



Forum Juris

Business Law. Up to date.

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Foreword



Frauke Heudtlaß

Rechtsanwältin, Partnerin
Service Line Employment
Tel: +49 211 8772 2587
fheudtlass@deloitte.de

Ladies and Gentlemen,
Dear Clients,

We are pleased to provide you with a new edition of our Forum Juris Newsletter which deals with current court decisions and other legal topics of high practical relevance.

Brexit was one of the most popular topics of this year. In this edition, we will analyze Brexit and its implications, in particular in the context of corporate restructuring projects.

The German Federal Court of Justice (*Bundesgerichtshof – BGH*) issued a decision dealing with the redemption of shares in a German GmbH and the remaining shareholders' contingent liability for compensation payments. In this context, we will explain the reasoning of the BGH as to the liability of the remaining shareholders.

Furthermore, we would like to introduce you to the major changes resulting from a new law against corruption in healthcare.

We hope that we have selected interesting topics for you and that you enjoy reading our newsletter. Should you have any questions as to the individual articles in this edition or suggestions regarding our Forum Juris Newsletter, please do not hesitate to get in touch with your contact persons.

And do not forget to make use of our Deloitte Legal Dbriefs webcast program which is designed to help you stay up to date on legal trends in Germany and abroad. For more information, please visit: www.deloitte.com/dbriefs/deloittelegal.

Finally, we would like to take this opportunity of wishing you a peaceful holiday season and a happy and prosperous new year!

Frauke Heudtlaß

Brexit: “German” Limited – unlimited?

The shareholders of a UK Limited which is headquartered in Germany face liability risks due to Brexit. Those concerned should be vigilant with regard to further developments and take steps to safeguard themselves in good time.

Based on landmark decisions established by the European Court of Justice (ECJ) around 15 years ago, the “private company limited by shares” according to UK law (in short: Limited) has become a standard item on the German corporate landscape. Due to the fact that its foundation is quicker and requires less capital than the German GmbH, the Limited was – in particular until the introduction of the German entrepreneurial company (*Unternehmergeellschaft – UG*) in 2008 – a popular legal vehicle for small and medium-sized companies in Germany. Meanwhile, the trend towards the Limited in Germany is declining (2007: 14,000, 2013: 12,000). Nevertheless, there is still a substantial number of these companies.

The Limited with its headquarters in Germany (in short: German Limited) is now threatened by distinct legal uncertainty. Under the freedom of establishment, which is provided for in Articles 49, 54 TFEU, and on the basis of the foundation theory as enunciated by the ECJ in landmark decisions such as “Centros” (ECJ, November 5, 2002 – C-212/97) or “Überseering” (ECJ, September 30, 2003 – C-208/00), the provisions of national law concerning non-German EU companies are recognized by German courts (Cf. German Federal Court of Justice, March 13, 2002 – VII ZR 370/98). This means that even if a non-German EU company

operates exclusively in Germany, the company can “take along” its domestic corporate law. This results in particular in the unconditional recognition of German Limited companies as legal persons by German courts and in the application of shareholders’ liability limitations as provided for by British statutory law.

But the foundation theory, which means the reference to the legal conventions of the country of foundation, is not the only possible way to treat foreign companies. In the absence of an EU aspect, German courts predominantly apply what is known as the so-called corporate domicile theory. According to this theory, the applicable law is not determined by the jurisdiction of a company’s foundation but based on where its headquarters are located – generally, this will be the place where the Executive and Supervisory Board meetings take place. Under the corporate domicile theory, the legal nature of a foreign company is exclusively determined in accordance with German corporate law, if the company’s head office is located in Germany. Since the foreign company was not established according to the incorporation provisions applicable to the GmbH or any other German limited liability legal form and was therefore not registered as such with the German Commercial Register, it is typically classified as a German general partnership (*offene Handelsgesellschaft - OHG*) or as a German civil law company (*Gesellschaft bürgerlichen Rechts - GbR*). In both legal forms, the shareholders are personally liable without limitation for the company’s obligations.



