INTERNATIONAL BRIEFING

Dear reader,

Welcome to the December edition of our International Briefing.

In this edition, we provide insight on several hot topics that will continue to be in the focus for clients and the legal profession in 2020.

Some months ago, the German Federal Ministry of Justice and Consumer Protection presented its plans for a new law imposing corporate sanctions and combatting corporate crime. Although the draft bill is still being discussed, you must consider the potential effects of this new law now, because it will, for example, significantly increase financial penalties, necessitate compliance activities and regulate internal investigations.

We inform on new plans to further strengthen the rules for controlling and approving foreign (non EU) direct investment resulting from Guidelines for German and European industrial policy (Industry Strategy 2030) published by the German Federal Ministry for Economic Affairs and Energy, and in addition, we provide an update on the delay to the reform of the planned real estate transfer tax for share deals.

Besides, the German Bundestag finally agreed on reforms to German stock corporation law to implement the second EU Shareholder Rights Directive. These reforms have particular implications for the remuneration of the executive board, also under CSR considerations. Therefore, we provide a respective update on CSR requirements for corporates in Germany. Therein, we will also briefly inform you about new binding due diligence obligations for supply chains regarding conflict minerals, based on EU law. Though such obligations will only enter into force on 1 January 2021, companies importing such conflict minerals into the EU will need to prepare well in advance.

Last but not least, our IP and IT colleagues outline the new concept for the imposition of administrative fines for violations of the General Data Protection Regulations, which the German Data Protection Conference presented in October. They also inform you about some record-breaking administrative fines imposed for breaches of the GDPR in Germany and other European countries.

We hope that you will find the information provided helpful in your daily business and we wish you Happy Holidays, a few days of repose during the coming festive season and a great start to 2020!

Best regards,

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CONTENT

A new German Act on Corporate Sanctions is coming

The German Federal Ministry of Justice and Consumer Protection is working on a law to strengthen the fight against corporate crime and has drawn up an as yet unpublished draft bill in this context. The centrepiece of this draft bill is a new German Act on Corporate Sanctions (*Verbandssanktionengesetz*).

The draft of the German Act on Corporate Sanctions pertains to sanctions against entities because of criminal offences which were committed out of them. In the future, penalties will be much more oppressive than the present corporate administrative fi-

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nes. Next to monetary sanctions, which could amount to up to EUR 10 million or 10 percent of the annual turnover (if the turnover is more than EUR 100 million per year), the draft also contains the possibility to order the liquidation of the accused entity.

Authorities will prosecute entities in case of, *inter alia*, a criminal offence committed by a person at chief-level (CEO, CFO etc.), but also in case of criminal wrongdoing of a lower-level employee where it was made possible by a weak compliance programme.

In principle, the draft bill contains an obligation on the competent authorities to investigate against the entity for which the offender of a corporate-related offence acted. However, the draft also contains various possibilities for these authorities to end an investigation based on a case-by-case assessment.

The draft bill already indicates that the planned new law on fighting corporate crimes will result in the liability for affected entities becoming noticeably more intense.

However, the draft bill points out that a truly effective compliance management system – which does not just exist in theory and is not only written down on paper – can be used as a mitigating factor. Additionally, a comprehensive and "fairly" conducted internal investigation and close cooperation with the authorities will lead to a possibility of having the maximum level of possible monetary penalties halved and will rule out the liquidation of the entity as a sanction.

As soon as the German Federal Ministry of Justice and Consumer Protection has published an official draft bill for the planned new law, we will provide you with more comprehensive information in the subsequent edition of our International Briefing.

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Germany will increase the screening of foreign investments

On 29 November 2019, the German Federal Ministry for Economic Affairs and Energy published Guidelines for German and European industrial policy, titled *Industriestrategie 2030*, (Industry Strategy 2030) which so far is only available in German.

The German initiative follows the general trend in the European Union to reflect on the competitive environment for manufacturing products and providing services in Europe and the world. According to the German Federal Minister of Economic Affairs and Energy, Peter Altmaier, the new policy addresses two major issues: improving the framework for manufacturing and services in Germany and building a European industrial policy.

STRENGTHENING THE COMPETITIVE ENVIRONMENT IN GERMANY

On the first issue, the policy mentions three points, (a) improving the framework for industry in Germany; (b) supporting new technologies; and (c) safeguarding technological sovereignty. Closer screening of foreign direct investments is proposed under the last heading. In this respect, situations that may endanger so-called technological sovereignty should be examined more closely.

