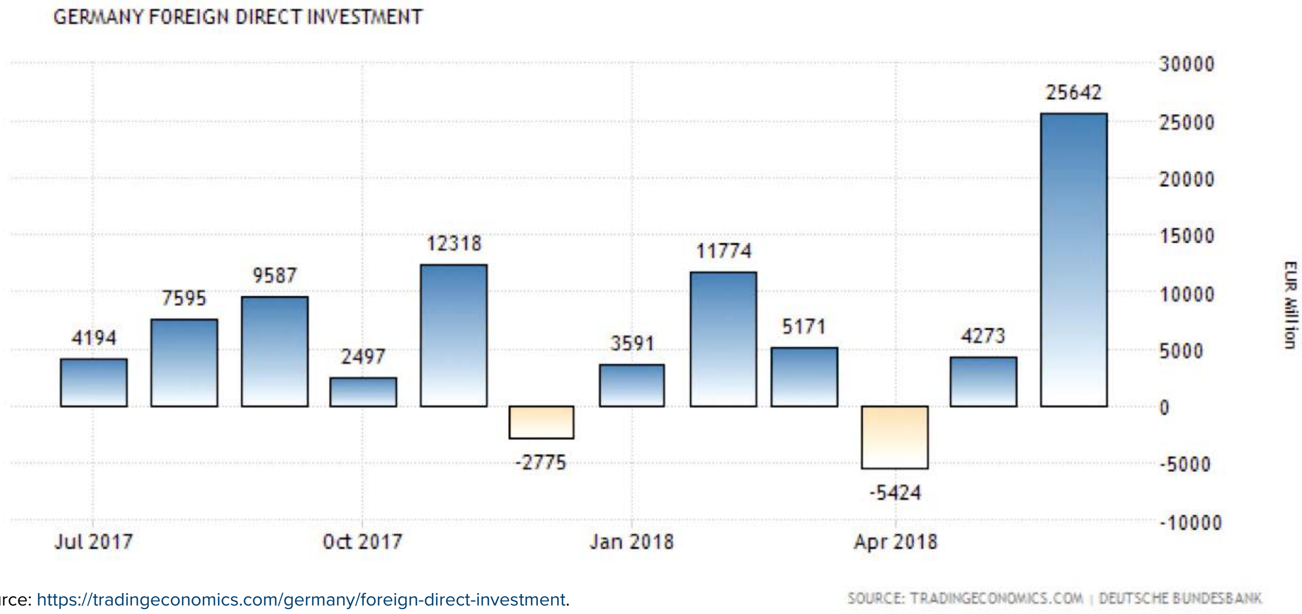
Dr Maximilian Emanuel Elspas
Co-head of the Corporate / M&A practice group

CONTENT

Germany's tighter FDI regime and the EU's path to uniform standards

1. The general investment environment in Germany

Foreign Direct Investment (**FDI**) in Germany has recently gained even greater significance than it has already gained over the past few years and Germany continues to attract large inflows of funds from EU and non-EU countries. FDI flows to and from Germany have increased in recent years. The largest German trading partners are at the same time among the biggest contributors to capital inflows, mainly through acquisitions and mergers. In the



Source: https://tradingeconomics.com/germany/foreign-direct-investment.

recent past, Chinese companies have increased their share of FDI and at one point Germany became the largest recipient, accounting for 31 percent of the total Chinese investment in the EU.[1]

Germany's great appeal as a favoured destination for investments is helped by its, by international comparison, rather "light" legal framework for company acquisitions and the fact that investments issued by third-country investors are only exceptionally subject to review, respectively to (i) a so-called sector-specific investment review and (ii) a general investment review.[2]

The above graph illustrates the FDI rates for the past four quarters.

Yet, concerns have arisen about the possible loss of essential know-how and, in particular, key technologies to non-European investors, which would harm the competitive position on the markets concerned in the long run. These concerns became manifest in the acquisitions of German robotics manufacturer Kuka by the Chinese company Midea, of Aixtron SE by the Chinese investment fund Fujian Grand Chip, and the acquisition of LEDvance or a stake in Daimler by Geely. As a result, the quest is on for the establishment of a more effective regulatory framework but with the accompanying goal of not impeding the overall investment atmosphere.

2. The German legal conditions for investments

German authorities may subject investments by foreigners to (i) a so-called sector-specific investment review and (ii) a general investment review. The first concerns investments in the defence industry or IT security for classified information, whereas the second review mechanism is of general nature and allows the acquisition to be reviewed where the investor is not a resident of the EU or European Free Trade Association (EFTA). In this context, the acquisition may only be prohibited if it substantially endangers German public order or security.

In spite of this liberal regulation, for legal certainty, we recommend that investors voluntarily notify their intended investment to the competent authorities when the target to be acquired is involved in activities that could even remotely give rise to public order or security concerns.

The German legal order also examines the competition on the market for the products concerned, according to the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen - GWB*). This review applies depending on the specific scale of the acquisition and is purely subject to legal criteria and market-economy based examination points, whilst disregarding political motives.

Of note are also sector-specific requirements, such as in the banking sector, though these equally do not allow political motives to be considered. A general tendency toward openness for investments can certainly be noted, for instance the BaFin, Germany's Federal Financial Supervisory Authority, has expressly welcomed Chinese investment activity in the German banking sector in May 2017.

CROSS-SECTOR INQUIRIES (*SEKTORÜBERGREIFENDE PRÜFUNG VON UNTERNEHMENSERWERBEN*)

The Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung - AWV*) lays down more precise rules on the circumstances under which the public order is potentially endangered and implements the level of security envisaged by the legislator; see Sections 55-59 AWV.[3] In this case, the German Ministry for

[1] See generally the annual UNCTAD reports, here the latest "World Investment Report 2018" and more in detail "Chinese investment in Europe: record flows and growing imbalances", joint report by MERICS and Rhodium Group; January 2017; https://www.merics.org/en/china-flash/chinese-investment-europe-record-flows-and-growing-imbalances, and "EU-China FDI: Working towards reciprocity in investment relations", by the same authors, April 2018, https://www.merics.org/en/papers-on-china/reciprocity.

[2] See for an overview the Blog by Georg Philipp Cotta and Christoph Heinrich on the changes in 2017 at https://www.beiten-burkhardt.com/de/news/germany-tightens-its-rules-foreign-corporation-acquisitions-and-proposes-eu-regulation.

[3] See the Blog by Georg Philipp Cotta and Christoph Heinrich at https://www.beiten-burkhardt.com/de/news/germany-tightens-its-rules-foreign-corporation-acquisitions-and-proposes-eu-regulation.

Economic Affairs and Energy (**Ministry**) is equipped with the power to intervene, commence the review process and, where the assessment shows that it is appropriate, even entirely block takeovers. German public order or security concerns raised by an acquisition can be traced back to critical infrastructure, especially software in the fields of telecommunication, cloud computing, energy and water, finance and insurance, healthcare, transport and the food industry. Here, the Ministry must start its reviews three months after having received notice of the specific investment.