Klaus Gresbrand

Rechtsanwalt, Senior Associate
Service Line Corporate/M&A
Tel: +49 211 8772 2501
kgresbrand@deloitte.de

Through its commitment to the foundation theory, the ECJ has barred the application of the corporate domicile theory to non-German EU companies having their head office in Germany. However, German courts still apply the corporate domicile theory to foreign companies from non-member states: in the "*Trabrennbahn*" case (October 27, 2008 – II ZR 158/06), the German Federal Court of Justice treated a stock company founded in Switzerland and having its head office in Germany as a partnership. In justifying its decision, the court pointed out that the fact that Switzerland is neither a member of the EU, nor has it ratified the EEA agreement, represents a "conscious decision against the European freedom of establishment opened to EEA member states which cannot be ignored by German courts".

If the United Kingdom became a non-member state after Brexit, the German Limited is threatened with a similar fate: in the event of disputes between the creditors of a German Limited and its shareholders, a German court could, on the basis of the corporate domicile theory, affirm the personal and unlimited liability of the shareholders for the company's obligations. It appears unlikely that this will be applied to liabilities incurred before any Brexit since such a retroactive effect would not be permitted in the vast majority of cases. However, it is certainly conceivable that liability limitations will be waived for liabilities which have been assumed after any Brexit.

Shareholders of a German Limited would therefore be well advised to keep a close watch on developments in the coming months and, if necessary, to safeguard themselves by converting the German Limited into a GmbH or into another type of limited liability company. Those who want to do so by way of a merger should not wait for Brexit to happen: the admissibility of a cross-border merger of companies from the United Kingdom to Germany is likely to be affected by any Brexit as well.

Corporate restructuring projects and Brexit – time to act now?



Andreas Jentgens

Rechtsanwalt, Partner
Service Line Corporate/M&A
Tel: + 49 211 8772 2227
ajentgens@deloitte.de



Klaus Gresbrand

Rechtsanwalt, Senior Associate
Service Line Corporate/M&A
Tel: + 49 211 8772 2501
kgresbrand@deloitte.de

Corporate restructuring projects – in other words, changes in the legal organization of a group – are prone to delays. This is true not only of the implementation phase but also of the planning phase, during which, e.g., tax implications and the legal implementation with due regard for company law and labor law must be examined in detail. In addition to this, not all corporate restructuring projects are run under immediate time pressure, especially if their aim is to realize long-term efficiency gains. And while other “important and urgent” projects keep the legal and tax departments busy, the “important but not urgent” restructuring projects often end up being put on the back burner. In the light of a possible Brexit this is not without risk, in particular for projects involving the UK.

- Labor law processes (i.e. signing and termination of employment contracts, transfer of employment relations)

All elements can entail cross-border implications.

Implications of Brexit for UK-related projects

If several components entail cross-border implications from an EU member state to the United Kingdom, a number of significant changes concerning the implementation are expected to occur after Brexit.

Some of the potential effects on the individual components Brexit may give rise to are summarized below.

Components of a restructuring project

Corporate restructuring projects typically consist of numerous individual steps and components, including the following common elements:

- Transfer of assets or rights (i.e., shares in companies, movable goods, real property, rights or sums of money)
- Formation, cancellation, or amendment of intra-group contracts (i.e., finance, service or license agreements, inter-company agreements)
- Measures taken under transformation law (i.e., mergers, spin-offs, changes of form)
- Corporate law processes (i.e., formation of a new company, liquidation, rebranding, transfer of the registered office, capital increase or decrease)

Transfer of assets or rights	The possible elimination of tax advantages granted by the parent-subsidiary directive (Directive 90/435/EEC) for intra-group transactions between the EU and the UK requires particular attention to an accurate assessment of the transferred capital goods.
Formation, cancellation, or amendment of intra-group contracts	Since from the data protection point of view, the United Kingdom risks being a "third country" after Brexit, it is reasonable to be particularly prudent with the transfer of personal data from the EU to the UK – even within a Group. The debate on Safe Harbor provisions, which were declared invalid by the European Court of Justice (ECJ) in 2015, demonstrates the difficulties involved in data transfer with third countries.
Measures taken under transformation law	Brexit may lead to the inadmissibility of cross-border conversion measures, in particular mergers between member states and in the United Kingdom. It is also to be feared that with the removal of the protection granted by the Mergers Directive, numerous restructuring projects with a UK aspect can no longer be treated as being tax-neutral.
Corporate law processes	Brexit may involve significant liability risks for the shareholders of a liability limited UK company (i.e. the Limited) headquartered in an EU member state. Click here for an outline of the legal risks for "German" Limiteds. The fate of a Societas Europaea (SE) with its registered office in the United Kingdom is also still unclear.
Labor law processes	The removal of the free movement of workers which is provided for in the TFEU may lead to a tightening of residence conditions for foreign employees in the United Kingdom. It is also possible that the requirements for employees coming from the United Kingdom and being seconded to a member state may change. The provisions on the transfer of undertaking (TUPE) would not be directly affected by Brexit, but the absence of applicability of Directive on Business Transfers (Directive 2001/23/EC) to the UK may lead to a post-Brexit de-harmonization of the TUPE regulations.