Altmaier considers that "technological sovereignty is the essential basis for the functioning of our highly developed industrial society. It can only be secured permanently if the relevant industrial capital is available and controllable in Germany and Europe". Third country investments in critical infrastructures or defence technology companies should be closely screened in order to avoid the loss of know-how and maintain self-determination in key technological fields. Soon, a new "Strategy Paper for Strengthening the German Security and Defence Industry" will be published. The Guidelines recommend reviewing existing rules, setting up a cooperation mechanism to involve other EU Member States and the European Commission in the procedure, and specifying the test criterion "public policy or public security".

Moreover, the Guidelines accept that, in cases where the narrow scope of existing investment control rules do not allow for the imposition of restrictions or the prohibition of a takeover, the German State can support private sector players and encourage them to acquire stakes in the companies concerned as "white knights".

Finally, the German Bank for Reconstruction (*Kreditanstalt für Wiederaufbau, KfW*) can also consider and provide temporary participation in enterprises. This has already been done in some cases in the past.

It must thus be expected that German investment controls will become more restrictive and the procedure more onerous in the future.

As regards the European dimension of investment controls, the Guidelines mention that the European Union has already adopted a Regulation of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments (Regulation (EU) 2019/452) (as already pre-informed in

our articles in the International Briefing of December 2018 entitled "The EU's path to uniform and stricter standards for screening foreign investments" and in the International Briefing of March 2019 entitled "New EU uniform and stricter standards for screening foreign investments"). Germany will align its rules on screening foreign direct investments with the EU rules sometime in 2020.

STRENGTHENING THE EUROPEAN UNION FRAMEWORK

The above-mentioned proposals on modifying the rules and procedures in Germany should, in the opinion of the German Federal Minister for Economic Affairs and Energy, be accompanied by changes at the European level.

As regards the control of mergers and acquisitions, a stronger focus should be placed on the analysis of global competition. Following the discussions of the Siemens-Alstom rail merger case, France, Germany and other countries requested a more thorough assessment of potential competition from companies outside the internal market, with particular attention paid to competition from State-controlled or subsidised companies from third countries.

As far as the rules governing competition are concerned, the policy recommends an amendment to the rules for companies with market power to take account of digital business models and the dominance of platforms. The Ministers for Economic Affairs of Germany, France and Poland have presented concrete proposals for modernising the EU competition framework on this issue.

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Update: delayed but not abandoned – the German Government Coalition postpones the reform of real estate transfer tax for share deals

The German Government Coalition (**Coalition**) did not adopt the planned draft bill designed to stem the use of share deals as a means of avoiding real estate transfer tax (see our article in the International Briefing of September 2019 entitled "Update: Reform of real estate transfer tax for share deals – draft bill introduced into the legislation procedure on 9 August 2019".

Consequently, the new rules will not enter into force on 1 January 2020. The Coalition instead sets itself the goal of completing the legislative procedure for the draft bill in the first half of 2020.

According to the statement of a spokesperson for financial policy, a closer look needs to be taken at the draft bill on the amendments to the real estate transfer tax act presented by the Federal Government on 31 July 2019. This is in reaction, among others, to the criticism levied against the draft bill during the public consultation in the Financial Committee of the Bundestag on 14 October 2019.

An evaluation of the criticism should now result in rules that will effectively implement the aim agreed in the Government Coalition Agreement, namely to prevent the use of tax structures for high-priced real estate transactions which are designed to misuse and avoid real estate transfer tax by transferring the shares in a company, which holds property, rather than the property itself. The German Federal Government's draft bill will continue to form the basis of any amended proposals.

It is not yet known whether and which changes the Coalition will implement in response to the criticism or how the rules will be amended specifically.

There is also still the question of to what extent the planned amendments will actually prevent the circumvention of real estate transfer tax in real estate transactions and whether the rules will be expanded in light of the alternative transaction structures that have developed.

One such alternative is "unit deals", which will continue to be free of real estate transfer tax after the legislative amendments, in their current form. In a unit deal, the real estate is held in a fund managed by a capital management company and only the shares in the fund are transferred. The trustee, which manages the shares, rather than the shareholder is viewed as the real estate owner. The transaction, therefore, does not result in a transfer of the civil law ownership rights as is necessary for the real estate transfer tax to apply. Providing that the real estate continues to be held as a contractual special asset, the transfer of shares in the fund will not give rise to real estate transfer tax.