In order to obtain legal certainty before the expiry date (since the final deadline for opening an inquiry is currently set at five years after the conclusion of the acquisition agreement), the acquirer should propose a so-called certificate of non-objection.

SECTOR INQUIRIES (*SEKTORSPEZIFISCHE PRÜFUNG VON UNTERNEHMENSERWERBEN*)

In the case of a sector inquiry, the target group concerned has been extended to include a wider range of defence and IT companies, see Sections 60 - 62 AWV. Companies producing or developing goods included in the export control list have now been added.

THE LATEST REVISIONS TO THE FRAMEWORK OF THE AWV

Starting with the 9th Regulation on the Amendment of the AWV of 14 July 2017 and continuing to the 11th and latest amendment of 5 January 2018, the German legislator has established a stricter set of rules for investments. These rules are designed to safeguard matters of public security, especially in relation to technological capacities in the arms sector and telematics infrastructure.

Based on a parliamentary act, amendment regulations for the AWV are adopted solely by the executive and at the present give the national Ministry the power to review acquisitions of a minimum of 25 percent investment share in national corporations by non-EU or – in case of misuse – EU corporations. As for the exact amendments, the 9th Regulation modified Article 55 et seq. on cross-sectoral review powers in the field of critical infrastructure and companies producing arms.

The 10th Regulation for the Amendment of the AWV of 28 September 2017 introduced a consolidated form of restrictive measures against investments to or from the Democratic People‘s Republic of Korea, as well as further amendments of the system of fines.

Lastly, the 11th Regulation on the Amendment of the AWV of 5 January 2018 implements the measures decided with respect to the arms embargo for Venezuela and the exemption regime for the EU-arms embargo for Russia into national law. In addition, this regulation contains more explicit rules on customs regulations and simplifying the procedure of investment control.

According to the revised rules, purchasers are obliged to register any acquisition in the industries mentioned in the Regulation with the Ministry. Furthermore, the Regulation foresees extended review periods, granting the Ministry a longer timeframe to review acquisitions i.e. appropriate measures must now be taken four months after notification in the case of cross-sector inquiries and within three months for sector inquiries. In this way, both, the sector-specific investment review on the one hand and the cross-sector investment review on the other, safeguard the maintenance of public security. The mechanisms only differentiate regarding to the respect that sector-specific inquiries contain stricter controls for more security-sensitive areas[4].

THE LATEST CASES AND PROPOSALS

As mentioned above, Germany enacted stricter rules on foreign acquisitions of corporations in 2017 in response to increase interest from Chinese investors in buying companies with important technology and know-how. Now, on 1 August 2018, the stricter German rules on foreign investment were put to the test. Yantai, the leading company in nuclear casting and forging products, had planned to acquire German undertaking Leifeld, which was founded in 1891 and is a supplier of chipless metal forming, as well as the global technology leader for flow forming machines. It looked as if the acquisition of Leifeld Metal Spinning AG (Leifeld) by the Chinese Yantai Taihai Group (Yantai) would have been prohibited, had the acquirer not decided to withdraw its application on the day that the German Federal Government authorised the Ministry to prohibit the acquisition.

Though the Ministry is yet to release detailed grounds for the decision, it is likely that the envisaged prohibition was mainly based on concerns regarding the production of dual-use goods, which could be used in the defence sector, as well as in machines suitable for the production of nuclear-related goods.

In addition, the German Federal Government‘s actions to prevent a Chinese State-owned group from taking minority stake in 50Hertz, a German power grid operator, supports the conclusion that Germany is shifting towards a stricter review of acquisitions by State-owned groups and non-European investors. The current procedural structures and review mechanisms have been criticised as being highly ambiguous and lengthy, as well as for requiring burdensome undertakings from the parties concerned. This state of affairs does thus not only require patience but also a secured funding for the planned acquisition.

As regards 50Hertz, the Chinese State-owned company made two attempts to buy shares, both of which were thwarted. The first attempt failed when the Belgian network operator, Elia, increased its shareholding. On the second attempt, Elia again increased its shareholding, applying pre-emptive rights and bought the remaining minority shares from Australian Investment Fond IFM. This minority shareholding was then resold to the German national promotional Bank (*Kreditanstalt für Wiederaufbau - KfW*) with a future option to resell the shares.

[4] See the Blog by Georg Philipp Cotta and Christoph Heinrich on the Aixtron and LEDVANCE cases at https://www.beiten-burkhardt.com/de/news/aixtron-and-ledvance-climate-change-chinese-investments-germany.

The case of 50Hertz reveals important legislative gaps and supports the need to establish review powers for share acquisitions under 25 percent and possibilities to intervene in cases outside the scope of critical infrastructures. Current legislation proposals however push towards even tighter restrictions, and more specifically aim for a 10 - 15 percent threshold to provide for more comprehensive control powers.

At the same time, tougher measures are being applied against the backdrop of increased government-supported foreign direct investments in key national technologies where there is a strategic interest in transferring security-related technologies. Germany's primary goal is to take preventive measures against the transfer of accumulated know-how and sensitive data and to prevent any detrimental consequences to Germany's public security interests.[5] Concerns about unwanted know-how transfers were sparked in particular by the secret acquisition of ten percent of Daimler by Chinese automotive conglomerate Geely. However, in this instance, Germany is faced with the constant struggle between safeguarding its unique selling point of innovative technologies and specialist know-how by blocking transactions and maintaining its pole position as preferred economic business partner. In light of the recent developments in the steel industry, triggered by the USA's actions, Germany is by mischance left "*squeezed between two nationalistic superpowers*".[6]

The new direction of increased review efforts in Germany is also part of a global trend towards stricter investment control, with the Investment Risk Review Modernization Act (FIRRMA) on the US side, a National Security and Investment White Paper published by the UK Secretary of Business, and proposals at EU level (see under point 3.).

On this note, implementing a stricter regime should however not be confused with the ultimate goal of protectionism. In light of the vast number of successful Chinese investments in German companies in the past, which have enabled expansion without the harmful side effects of draining expertise and jobs[7], genuine fears about the future of Germany's public security may be largely unfounded. However, the German Government, together with the Ministry, currently appears more keen on intervening in the case of foreign investments in areas essential for public security, i.e. to implement more intensive review transactions in connection with information technology, telecommunications, in the transport and traffic sector, health, water supply, food, as well as in finances and insurance.

The primary goal of the recently proposed amendments to the AWV is to regulate a lower review threshold of 15 percent, as opposed to the currently in place 25 percent mark, and to include security sensitive high technology branches within the material scope of cross sectoral review powers. Further, according to the regulatory proposals, notifications to the Ministry are mandatory for all acquisitions exceeding the 25 percent, 50 percent or 75 percent mark.[8] Accordingly, Germany is endeavouring to ensure more frequent and likewise more detailed reviews are performed for acquisitions in the fields of high technology and critical infrastructure. As a result, the general preparation process for successful transactions will be more laborious and is likely to include proposals to the investment control agencies.