Résumé

It remains to be seen what detailed impact Brexit will have – some of the effects described above may be less severe than feared and might be weakened or entirely averted by international treaties. However, it is certain that restructuring projects with UK relevance carried out over the next few years will always encounter legal uncertainties – and that the well-known and proven “toolbox” in planning and implementing restructuring projects will only remain available for a limited period of time. Those who prefer operating on familiar territory should therefore aim for an early implementation of UK-related restructuring projects.



Reform of German zoning laws – Urban Area



Marco Engelmann

Rechtsanwalt, Senior Associate
Service Line Commercial
Tel: +49 30 25468 219
mengelmann@deloitte.de

Are you a real estate developer or investor looking for construction areas in the inner city? Or a tradesman or retailer who wants to live in a vibrant part of town? Then you can look forward to the planned reform of German zoning laws, as laid down by the German *Baunutzungsverordnung (BauNVO)*.

On June 16, 2016 the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (*Bundesministerium für Umwelt, Naturschutz, Bau und Reaktorsicherheit - BMUB*) published its draft bill regarding the amendment of the BauGB (*German Baugesetzbuch*) and the BauNVO. The amendment will primarily serve to transpose EU directives and to push forward the concept of the "mixed-use city of short distances" as well as the densification of cities. The core piece of the reform will be the implementation of a new type of land-use area, the "Urban Area".

The planned reform will bring opportunities, especially for developers, investors, planners, and tradesmen - but also challenges.

As part of para. 6a BauNVO, which is to be newly introduced in the BauNVO, the BMUB plans the creation of a new type of land-use area that is intended to serve as an instrument for densification and mixing various uses (e.g., living, business, culture, leisure) the so-called "Urban Area (MU)".

The new land-use area is to be both systematically and functionally classified between the "central area" (which is an area mainly for commerce, administration, and culture) and the "mixed area" (which is an area mainly for housing & trade).

"Urban Areas serve [residential] housing purposes and the accommodation of businesses as well as facilities for social, cultural, and other purposes in a segmented mixed use, to the extent that these businesses and facilities do not disturb the residential housing use"
(para. 6a sec. 1 BauNVO-E).

In contrast to the "Mixed Area", the different types of use within an "Urban Area" are not to be subject to a strict quota system so as to ensure the greatest possible freedom in urban planning.

With the Draft Bill, the BMUB even aims to make mixing various uses within one building possible, with facilities serving business, social, and cultural purposes on the ground floor and housing on the upper floors. In the "Urban Area", purely residential buildings will be permitted only in exceptional cases and the same holds true for single-use office buildings. These types of single-use buildings are permissible in the "Mixed Area" as well as in the "Central Area". In this respect the draft bill conflicts with demands brought forward by interest groups (especially those in the statement by the ZIA dated July 6, 2016).

The new type of land-use area will provide local public authorities with more flexibility with regard to building activity in high-density areas. At the same time the implementation of the "Urban Area" will enable a still further increase in site density. To this end the new wording of sec. 17 BauNVO codifies a site occupancy index of 0.6 GRZ, equal to the ratio applicable to the "Mixed Area", and a floor space index of 3.0 GFZ, equal to the index applicable to the "Central Area".

This opens the way to much denser structures than in residential areas.