We will continue to keep you updated on further developments.

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Update on CSR requirements for corporates in Germany

In this issue, we inform on two recent CSR developments in Germany, namely with regard to executive board remuneration (A) and conflict minerals (B).

A) ARUG II AND THE NEW SIGNIFICANCE OF CSR FOR THE REMUNERATION OF THE EXECUTIVE BOARD

The German Parliament's (***Bundestag***) adoption of the German Federal Government's draft bill on the implementation of the second EU Shareholder Rights Directive (**ARUG II**) was both expected and overdue. On 14 November 2019, it adopted an amended version of the draft bill that had been prepared by the Committee for Legal Affairs and Consumer Protection of the Bundestag (**Legal Committee**). These amendments are somewhat unexpected and could create quite a stir. In particular, the Legal Committee stressed the importance of Corporate Social Responsibility (**CSR**) and its impact on the remuneration of the executive board. In the future, supervisory boards must take social and ecological considerations into account when determining the remuneration of executive board members. This change was introduced into the legislative procedure surprisingly quickly and without any commotion. It is particularly notable because remuneration is a classic economic control mechanism. Suitable financial incentives can be used to steadily guide the behaviour of the recipient in the desired direction. Can it therefore be expected that the executive board members of all German stock-listed companies will put an even greater focus on social and environmental issues in the future as the supervisory boards align their remuneration structures accordingly? In detail:

The second EU Directive (2017/828) on shareholder rights of 17 May 2018 supplements the first EU Directive (2007/36/EC) on the same issue. Germany was supposed to implement the Directive into national law by June 2019. However, this did not occur. On 9 May 2019, the Bundestag discussed the draft bill in its first reading and sent the bill to the Legal Committee for further consultation. The Legal Committee held a public hearing on 5 June 2019 and consulted eight experts on the draft. Simultaneously, the German Federal Council (*Bundesrat*) adopted its position on the draft bill on 17 May 2019; the German Federal Government responded with comments. On 13 November 2019, the Legal Committee then adopted its resolution recommendation (Bundestag Papers 19/15153). The Bundestag followed this resolution recommendation in all respects on 14 November 2019.

According to the German Federal Government's draft bill, the second EU Shareholder Rights Directive – and in principle ARUG II, too – aims to improve shareholder involvement in stock-listed companies and facilitate the cross-border transfer of information and the exercise of shareholder rights. To this end, the EU Directive contains a number of provisions:

- On a shareholder say on the remuneration of executive board members and supervisory board members ("say-on-pay"), and
- On transactions with companies and persons who are related to the company ("related party transactions"), and
- Designed to better identify and obtain information from shareholders ("know your shareholder"); and
- To improve transparency with respect to institutional investors, asset managers and proxy advisors.

The German Federal Ministry of Justice and Consumer Protection published answers to frequently asked questions on ARUG II on 13 November 2019. These FAQs provide a good overview of the new rules, including the amendments adopted by the Legal Committee. You can find a copy of the FAQs here (only available in German).

On the issue of remuneration for executive board members, in the future the general meeting of shareholders may set the maximum level of remuneration that the supervisory board can offer executive board members, Section 87 para. 1 German Stock Corporation Act (*Aktiengesetz,* ***AktG***), as amended. The account of the public consultation provided in the resolution recommendation of the Legal Committee clarifies that this new rule stems from a compromise between two parliamentary groups, the CDU/CSU and the SPD on the initial aim of strengthening of shareholder rights.

The key new element is that in the future, the supervisory board must ensure that the remuneration policy of stock-listed companies with respect to the remuneration of its executive board members **contributes to a sustainable and long-term development of the company**, Section 87 para. 1 second sentence AktG, as amended. The inclusion in ARUG II of a rule with respect to how social and environmental aspects should be taken into account when calculating executive remuneration was not planned. The German Federal Government originally only wanted to use the ARUG II to make merely editorial amendments to Section 87 para. 1 second sentence AktG. Since the German Appropriateness of Executive Remuneration Act of 2009 (*Gesetz zur Angemessenheit der Vorstandsvergütung, VorstAG*), there have been rules requiring the remuneration policy for the executive board members of stock-listed companies to be aligned with a "sustainable company development". The prevailing view in the legal literature is that this has to be interpreted narrowly, so that the remuneration policy must be aligned with the long-term success of the company, i.e. at least spanning more than one accounting period. A more extensive obligation, requiring the remuneration policy to be aligned with economic, environmental and social aspects, was largely rejected. The German Federal Government wanted to use ARUG II to reinforce this restrictive interpretation through a clarification in the wording of Section 87 para. 1 second sentence AktG.