In numerical terms, the number of review procedures is expected to increase. During the period from October 2013 to July 2017, a total of 383 acquisitions were reviewed, 36 within a formal procedure. Since the legislative reforms of July 2017, 62 acquisitions have already been reviewed, 39 within formal procedures. Compared to 2016, which had an overall number of 42 procedures and 2017 with 66, all signs point towards an increase to 100 procedures p.a.[9] Once this stricter approach to foreign direct investments is fully implemented, in future emphasis for companies must lie on thorough foreign investment due diligence in M&A transactions.

3. Prospects for European FDI review rules

As far as upcoming developments on the EU plane are concerned, the plan is to develop a specific EU-wide mechanism, aiming at greater level of transparency and preventing negative effects on critical infrastructure, technologies and sensitive information. Currently, less than half of EU Member States have legislation in place that allows them to review FDI on grounds of national security or public order.[10] The Commission proposed a draft legal text in September 2017, which some optimistically want to see enacted by the end of this year. The proposed rules primarily grant the Commission the authority to implement a security review of the investment and give a non-binding opinion to the relevant EU Member State in the case that EU interests are endangered. This complies with the EU's approach that "*Foreign direct investments are a major source of innovation, growth and jobs [...] and keeping the EU open to investment is crucial, but the right tools to protect key technologies from strategic threats and ensure that our essential interests are not undermined are needed*".[11]

FUTURE FDI CONTROL IN THE U.K.

Similar endeavours have also been undertaken by the UK. The general aim behind proposed amendments is to screen investments, particularly of Chinese State-owned companies. Recently, the UK Government introduced legislation on national security regarding FDI in the sector of cutting edge technologies. According to this proposal, the Government can review transactions, where

[5] Cf. https://www.verfassungsschutz.de/embed/vsbericht-2017.pdf pp. 279/280.

[6] https://global.handelsblatt.com/opinion/germanys-china-syndrome-2-897518.

[7] Among the most relevant investments are FDI in the Daimler AG, Kuka AG, Aixtron Se und 50Hertz Transmission GmbH, for more detailed view on Chinese investment preferences see: https://www.finanzmag.com/grossinvestor-china-setzt-auf-europa/.

[8] https://www.politik-kommunikation.de/gesetz-des-monats/deutschlands-chinesische-mauer-2146963973; https://www.onpulson.de/33734/bundesregierung-will-chinesische-investoren-ausbremsen/.

[9] http://www.manager-magazin.de/unternehmen/industrie/die-gruende-fuer-die-berliner-beschluesse-gegen-leifeld-und-50hertz-a-1221450-3.html.

[10] http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-screening-of-foreign-direct-investment-in-strategic-sectors.

[11] Emil Karanikolov, Bulgarian minister for trade: cf.: http://www.consilium.europa.eu/de/press/press-releases/2018/06/13/screening-of-investments-council-agrees-its-negotiating-stance/.

the turnover is expected to exceed £ 1 million, as compared to the current turnover threshold of £ 70 million. Reforms of the Enterprise Act 2002 will amend thresholds for review in the sectors of advanced technologies and dual-use goods. Here, the threshold for UK turnover is also lowered to £ 1 million and allows for the review of transactions with lower turnover rates where at least 25 percent of the relevant goods or services are supplied to the UK market.

Moreover, the Government Green Paper of 17 October 2017 on the Business, Energy and Industrial Strategy (BEIS) also contributes to developing a regulatory regime for screening and reviewing transactions, which raise national security concerns.

The guidance published on 15 March 2018 proposed two statutory instruments, respectively an affirmative statutory instrument and the negative statutory instrument for turnover thresholds. The proposed tests regard the development, design, and manufacture of and the supply of services for dual-use goods, computing hardware and in the area of quantum technology. Under section 23A of the Enterprise Act 2002, the military and dual-use sector includes enterprises involved in the development and production of goods specified in the relevant export control legislation.

In addition, since 2010, selected parliamentary committees have been allowed to take evidence from bidders and target companies in hearings. With the new rules adopted on 11 June 2018, the UK's merger control regime now places greater emphasis on regulating FDI, and introduces stricter threshold tests for businesses active in the military, dual-use, computing hardware and quantum technology sectors. According to these amendments, ministers can intervene where the UK turnover exceeds £ 1 million. This prospect points towards further, more comprehensive changes, with the prospect of a white paper which is expected to be published later this year.

FDI CONTROL CHANGES IN THE U.S.A.

As far as the U.S.A. are concerned, the latest development is Congress' successful negotiation of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) adopted 13 August 2018.

With rules requiring a more comprehensive annual report, FIRRMA aims at increased transparency. For future inbound investments, the Committee on Foreign Investments in the United States (CFIUS, interagency body within the U.S. Treasury Department) undertakes a national security review. Further, the Act deals with jurisdiction, practices and overall administrative procedures of CFIUS in greater detail. As for the expanded and more detailed jurisdiction of the CFIUS, covered transactions can now be reviewed for a possible impairment of U.S. national security. If these negative effects are confirmed, the CFIUS is granted the authority to either amend or entirely block transactions. The protective scope of the FIRRMA includes critical technologies in the arms sector (subject to the International Traffic in Arms Regulations, ITAR or Export Administration Regulations, EAR). As for the administrative procedures, parties desiring FDI can now file for a short declaration clearing the transaction or apply for a full voluntary notice. With the rules under the FIRRMA, the CFIUS can define the U.S. substantial interests and submit transactions for review and further investigation. The new review timelines set out an extended timeframe of 45 days with potential extensions up to 60 days. In this regard, the annual report includes inter alia details on reviews with full notice, results of the cases and statistics on the length of the CFIUS review processes.

4. Conclusions

Although Germany still wishes to tighten its investment review policy, in light of the global trend towards greater security and essential public security goals, increases in the number of investment reviews will by no means knock Germany of the list of preferred business partners.

Nevertheless, investors should anticipate that more time will be devoted to preparation and constraints must be satisfied if an FDI is to be implemented successfully. Given the rapid increase in cyber criminality and the immanent risks that need to be faced in an increasingly complex globalised world economy, future FDIs should be designed true to the motto: better safe than sorry.

Dr Rainer Bierwagen
Lawyer
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Berlin and Brussels

Proposals to reform German RETT provisions for Share Deals

On 21 June 2018, the Conference of Finance Ministers of the German Laender (**Finance Ministers Conference**) examined a possible reform of the German real estate transfer tax (RETT) regime and laid down a catalogue of measures, which is planned to form the basis for new rules for RETT applicable to share deals. Goal of the reform is to limit the room to manoeuvre with regard to current options for avoiding RETT on the transfer of shares in companies owning real property. Not only was this topic on the agenda of the Finance Ministers Conference in 2016, but the reform of RETT rules for share deals is one of the legislative tasks agreed in the German Federal Government Coalition Agreement of 12 March 2018. It can therefore be expected that the reform will be implemented in the very near future, likely even before year end. The reform will not only affect the real estate sector, but will impact all companies which own property, whether selling or restructuring medium-sized production facilities or considering succession planning with respect to family-owned companies.