In order to improve the effective usage mixture in urban areas and for the sake of increasing site density, the "Technical Guidance for the protection against Noise" (*TA Lärm*), which regulates noise emission, will be changed as well. The draft bill dated July 7, 2016 aims at increasing the maximum noise emissions permissible in urban areas to 63 dB(A) in the daytime and 48 dB(A) at night. These new emission thresholds by far exceed those applicable in mixed areas and nearly reach those for "industrial estates". Given the rather heavy debates that the new regulations have unleashed, however, it is not yet certain whether the new standard thresholds will actually be included in the final version of the administrative regulations.

Due to the often deviating and sometimes even contrary interests and requirements for the various types of uses and users, high density areas involve a particular risk of conflicts of interest. Challenges such as climate and noise protection need to be managed as well.

With its Draft Bill, the BMUB is trying to achieve both: compliance with EU Directives relating to climate and noise protection and an increase in the mixture and density of urban areas and thereby create a regulatory framework for larger modern German cities. As the goals pursued by the BMUB seem to contradict each other and to be hard to converge, it remains to be seen whether the Bill will actually lead to the envisaged goal.

It is presently expected that the Bill will be finalized and enacted by the end of this legislative period. In particular investors, developers as well as tradesmen and retailers, should therefore closely monitor further developments.

Extension of a contract with the Managing Director



Dr. Anna Borsci

Rechtsanwältin, Associate
Service Line Corporate/M&A
Tel: + 49 511 307559 3
aborsci@deloitte.de

When an extension of an existing contract between a limited partnership (*GmbH & Co. KG*) and a managing director of the general partner is intended, the question frequently arises whether approvals by the shareholders' meetings of the limited partnership or the general partner are required.

Circumstances of the case

The Managing Director (*Geschäftsführer*) of a German GmbH which acts as the general partner of a limited partnership under German law (*GmbH & Co. KG*) had entered into a Managing Director service agreement with the GmbH. Subsequently, the Managing Director, simultaneously acting for himself as well as in his capacity as legal representative of the GmbH, prolonged the term of that agreement. At the time the extension was carried out, the Managing Director was exempted from the restrictions of sec. 181 German Civil Code (restrictions on self-dealing and multiple representation). Prior to the extension of the agreement, the Supervisory Board, which was responsible for certain decisions under the limited partnership's Articles of Association, had given its approval. The relevant question was whether an approval by the limited partnership's or the general partner's shareholders' meetings was required in addition to the Board approval.

Court decision

In its decision dated April 19, 2016, the Federal Supreme Court reiterated that, unless otherwise provided for in the Articles of Association, only the general partners have the right to represent

a limited partnership. An exception is made for so-called "fundamental decisions" which regulate the relationship between the shareholders and for which an approval by the limited partnership's shareholders' meeting is required. The conclusion of a managing director service agreement can also be seen as a fundamental decision if it contains regulations pursuant to which the general management authority of the Managing Director is to be regulated in a completely different way than the model envisaged by statutory law. In the case at hand, the Court came to the conclusion that the mere extension of an existing agreement with a managing director was not to be considered a fundamental decision and therefore no approval by the limited partnership's shareholders' meeting was required.

According to the Court's decision, there was also no requirement for an approval by the general partner's shareholders' meeting. The Court abstained from dealing with the question whether there is a general requirement of obtaining an approval of the general partner's shareholders' meeting for the conclusion of a service agreement with a managing director as this is discussed in German corporate law literature. The Court pointed out that the relevant case was not related to the conclusion of, but merely to the extension of an existing agreement and that, furthermore, there was no need for additional protection by the general partner's shareholders' meeting as the Supervisory Board had already granted its approval.

Practical advice

The decision illustrates that, under certain circumstances, no approvals by the limited partnership's or the general partner's shareholders' meetings are required for the mere extension of a managing director service agreement. Nevertheless, the circumstances of the individual case are relevant. It is unclear whether the principles laid down by the Federal Supreme Court would also be applied to the conclusion (rather than the extension) of a relevant agreement. Although the decision hints that even under such circumstances no approval would be required, it is advisable to obtain an approval by the general partner's shareholders' meeting for precautionary reasons.