As the resolution recommendation of the Legal Committee shows, the result was exactly the opposite. On the Legal Committee's explicit recommendation, the terms "*sustainable*" and "*long-term*" are used cumulatively in Section 87 para. 1 second sentence AktG. The summary of the consultation proceedings in the Legal Committee surprisingly does not say anything else on this issue. On this point, the Legal Committee's justification for its resolution speaks for itself:

"*The current obligation on the supervisory board to consider the "sustainable development" of the company when setting executive remuneration has been understood both in practice and in the literature as meaning "long-term development". By using both "sustainable" and "long-term", the Legal Committee wants to make it clear that, when setting the remuneration, in particular when selecting remuneration incentives, the supervisory board also has to look at the social and environmental aspects.*"

What this means specifically will have to be examined in greater depth. In light of the clear legislative intent, the current interpretation of Section 87 para. 1 second sentence AktG cannot be expected to be maintained without change. In the future, the supervisory board must also "look at" social and environmental factors. However, this alone does not say whether and to what extent the supervisory board is obliged to actually take these "look at" CSR aspects into account in each case and address them in the executive remuneration. In any case, the new rule in Section 87 para. 1 second sentence AktG clearly specifies the guiding principle that the supervisory board must also align the executive remuneration policy with the sustainable development of the company in the future.

The German Federal Ministry of Justice and Consumer Protection's indication in the FAQs on the aim of the ARUG II could also be understood as supporting this approach: "*The actions of asset managers, institutional investors, proxy advisors, supervisory boards and executive boards should be aimed at growth that is as sustainable as possible and contributes to the long-term success for the company.*" This extends beyond the original phrasing on the formulation of the aims of ARUG II in the German Federal Government's draft bill.

Finally, in connection with the adoption of the ARUG II, we would also like to draw your attention to the fact that the Government Commission on the German Corporate Governance Codex adopted a revised version of the German Codex on 9 May 2019 (**GCGC 2019**). Once ARUG II enters into force, the GCGC 2019 will – if appropriate after adaptions to take into account ARUG II as adopted – replace the Codex of 7 February 2017, which shall continue to apply until then. In the new paragraph 2 of the preamble of the GCGC 2019, the Government Commission expressed its view that the company and its institutions must be aware of the role of the company in the community and its corporate responsibility in their actions. As social and environmental factors influence the success of the company, the executive board and the supervisory board must ensure, in the interests of the company, that the potential effects of these factors on the corporate strategy and operative decisions is recognised.

In line with the Government Commission's view, in the future, the supervisory board must base the executive remuneration policy not only on the long-term, but also on the sustainable development of the company pursuant to Section 87 para. 1 second sentence AktG, as amended. This applies particularly in light of the control function that remuneration has on the conduct of the executive board.

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B) UPDATE ON CORPORATE SOCIAL RESPONSIBILITY: BINDING DUE DILIGENCE OBLIGATIONS FOR SUPPLY CHAINS FOR CONFLICT MINERALS

It's been clear for more than two years: Regulation (EU) 2107/821 of the European Parliament and the Council of 17 May 2017 will enter into force on 1 January 2021. With this so-called Conflict Minerals Regulation, the EU has created a uniform system for implementing supply chain due diligence obligations with respect to imports of tin, tantalum and tungsten and their ores, and gold (3TG) originating in conflict-affected and high-risk areas. It is designed to provide greater transparency and security with respect to the supply practices of EU importers, smelters and refineries. In contrast to an EU directive, the Conflict Minerals Regulation does not need to be implemented into national law. It is directly applicable national law. This also applies to EU Commission Delegated Regulation (EU) 2019/429 of 11 January 2019, which supplements the Conflict Minerals Regulation.