CURRENT LAW

The reform proposal targets transactions involving the transfer of shares in real estate-owning companies (by way of share deal), rather than the transfer of real property itself (through an asset deal). Under current German law, RETT will generally arise also in share deals – despite the fact that legal ownership of the real estate remains identical. Different principles also apply, depending on whether the property is held by a partnership (e.g. limited partnership – *Kommanditgesellschaft - KG*) or a corporate entity (e.g. limited liability company – *Gesellschaft mit beschränkter Haftung - GmbH*):

- In simple terms, the transfer of interest in real estate-owning partnerships (*Personengesellschaften*) is not subject to RETT if, within a period of five years, less than 95 percent of interests in the company‘s assets are legally or economically transferred to new shareholders. This means that 5+ percent must remain with the initial partner for the duration of that period to avoid RETT.

- The transfer of shares in real estate-owning corporate entities (*Kapitalgesellschaften*) is not subject to RETT when less than 95 percent of the shares are transferred in legal or economic terms to a new shareholder or to a group of related shareholders. This means that RETT can be avoided even where 100 percent of the shares are transferred, as long as no shareholder or group of shareholders owns 95 percent or more of the shares.

In other words: Transferring less than 95 percent of shares or transferring less than 95 percent to one acquirer (or one group of acquirors) can avoid RETT, in each case depending on whether the real property-owning company is a partnership or a corporation.

This structural option under current German law is historically based, systematically justified and perfectly legitimate: As a form of transfer tax, RETT is levied on the transfer of real estate, not on a transfer of shares. In the legislator‘s view, the inclusion of certain types of share transfers (e.g. legal and economic consolidation of shares) in the list of taxable events serves to prevent tax avoidance. That is also the rationale behind the 95 percent threshold: The fact that the sale or purchase of 95 percent rather than 100 percent of the shares is sufficient for RETT to arise, aims to avoid structures involving the retention of only a “tiny” minimum shareholding. Under the current system, a separate minimum shareholding of more than 5 percent is not considered “harmful”.

The increase of the RETT rate by the German Laender from a uniform 3.5 percent in 2010 to 6.5 percent in some cases over the past years has made property tax-neutral share deals increasingly attractive.

PLANNED CHANGES

The Finance Ministers Conference in June proposed the following main amendments:

1. Reducing the “harmful” shareholding threshold for share deals regarding real property-owning corporate entities (*Kapitalgesellschaften*) and partnerships (*Personengesellschaften*) from currently 95 percent to 90 percent.

2. Increasing the period under review (after which time new partners will be considered old partners) from five to ten years for partnerships.

3. Aligning current rules for corporate entities with existing rules for partnerships: As has been the case for partnerships, RETT shall in the future be triggered also for property-owning corporate entities where there is a change in the shareholders (from currently 95 percent of shareholders to an anticipated 90 percent in the future) within a particular time period (currently five years for partnerships, foreseeably ten years in the future).

POSSIBLE CONSEQUENCES FOR PRACTICE

The rules are intended particularly to make share deals less attractive where the target is a real estate-owning corporate entity; under current law – and in contrast to partnerships – 100 percent of the shares can be sold or transferred without incurring RETT when the acquirers are unrelated and no one acquirer (and no group of related acquirers) obtains more than 94.99 percent of the shares. If the key features outlined above become law, this will no longer work. At present, it is not clear to what extent the specific exemption provisions, which currently apply in the case of the acquisition of shares in partnerships, will also apply after the adoption of these amendments. Potentially, these exemptions will not apply.

The general reduction in the shareholding threshold from 95 percent to 90 percent for both partnerships and corporate entities and the increase in the relevant retention period to ten years will make it much less attractive to retain old shareholders in a company for the purposes of saving on RETT.

The amendments proposed by the Finance Ministers Conference yet need to be turned into a specific legislative proposal which is currently being worked on by the German Federal Ministry of Finance. Such legislative proposal is expected to be presented very shortly. The crucial question at this point in time is when these planned new provisions would finally apply. It is even conceivable that the new RETT rules will apply retroactively, e.g. from the day of publication of the applicable draft bill or maybe even earlier. Still, German constitutional law and the case law of the German Federal Constitutional Court pose hurdles to retroactive application.

CONCLUSION

The key features of the RETT reform, as outlined above, are likely to make share deals significantly more difficult and less attractive at least from a pure RETT perspective. This will be particularly true to the extent that indirect changes in the shareholding structures of corporate entities, and possibly even in companies listed on the stock exchange, which hold real property, are relevant and may have to be added up over a period of ten years. However, even medium-sized production companies, which own their own factory premises, or family-owned companies with real estate assets will be more severely affected, whether as part of the sale or restructuring of the company or within the framework of succession planning. In any case, where you are engaged in ongoing transactions or are planning transactions in the future, we recommend that you keep updated on the RETT reform and take it into account for your transactions.

Dr Malte Strüber
Lawyer | LL.M. | Tax advisor | Licensed Specialist for Tax Law
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Berlin

Time is running out for geo-blocking

From 3 December 2018, the EU Geo-blocking Regulation (Regulation) will prohibit unjustified geo-blocking within the European Union. This legislative change will particularly affect all companies selling goods or providing services online to EU customers. Companies need to act now and review the implications of the Regulation on their businesses and, where necessary, amend their sales methods and terms and conditions.

WHEN DOES THE REGULATION APPLY?

The Regulation does not differentiate between traders established in the EU and those established in third countries. Instead, retailers, marketplaces and service providers targeting customers in at least one EU/EEA Member State are subject to the Regulation. The Regulation applies to the sale of goods, as well as to the provision of many services. The Regulation also covers all sales channels (online and offline), B2C and B2B sales or services (if the goods or services are used for the company‘s own end use, e.g. office supplies).

WHAT IS GEO-BLOCKING?

In short, geo-blocking refers to a contractual or technical restriction that prevents customers from buying or accessing a product or service based on their location, residence or nationality.

WHAT KINDS OF MEASURES ARE PROHIBITED BY THE REGULATION?

A trader may not, for reasons related to a customer‘s nationality, place of residence or place of establishment,

- apply different net prices or different general conditions of access to goods or services where the customers seeks to receive the goods or services in an EU Member State where the trader operates;
- apply different conditions for a payment transaction;
- block a customer‘s access to its online interface; and
- automatically redirect a customer to a different version of its online interface.

These prohibitions also apply to indirect discrimination, based, e.g. on the customer‘s IP address or on the place of issue of the customer‘s payment instrument.