There is nothing new in this. However, on 6 November 2019, the German Federal Government adopted a draft bill on the implementation of the Conflict Minerals Regulation. This is a good opportunity, not only to remind you that the regulation will enter into force in a year, but also to encourage you to ensure that you start making the necessary preparations on time, if you have not already.

In the draft bill, Peter Altmaier, the German Federal Minister for Economic Affairs and Energy states: "*Companies must comply with their due diligence obligations, especially within the context of the procurement of raw materials. The Federal Government has always stressed this need and the draft bill that was adopted today shows that we are serious. With the Federal Institute for Geosciences and Natural Resources (BGR), we have a tasked an expert agency with the supervision of the affected companies. It has a broad authority to redress any infringements of the regulation and to prevent them occurring in the future.*"

In the future, companies falling under the scope of the Conflict Minerals Regulation must adjust their management system to support the performance of their due diligence obligations in the supply chain. This includes, among others, establishing a supply

change policy (in line with the standards in the Model Supply Chain Policy set out in Annex II of the relevant OECD Due Diligence Guidelines) and introducing a complaints mechanism as an early warning system for the identification of risks. In addition, companies must fulfil certain risk management obligations. These include in particular the identification and assessment of risks of adverse effects on the supply chain for 3TG, as well as the implementation of a strategy that is designed to prevent or mitigate the negative effects. In addition, the companies concerned will have to report each year on their strategies for fulfilling their due diligence obligations and their procedures for ensuring responsible procurement. Besides the information and disclosure requirements on companies, the Federal Government also envisages that the BGR will issue an annual report.

Whether, in addition to this sector-specific conflict minerals regulation, a law similar to the French Loi de Vigilance will be adopted, which would introduce general due diligence obligations, will depend on the results of the ongoing monitoring of the German Federal Government's National Action Plan on Business and Human Rights and the future steps of the new EU Commission in the area of CSR and sustainable finance (see on this our article in the International Briefing of September 2019, "Update Corporate Social Responsibility: Binding CSR due diligence obligations are on the rise").

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New concept for the imposition of administrative fines for violations of the GDPR

On 16 October 2019, the *Data Protection Conference (DSK)* presented its concept for the imposition of fines in proceedings against companies for breaches of data protection laws. This preceded earlier announcements according to which the model was to be discussed further and a decision on its publication would only be taken at the DSK Conference on 6 and 7 November 2019. The approach, which follows a complex calculation formula with various classifications, will lead to significantly higher administrative fines for data protection violations in the future. The system was developed with antitrust fines in mind.

IMPOSING ADMINISTRATIVE FINES PURSUANT TO THE GDPR

Administrative fines for GDPR infringements are subject to Article 83 GDPR. Pursuant to this Article, the administrative fines to be imposed should "*in each individual case be effective, proportionate and dissuasive*".

Depending on the specific circumstances of each individual case, the administrative fines will be imposed in addition to, or instead of, measures pursuant to Article 58 (2) GDPR (Article 83 (2) sentence 1 GDPR). Article 83 (2) sentence 2 GDPR provides for a multitude of factors when it comes to determining the amount of the administrative fine. The administrative fines may be as high as EUR 20 million or up to 4 percent of a group company's total worldwide annual turnover of the preceding financial year, whichever is higher (cf. Article 83 (4) to (6) GDPR).

RECORD-BREAKING ADMINISTRATIVE FINES PURSUANT TO GDPR

- **EUR 50 million** by the **French supervisory authority** imposed on a leading internet group for transparency infringements with regard to data processing for personalised advertising and use of an invalid declaration of consent of the users as a legal basis.

- **EUR 1 million** by the **Italian supervisory authority** imposed on a leading social network for unauthorised data transmission to a data analysis company.

- In Germany, the **Berlin supervisory authority** has imposed a fine in the amount of **EUR 14.5 million** on a real estate company. According to the authority, the company stored personal data of tenants in an archive system without a determined data deletion concept. *Inter alia*, financial data and data regarding personal circumstances were stored, e.g., tax, social and health insurance data. Already in 2017, the company has been notified of the need to modify its archive system. Subsequently, the company adopted certain procedures but failed to reach an adequate level of compliance one and a half years later. Nevertheless, the authority points out to have taken into account both the measures taken and the cooperation while calculating the fine.