DO WE NEED TO SELL OUR PRODUCTS TO ALL EUROPEAN COUNTRIES NOW?

The Regulation does not force traders to extend their business activities (i.e. delivery area) to additional EU Member States. However, a customer situated in one EU Member State needs to be able to have the goods delivered to another EU Member State where the trader already offers a delivery or a pick-up service. For example, if a German online retailer only offers delivery to Germany and Austria, it does not need to deliver its goods to France. However, a French customer with a French credit card and a French home address in Strasbourg needs to be able to access, order and pay for the goods and have them delivered to his workplace address in neighbouring Kehl, Germany.

DO WE NEED TO SELL AT THE SAME PRICES ON OUR .DE AND OUR .FR WEBSITE?

The Regulation neither forces traders to abandon their localised website versions nor does it require them to harmonise their prices and sales conditions across different EU websites or other points of sale. However, all EU customers need to be able to buy products from all EU websites/website versions. For example, if a German online retailer has a German .de and a French .fr website, it does not need to offer its German promotional price on its French .fr website, too. However, that French customer from Strasbourg needs to be able to access, order and pay for the goods from the German .de website and have them delivered to his German workplace in Kehl.

WHAT PARTS OF THE SALES PROCESS ARE AFFECTED?

Geo-blocking can take many forms. Changes may be required, for example, to the following processes:

- order procedures (e.g. order forms);
- payment methods (e.g. acceptance of credit cards);
- customer authentication processes;
- pricing;
- terms and conditions (e.g. conditions concerning the customer‘s location);
- information texts (e.g. Q&A for potential customers);
- website and app availability and redirections (e.g. IP checks, automatic referrals) and
- distribution agreements.

ARE THE ANY EXCEPTIONS?

The Regulation does not apply, for example, to audio-visual services, radio broadcasting, financial retail services, healthcare services, transport services and gambling. A provider may also be exempted from some of the Regulation‘s obligations where required by national (e.g. pricing of books) or where its services are copyright protected (e.g. online music).

HOW WILL THE RULES BE ENFORCED?

The Regulation will be subject to both private enforcement (by competitors and consumer organisations) and public enforcement (by national authorities). In Germany, the German Federal Network Agency (*Bundesnetzagentur*) will be in charge of enforcing the Regulation and will be able to impose fines of up to EUR 300,000 for intentional or negligent infringements of the Regulation. We expect that the European Commission will closely monitor the Regulation‘s decentralised enforcement.

WHAT ARE THE MOTIVES BEHIND THE REGULATION?

The European Commission views cross-border e-commerce as contributing to the integration of the EU internal market. That is why the Commission is fighting hard to end any impediments to cross-border e-commerce. In 2015, the Commission launched its Digital Single Market strategy to address such impediments. From the outset, geo-blocking was high on the Commission's agenda. The Commission's concerns were corroborated when its inquiry into the e-commerce sector indicated that approx. 38 percent of responding retailers implement geo-blocking measures.

LAST BUT NOT LEAST...

European competition law may also prohibit companies from using geo-blocking measures:

- Typically, supply agreements limiting the trader's ability to passively sell to customers in certain territories are illegal under EU competition law.
- Geo-blocking measures implemented by dominant companies may be considered an illegal abuse of that dominant position.
- In contrast, under EU competition law, it is legal for non-dominant traders to unilaterally decide not to sell cross-border.

The stakes are high if a geo-blocking measure infringes EU competition law. For example, the European Commission recently fined Pioneer EUR 10 million for, *inter alia*, allegedly limiting "*the ability of its retailers to sell-cross border to consumers in other Member States in order to sustain different resale prices in different Member States*".

Christoph Heinrich
Lawyer
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Munich

Rapid developments in Corporate Social Responsibility (CSR)

Sometimes it takes a while for new concepts to become accepted and anchored in awareness alongside established patterns of thought. That time has come for Corporate Social Responsibility (CSR). Numerous recent developments in the field of CSR suggest that all private and public companies should urgently address the issue of CSR more closely, if they have not already done so.

NEW DEVELOPMENTS

The German "National CSR Forum" published its "Berlin Consensus on Corporate Responsibility in Supply and Added Value Chains" (*Berliner Konsens zur Unternehmensverantwortung in Liefer- und Wertschöpfungsketten*) on 25 June 2018. Various organisations representing social partners, associations, chambers of commerce and civil society are involved in the forum. These stakeholders agreed in the Berlin Consensus on key elements for the responsible management of supply and added value chains. The breadth and depth of the foreseen audits will depend on the size, sector, and activities of the company concerned, as well as the severity of the risks presented.

At an international level, the OECD published its "*Due Diligence Guidance for Responsible Business Conduct*" at the end of May 2018. With such general Due Diligence Guidance, the OECD offers companies practical assistance with the implementation of the OECD guidelines for multinational enterprises. In addition, special OECD due diligence guidances concerning the areas of conflict minerals, raw materials and resources, textiles and shoes, agriculture and institutional investors already exist for some time.

The Berlin Consensus, the OECD guidelines for multinational enterprises and other international CSR instruments are not designed to create legal duties. Companies are therefore left to decide to what extent they will take them into account. However, the press release of the German Federal Ministry for Labour and Social Affairs about the Berlin Consensus should certainly make you sit up and take notice. State Secretary Bjoern Boehning was quoted in the press release as saying that binding(!) national and international standards are essential. In the Berlin Consensus, the national CSR Forum also stated its desire to take part in discussions "on the generation of a common regulatory framework for global business activities, that will apply equally to all players." When, how and to what extent this ambitious goal can be achieved remains to be seen.

Even today, an increasing number of legal obligations are established at European level with the goal of encouraging responsible business conduct. This includes in particular Regulation (EU) 2017/821 of 17 May 2017 on so-called conflict minerals, which imposes binding supply chain due diligence obligations on importers of conflict minerals as of 1 January 2021.

As a result of the EU CSR Directive and the German implementing law, certain large corporations have had to expand their annual reports to include a non-financial declaration for financial years beginning on or after 1 January 2017. This requires companies to report, for example, on the due diligence processes used for non-financial aspects (sections 289b and 289c German Commercial Code (*Handelsgesetzbuch*)). According to a recently published report on a study carried out by Global Compact Network Germany and ecosense, companies invested considerable time and effort in complying with the new non-financial reporting aspects for the first time in 2017. On the other hand, there was a dramatic increase in the level of attention paid by management and supervisory boards, in particular, to non-financial topics.

OUTLOOK

Further developments at both national and international levels are likely. With its national action plan for business and human rights, the German Federal Government is currently pursuing a voluntary compliance approach to establish human rights due diligence processes. Companies are urged to assess their business activities and relationships for human rights risks and to implement appropriate measures. If companies fail to voluntarily comply and sufficiently establish these due diligence processes, the measures may later become binding legal obligations. Whether or not this will be necessary remains to be seen. Ultimately, all stakeholders involved in the Berlin Consensus agreed that functioning sustainability management offers increased opportunities for companies to improve their competitive position. This alone should be sufficient incentive for companies to address the topic of sustainability more closely.

An increasing number of investors also expect companies to comply with fundamental social, environmental and human rights standards. In March 2018, the EU Commission adopted its action plan on financing sustainable growth and established central goals concerning the greater consideration of sustainability criteria on the financial market. Over the next twelve months, a whole series of initiatives are planned. The Commission has already presented the first regulatory proposals. These initiatives will also look at how sustainability can be better taken into account in ratings and market analyses. This will have a direct effect on companies and will make a functioning sustainability management system even more vital.

Dr Daniel Walden
Lawyer
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Munich

Dr André Depping
Lawyer | M.L.E
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Munich

Russia: Extension of VAT liability to B2B digital services as of 2019

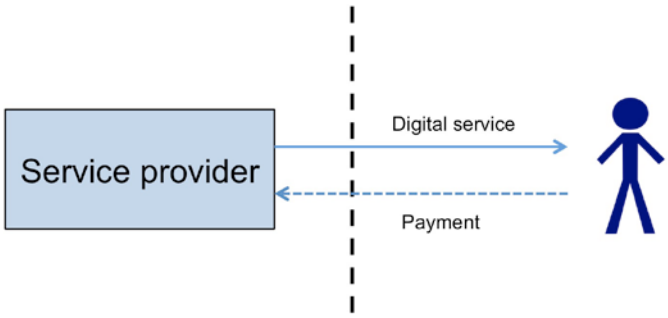
In recent years, the revenue and sales tax treatment of digital services has increasingly moved into the focus of legislators in many countries. In 2017, Russia, too, changed its VAT regulations for B2C services to “Google Tax”. As of 2019, these regulations will also apply in the case of B2B, so that non-Russian companies providing digital services to Russian entrepreneurs should review their digital service relationships as a matter of urgency. This includes, in particular, service relationships between affiliated companies.

CURRENT LEGAL FRAMEWORK

The regulations that have been applicable since 2017 essentially correspond to those that apply in the European Union. Digital services provided by a foreign company to private end customers domiciled in Russia are subject to Russian VAT.

The Russian law contains an exhaustive list of digital services, including, for example, the following services according to Article 174.1 RF Tax Code:

- rights to software and IP, including updates made available over the Internet, including games, apps, e-books;
- digital advertising;
- access to Internet platforms;
- automated creation and management of web pages;
- storage, processing and administration of data on the Internet, automated creation of data analyses, statistics, reports, etc.;
- hosting services.



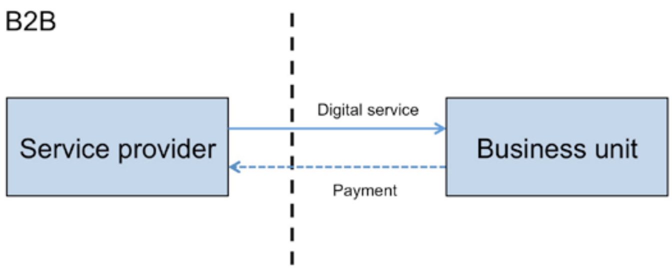
A foreign company must register for tax in Russia if it provides digital services to private end customers in Russia. The foreign company must then declare the turnover in Russia on an ongoing basis and pay the VAT due.

For digital services provided B2B, the regulation previously considered the service recipient as the debtor of the value-added tax. This procedure corresponded to the European reverse charge procedure.

CHANGES AS OF 2019

With effect from 2019, the Russian legislator changed this regulation.

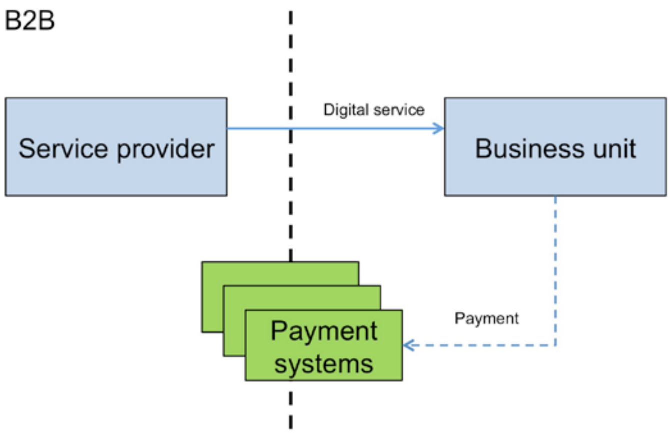
There has been no change in the scope of the digital services covered. However, the distinction between digital services provided to companies and those provided to private consumers residing in Russia has been removed.



As of 2019, foreign companies must also register for digital services provided B2B in Russia, declare Russian turnover and pay VAT. The obligation to register applies even if a VAT exemption is applicable.

The Russian service recipient can only deduct input VAT from the digital service purchased if the service was purchased from a company, which has registered for tax in Russia. Accordingly, Russian service recipients should contractually agree on the necessary registration and insure themselves against any input tax risks arising from a lack of registration.

If payment for the digital service is made to one payment agent (e.g. via one payment system) or if several payment agents (payment systems) are involved in the payment chain, the first payment agent to collect the payment from the Russian service recipient is considered to be the debtor of the Russian VAT. Russian banks, financial institutions, as well as telecommunication providers, are not considered tax debtors, so that in such cases the foreign service provider or the first foreign payment agent must pay VAT.



SIGNIFICANCE FOR PRACTICE

Companies that have previously provided their digital services exclusively to companies based in Russia (or to a Russian permanent establishment of a foreign company) should be required to register for the first time for this type of service. For companies that already provide digital services to private end customers based in Russia, the necessary separation between private and corporate customers will no longer apply in the future. All they have to do in the future is to accurately determine the volume of Russian sales.

Companies that provide their digital services in a bundle with other services must check the contractual basis for customers in Russia, including affiliated companies, with regard to whether a separate fee has been agreed for each individual service or whether uniform invoicing takes place. In the latter case, there is a risk that in a worst-case scenario the foreign company will have to pay Russian VAT on the entire turnover due to the lack of a breakdown. At least in these cases it is unclear to what extent the foreign company or the Russian service recipient is the tax debtor.

Unless there are amendments or to the new law or explanatory memoranda issued by the end of 2018, groups and large companies that invoice their Russian affiliates for digital services as part of group cost sharing will also be affected. Since foreign service providers of digital services must be registered for tax purposes in Russia, corporate groups should verify which group company is most suitable for this purpose. Restructuring measures or changes to contractual structures may be necessary.

SUMMARY

In summary, non-Russian companies providing digital services to Russian companies should review their digital service relationships. This includes, in particular, service relationships between affiliated companies as well as intra-group agreements on cost sharing.