- The **British supervisory authority** has announced that it intends to impose fines in the amount of **GBP 183.39 million** on an airline and **GBP 99 million** on a hotel chain. The airline is accused of not having sufficiently secured its own websites, including the website for entering payment information. The hotel chain is alleged to not have sufficiently secured its booking data base, including the payment information of the customers.

NEW MODEL FOR CALCULATING ADMINISTRATIVE FINES DEVELOPED BY DSK

In a press release dated 16 October 2019, DSK states that the concept "*is intended to contribute to transparency with regard to the enforcement of data protection law*". In particular, "*responsible parties and processors*" shall be enabled to "*understand the decisions of the supervisory authorities*". The concept is, though, only intended to have a temporary effect, namely until a European regulation has been adopted by the European Data Protection Committee (EDSA). According to the minutes of the 2nd Intermediate Conference 2019 on 25 June 2019 in Mainz, a draft of the concept had already been presented to the *Task Force Findings of the EDSA* and had "*met with interest*" there.

CALCULATING ADMINISTRATIVE FINES PURSUANT TO THE NEW CONCEPT

The concept follows a complex five-step calculation for the determination of administrative fines:

1) Classification of the company concerned into a category of size;

2) Schematic determination of the average annual turnover;

3) Calculation of the basic economic value or a daily rate;

4) Multiplication of the daily rate by a factor derived from the seriousness of the offence;

5) Final adjustment of the determined value on the basis of suspect-related and not yet considered circumstances of the individual case.

CLASSIFICATION OF THE COMPANY CONCERNED INTO A CATEGORY OF SIZE

The basis for the calculation is the worldwide turnover (not the regularly much lower profit) of the company concerned, whereas the data protection supervisory authorities will not focus on the turnover of the individual legal entity but on the group of companies. The calculation according to the concept can therefore result in very high administrative fines and massive consequences for the companies concerned.

As a first step, the model for setting fines provides for a classification of the company concerned into one of four size categories. The size categories and the classification into these categories are based on the total worldwide sales achieved in the previous year. The size categories concern:

- Micro enterprises (up to EUR 2 million turnover; size category A);
- Small enterprises (over EUR 2 million to 10 million turnover; size category B);
- Medium-sized companies (over EUR 10 million to 50 million turnover; size category C); and
- Large enterprises (over EUR 50 million turnover; size category D).

These size categories are divided into various sales-dependent subgroups.

SCHEMATIC DETERMINATION OF THE AVERAGE ANNUAL TURNOVER

At the second stage of the calculation of the fine, an average annual turnover fixed for the specific subgroup of the size category is then determined in tabular form and by reference to the size category. For companies with an annual turnover of more than EUR 500 million, the actual turnover is used as the basis for the calculation instead of an average value, whereby the maximum fine of 2 percent or 4 percent must be observed.

CALCULATION OF THE BASIC ECONOMIC VALUE OR A DAILY RATE

At the third stage, an economic basic value is determined from the mean value in the form of a daily rate by dividing the mean value by 360 (days).

MULTIPLICATION OF THE DAILY RATE BY A FACTOR DERIVED FROM THE SERIOUSNESS OF THE OFFENCE

Stage four provides for a classification of the offence according to its seriousness into one of four levels (light, medium, heavy and very heavy). In this context, the fact-related criteria of Article 83 (2) GDPR and the circumstances of the individual case should be taken into account. The classification leads to a factor framework fixed for the respective degree of seriousness, from which in turn a factor is to be selected on the basis of the seriousness of the act. In this regard, the concept for material infringements (Art. 83 (5) and (6) GDPR) provides for higher factors than for formal infringements (Art. 83 (4) GDPR). In the case of very serious infringements only minimum factors of 6 or 12 are provided for. The factor actually determined is then multiplied by the basic value or daily rate, whereby the maximum amounts possible under the GDPR may not be exceeded. The result of the multiplication is a first indication of the fine to be imposed.

FINAL ADJUSTMENT OF THE DETERMINED VALUE

This will then be adjusted in the fifth and final step "*on the basis of all other factors in favour of and against the company concerned*", "*to the extent that these have not yet been taken into account*" at the fourth stage. The concept explicitly refers to "*a long duration of the proceedings or imminent insolvency of the company*" as circumstances to be taken into account.

The extent to which the other circumstances are to be taken into account does not follow from the concept.

However, it should be noted that this stage may also lead to (significant) increases in the calculated value and thus in the administrative fine. Before the concept was published, industry circles said that the calculated fine could be increased by up to 300 percent, but only reduced by up to 25 percent. Such a regulation has now been waived within the framework of the concept.

PRACTICAL IMPLICATIONS

The new concept is expected to cause significantly higher administrative fines in the future. The *Berlin Commissioner for Data Protection and Freedom of Information* announcing that she is planning on imposing a fine in the amount of several millions in the near future seems to paint the same picture. Similarly high fines might become the norm rather than the exception for large and economically successful companies in the future if the basis for calculating the fine is always the worldwide turnover of the company.

THE CONSEQUENCES – A SAMPLE CALCULATION

The serious implications are illustrated above all by a small calculation example based on a company with an annual turnover of EUR 425 million.

At the first stage, this company is to be qualified as a large company in subgroup D.VI (annual turnover of more than EUR 400 million to EUR 500 million). This results in an average annual turnover of EUR 450 million at the second stage and a daily rate of EUR 1.25 million at the third.

At the fourth stage, this basic value remains the lower limit of the fine, even in the event of a minor infringement. The reason for this is that the calculation does not provide for a factor smaller than 1 by which the daily rate can be multiplied, so that a reduction of the fine is in any event ruled out at this stage. In the case of a serious formal infringement, the multiplied basic value ranges from 4 to 6 times the daily rate, in the case of a serious material infringement even from 8 to 12 times. In the case of a very serious infringement, the maximum fine shall be 2 percent or 4 percent of the annual turnover.

A slight material infringement, e.g. of the right to immediate cancellation (Articles 17, 83 (5) (b) GDPR), may result in a fine of EUR 1.25 million to EUR 5 million at stage 4 for the undertaking in the example.

The extent to which this amount is adjusted at the fifth stage and the limits are exceeded or undercut remains open and depends on the specific individual case.

Courts are, however, not legally bound to this model for calculating administrative fines. They are free to determine administrative fines in accordance with statutory regulations. This, however, is not necessarily an advantage for companies being fined as the decision of the Higher Regional Court of Dusseldorf on an antitrust law matter demonstrates (Higher Regional Court of Dusseldorf, judgment dated 28 February 2018 – V-4 Kart 3/17 OWi; this decision was later annulled by the German Federal Court of Justice (BGH) as the judgment was delivered too late, cf. BGH, decision dated 9 July 2019 – KRB 37/19).

This development once again shows how important it is to have efficient, appropriate as well as well-documented compliance measures in place from a data protection point of view. These measures will not only benefit companies in dealings with authorities but also in consequent legal disputes being a highly effective means of defence against administrative fines calculated incorrectly. On the one hand, effective and appropriate compliance measures can minimise the risk of infringing on GDPR regulations; on the other hand, they may be a mitigating factor if an infringement occurs despite the measures taken reducing the fine. Compliance measure might even constitute evidence against wilful misconduct and negligence. However, activities in the compliance area that are only taken after a violation and during the ongoing administrative fine proceedings must also be taken into account to a lesser extent (cf. BGH, decision dated 9 May 2017 – 1 StR 265/16).

LOOKING OUTSIDE THE BOX: ZERO TOLERANCE FOR NON-COMPLIANCE

If one compares the considerations presented on a hard and expensive sanctioning practice for GDPR violations with further current developments in the compliance area, a clear trend towards hard sanctions and an official “zero tolerance strategy” can be discerned. Not only in data protection law, but also in other areas, non-compliance should become much more expensive. For criminal offences (e.g. corruption, tax evasion, illicit employment, fraud, environmental offences etc.) committed from within a company, monetary sanctions of up to 10 percent of the average annual turnover should be imposed on companies. This is provided for in the current draft for a new corporate sanctions law (*Verbandssanktionengesetz; VerSanG-E*). Read more about this in the first article in this International Briefing.

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About the French Desk

Our French Desk supports French companies that are looking to establish themselves on the German market or are already active in Germany, as well as German companies that intend to become active on the French market. We have team members located in all of our offices and can manage mandates in French.

We advise on all corporate, labour and tax law issues, and on EU law. We assist, for example, with the conclusion of partnerships and strengthen and support companies when planning market entry and during all phases of their business.

Our multi-disciplinary approach and close cooperation between experts from various offices means we can tailor our team to your needs while always providing you with comprehensive advice of the highest quality.

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.

AWARDS

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