Anna Lesova
Lawyer (RF) | LL.M.
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Dusseldorf and Moscow

Data protection since May 2018: The GDPR in the energy sector

On 25 May 2018, a new epoch began for data protection in Europe: the General Data Protection Regulation (Regulation EU 2016/679 – GDPR) now forms the European framework for data protection. Even if numerous national and European provisions continue to apply to the protection of personal data, the GDPR places demanding requirements on corporate structures and on the processing of personal data. With this in mind, energy suppliers should not only take the general GDPR considerations into account, but should ask themselves some additional questions.

WHAT'S NEW?

The GDPR builds upon the approach taken by the previous data protection law and modernises this approach based on the experience gathered over the last 20 years, as well as the relevant case law. The GDPR contains a number of new elements that are designed, on the one hand, to strengthen the protection of the rights of data subjects and, on the other hand, to facilitate the transfer of data within the digital internal market for companies. The GDPR introduces the basic principles of data protection through technology and default privacy settings ("privacy by design" and "privacy by default") in order to ensure that data protection interests are taken into account in business process and products from the very start. New transparency requirements strengthen the rights of data subjects and give them more control over their personal data. A new element in this regard is the right to data portability, which allows a data subject to demand that a company transfer any personal data, which the data subject made available the company based on consent or a contract, to or back to another company. The regulation also gives data protection authorities the power to impose fines on data controllers and processors of up to EUR 20 million or four percent of the worldwide annual group turnover. In addition, data subjects may claim compensation for non-material damage caused as a result of serious violations of the data protection provisions. Previously, companies were obliged to notify and ensure that prior checks were performed on processing operations that were likely to present specific risks. These requirements have been abolished. In their place is an instrument that is unfamiliar to German companies, and requires the evaluation of the risks before starting data processing: the data protection impact assessment.

WHAT IS KEY: THE COMPANY IS RESPONSIBLE

One of the key principles that the GDPR seeks to establish is the responsibility of companies to ensure effective data protection. While a company wishing to process personal data is now freed from a number of the bureaucratic notification requirements, it is now expected to independently ensure effective data protection in all its commercial activities in all areas of the organisation and all products from the very start. Company processes and products should therefore be designed with data protection in mind from early on in the development process.

WHAT DOES THIS MEAN IN PRACTICE?

All companies are required to maintain a register of all the processing activities that occur under their authority. Many companies have therefore already taken a comprehensive inventory of all data processing procedures performed internally. In addition, the GDPR requires every company to document and ensure the legality of all data processing. The processing inventory can also be used to fulfil this central documentation function. Companies must perform a data protection impact assessment for all processing that poses a particular risk for the data subject. A data protection impact assessment must be made, in particular, for any processing, which allows behaviour to be analysed (e.g. consumer behaviour). Moreover, most companies are required to name a data protection officer. Fines can be imposed for failure to comply with these compliance requirements, so that a lack of documentation or the failure to name a data protection officer trigger the risk of fines.

In addition to these general compliance requirements, it is in a company's own interests to ensure that the rights of the data subjects to information, access, rectification, erasure or data portability can be implemented. The new right to data portability, in particular, is a challenge for some sectors. In the energy sector, this right might make it easier for competitors to offer tailored rates as it allows them to access the consumer history of new customers. In this respect, customers can demand that their previous energy provider provide a copy of all data pertaining to them in a commonly-used, electronic format. This means extra effort for companies, but also chances to develop new products.

GDPR IN ENERGY COMPANIES

In addition to taking the general provisions of the GDPR into consideration, energy providers should ask themselves these questions in light of the GDPR requirements and those of the sector:

1. Do your customer contracts and consent forms for data processing meet the requirements of the GDPR?

2. What influence does the GDPR have on your customer regain programmes and other marketing activities?

3. Do your contracts with service providers (e.g. call centres) meet the requirements of the GDPR?

4. Are your company's internal IT processes attuned to the new GDPR? In particular: What do you have in place with respect to data protection? Have you established concepts and routines for erasing the data of data subjects?

5. Do you have processes in place to enable you to react to personal data breaches (hacker attacks)?

6. What is the relationship between the data protection requirements of the GDPR and the special security requirements imposed on your company as critical infrastructure?

7. What special requirements have to be implemented with respect to smart metering?

As far as we can tell, many companies are not 100 percent compliant with the GDPR even three months after its entry into force on 25 May 2018. While the authorities have been tolerant in this initial stage of the "GDPR readiness" in certain areas, companies are expected to take data protection seriously and ensure that compliance levels are high, particularly in the core areas of data processing and the processing of sensitive personal data of data subjects. However, in our opinion, this "*de facto* transitional phase" will soon be over.

GDPR SPRINT TIP:

If you have not yet started to implement the GDPR or are just at the start of this process, we would recommend that you set the following priorities:

1. **Get an overview of your processes!** Take an inventory of your data protection processes and record them in a processing inventory. This inventory will be the first thing that the authorities ask for.

2. **Deal with your customer related processes and the rights of data subjects!** Unhappy customers and customers, who have a bad experience with data protection, will complain to the authorities. Make sure you fulfil the data protection expectations of your customers.

3. **Deal with customer contracts and information texts!** Authorities can easily take a look at these documents. Make sure that the texts you use are based on the latest GDPR developments.

4. **Look after your employees!** Employee data protection is important and unhappy employees can be a significant data protection risk.

5. **Do the things that are easy to implement!** It is easy to select and appoint a data protection officer and does not take much time.

6. Address the remaining aspects of the GDPR according to your risk priorities.

Dr Axel von Walter
Lawyer | Licensed Specialist for Copyright and Media Law | Licensed Specialist for Information Technology Law
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Munich

Always moving forward, never back – new rules for the transparency register

In July 2018, the 5th European Money Laundering Directive entered into force, bringing with it numerous changes to the transparency register playbook.

National legislators have until the start of 2020 to transpose the legal requirements of the new directive into national law. Until then, the changes will not have any direct effect. However, even now the new rules are having an impact on both existing provisions and administrative practice.

NEW: ACCESS FOR ALL

Until now access to the transparency register required a "legitimate interest". To the extent that it is so transposed into national law, the new directive foregoes the "legitimate interest" requirement. Article 30 para. 5c) of the 5th European Money Laundering Directive now foresees that the information about the beneficial owners of a company will be available to "members of the public", i.e. to anyone. This change will influence the current administrative practice with respect to the "legitimate interest" assessments. "Legitimate interest" is therefore likely to be interpreted even more generously in the future than is already the case. As a result, even very sensitive information about the personal financial circumstances of beneficial owners and internal company information will be available to all without any real hurdles.

RECOMMENDATION

For this reason, it even more necessary that you carefully examine all information before reporting it to the transparency register. Once information has been shared with the register, it is likely to be accessible forever. As something shared on the internet is never really forgotten, we recommend that you take a very restrictive approach with respect to the information that you report to the transparency register.

DELIBERATE SUSPICION

But it doesn't stop there. The new directive requires companies to inspect the transparency register and confirm the beneficial owners of prospective business partners, before starting any new business relationships. Article 14 of the European Money Laundering Directive states: "*Whenever entering into a new business relationship with a corporate or other legal entity, or a trust (…) the obliged entities shall collect proof of registration or an excerpt of the register.*" This not only makes it possible for the public to go snooping into the ownership structures of partners, but it actively encourages it.

This significantly increases the risk that any erroneous information notified to the transparency register or any omissions will be uncovered. Subsequently, the liability risks for directors, shareholders and companies increase. The extent of the review and inspection obligations for the companies will also increase.

WHAT'S LEFT?

As with before, each company must provide the personal data for its beneficial owners to the register. A beneficial owner is anyone who holds more than 25 percent of the share capital or voting rights in a company or otherwise exercises similar control (c.f. our December and May newsletter). During the legislative process there were some discussions on whether this threshold should be reduced to 10 percent. However, in the end, the legislators relinquished this idea and the threshold remained at 25 percent.

CONCLUSION

A company's failure to delete personal data, which is no longer required, can now result in substantial fines. No stakeholders dispute the significance of the new data protection rules (c.f. the respective article in this newsletter). Against this background, it is surprising that the Money Laundering Directive not only requires the collection of personal data, but also makes it accessible to all. National legislators now need to take particular care in the transformation of the directive into national law.

For companies, the level of effort and the risks will increase, as they will have to take greater care when deciding with whom they will do business. In this respect, the real purpose of the transparency register should be remembered: to combat money laundering and terrorist financing. Whether this goal actually requires the sensitive data of shareholders and companies to be accessible to all remains questionable.

Hence: instead of using the reform to clarify the existing and sometimes unclear rules of the existing Money Laundering Directive, the European legislators have continued blithely on, in order to minimise even the transparency register's last remaining protective hurdles to access to the private sphere of beneficial owners: always moving forward, never back.

Dr Maximilian Degenhart
Lawyer
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Munich

BEITEN BURKHARDT ranked in the top tier of best M&A legal firms 2018 by Wirtschaftswoche

The leading German economy weekly *Wirtschaftswoche* recently ranked BEITEN BURKHARDT in the top tier of the best legal firms in the field of Mergers & Acquisition for 2018. A three level procedure involving market analysis by the Handelsblatt Research Institute, a survey and recommendations of an expert jury formed the basis for this ranking.

BEITEN BURKHARDT events

Meet BEITEN BURKHARDT partners at these upcoming events:

ABA, 3-4 OCTOBER IN NEWPORT BEACH, CALIFORNIA

The ABA Intellectual Property Law Section will host its second annual CLE seminar focusing on new developments, emerging issues, and best practices in IP Law. A flyer about our delegates can be downloaded here.

For further information about the event please visit the event website.

IBA ANNUAL CONFERENCE, 7-12 OCTOBER 2018 IN ROME

As the most important event on the international legal community's calendar, the IBA Annual Conference presents an unparalleled opportunity to share our knowledge and develop our global network of colleagues and business contacts. A flyer about our delegates can be downloaded here.

For further information about the event please visit the event website.

EXPO REAL, 8-10 OCTOBER IN MUNICH

BEITEN BURKHARDT will be represented for the sixth time on the joint stand with the City of Frankfurt at EXPO Real, Europe's largest B2B trade fair for real estate and investments. Meet our partners at the City of Frankfurt stand in Hall C1, stand 230.

You can find further information about the trade fair on the EXPO Real website.

About the Corporate / M&A practice group

CORPORATE

BEITEN BURKHARDT provides comprehensive corporate law advice on all aspects and issues arising in relation to the establishment and structuring of companies, current company management, reforms in connection with reorganisation or generational changes, or in connection with the sale or acquisition of business units or their liquidation and dissolution. We advise medium-sized companies and multinational groups, family-owned companies and their shareholders, listed and unlisted stock corporations, publicly-owned companies and foundations, start-ups and venture capital firms, as well as strategic and financial investors from Germany and abroad. Excellent technical knowledge and many years of experience in corporate law and across various sectors allow us to provide our clients with individual and practical solutions for complex, specialised topics and legal issues arising in day-to-day business.

M&A

Mergers & Acquisitions has been a core area of expertise for BEITEN BURKHARDT since the establishment of the firm. We advise medium-sized companies and multinational groups, family-owned companies and their shareholders, listed and unlisted stock corporations, publicly-owned companies and foundations, start-ups and venture capital firms as well as strategic and financial investors from Germany and abroad on national, international and cross-border transactions, auctions and exclusive negotiations, carve-outs, takeovers and mergers. Our know-how and practical transaction expertise allows us to optimally assist our clients during all phases of M&A transactions. We advise on preparations and the conceptual design of a transaction, lead and manage legal, tax and economic due diligence assessments of the target(s), assist with and steer contractual negotiations, provide support during signing and closing of the transaction documents, and assist with post-closing and post-merger activities.

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EDITOR IN CHARGE
Thomas Seipel | Lawyer

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YOUR CONTACTS

BEIJING
Suite 3130, 31st floor | South Office Tower
Beijing Kerry Centre | 1 Guang Hua Road | Chao Yang District
Beijing 100020
Susanne Rademacher
Tel.: +86 10 8529-8110 | Susanne.Rademacher@bblaw.com

BERLIN
Luetzowplatz 10 | 10785 Berlin
Dr Christian von Wistinghausen
Tel.: +49 30 26471-351 | Christian.Wistinghausen@bblaw.com

BRUSSELS
Avenue Louise 489 | 1050 Brussels
Dietmar O. Reich
Tel.: +32 2 6390000 | Dietmar.Reich@bblaw.com

DUSSELDORF
Cecilienallee 7 | 40474 Dusseldorf
Prof Dr Hans-Josef Vogel
Tel.: +49 211 518989-0 | Hans-Josef.Vogel@bblaw.com

FRANKFURT AM MAIN
Mainzer Landstrasse 36 | 60325 Frankfurt am Main
Dr Detlef Koch
Tel.: +49 69 756095-408 | Detlef.Koch@bblaw.com

HAMBURG
Neuer Wall 72 | 20354 Hamburg
Oliver Köster
Tel.: +49 40 688745-118 | Oliver.Koester@bblaw.com

MOSCOW
Turchaninov Per. 6/2 | 119034 Moscow
Falk Tischendorf
Tel.: +7 495 2329635 | Falk.Tischendorf@bblaw.com

MUNICH
Ganghoferstrasse 33 | 80339 Munich
Dr Maximilian Emanuel Elspas
Tel.: +49 89 35065-1242 | Maximilian.Elspas@bblaw.com

ST. PETERSBURG
Marata Str. 47-49 | Lit. A | Office 402
191002 St. Petersburg
Natalia Wilke
Tel.: +7 812 4496000 | Natalia.Wilke@bblaw.com