The transfer of shares by way of anticipated inheritance leads to forfeiture of loss carry-forwards



Moritz Burwick

Rechtsanwalt, Senior Associate
Service Line Corporate/M&A
Tel: + 49 621 15901 849
mburwick@deloitte.de

The Financial Court of Muenster (*FG Muenster*) had to decide whether the transfer of more than 50% of the shares in a GmbH by way of anticipated inheritance leads to the forfeiture of loss carry-forwards within the meaning of sec. 8c of the German Corporation Tax Act (*KStG*). In its ruling dated November 4, 2015 (9 K 3478/13 F), the Financial Court of Muenster confirmed the forfeiture of loss carry-forwards in such a case, after the tax office responsible had previously disregarded the contrary provision of the Federal Ministry of Finance's (*Bundesfinanzministerium - BMF*) circular dated July 4, 2008, under which sec. 8c *KStG* does not apply to the transfer of shares by way of anticipated inheritance.

Facts of the case (summary):

The applicant, a GmbH, had registered share capital of EUR 27,000.00. Approximately two thirds of the shares were held by a father, one third by one of his sons. In the relevant year, 2008, the father - by way of anticipated inheritance - transferred a share representing more than half of the share capital to his son who already held shares in the company. The application of the German law rules pursuant to which the recipient of the respective donation would have been obliged to compensate the other legal heirs in the course of the distribution of the inheritance at a later time within the meaning of secs. 2050, 2052 of the German Civil Code (*Bürgerliches Gesetzbuch - BGB*) was expressly excluded. After a tax field audit, the responsible tax office decided the loss carry-forwards were forfeited because of the transfer of shares. It took the view that in order to qualify as a transfer by way of

anticipated inheritance, the transfer must come with the respective compensation obligations as foreseen by sec. 2050 BGB, which may not be derogated. In the case decided by the Court, that provision of German law had however expressly and properly been derogated. The applicant GmbH raised an objection. In support of its objection, it contended that, according to the Federal Ministry of Finance's circular dated July 4, 2008, the transfer of shares by way of anticipated inheritance is not subject to sec. 8c *KStG* and that no reference is made to sec. 2050 BGB in the circular. As a result, a transfer of shares by way of anticipated inheritance should not lead to the forfeiture of the loss carry-forwards. However, the objection was considered unfounded, whereupon the applicant filed a suit with the Financial Court.

Decision

The Court ruled against the applicant by confirming the tax office's decision, according to which the transfer of shares had led to a forfeiture of the loss carry-forwards. Contrary to what the applicant claims and contrary to the BMF letter's wording, sec. 8c *KStG* applies to such cases. An appeal is still pending at the Federal Financial Court ("BFH", File ref.: BFH I R 6/16). With regard to the tax details cf. Deloitte Tax Newsletter dated April 21, 2016.

Possible remedies and other options

The discrepancy between the judicial and the administrative practice, the latter based on the circular from the Federal Ministry of

Finance, causes legal uncertainty. The new draft circular concerning sec. 8c KStG (as of April 15, 2014) does not contain any relevant modifications with respect to the rules applying to anticipated inheritance (with these modifications being limited to limitations to close relatives, see marginal note 4). Thus, the discrepancy will continue to exist. The Federal Ministry of Finance circulars are not legally binding on the Courts. The question arises of whether and how possibilities of legal protection can be guaranteed if the tax office responsible disregards a circular from the Federal Ministry of Finance. Furthermore, there could be other options for the taxpayer that should be considered. To this extent one needs to distinguish between cases where shares have already been transferred (see subsections 1 and 2) and cases of planned future share transfers (see subsections 3 and 4).

1. Disciplinary Complaint (Dienstaufsichtsbeschwerde)

The disciplinary complaint is an informal legal remedy against the personal conduct of an official or a public sector employee. Its main aim is to require specific measures against the responsible person. The disciplinary complaint does not lead to any other decision concerning the substance of the case and is hence unsuitable as a legal remedy.

2. Appeal for subject-specific supervision (Fachaufsichtsbeschwerde or Sachaufsichtsbeschwerde)

The appeal for subject-specific supervision is an informal legal remedy which can be considered if

the addressee of a decision or an official measure disagrees with the manner of handling the case, especially if they consider the decision to be wrong. Its main aim is to obtain a different decision concerning the substance of the case. Due to the general principle that an institution must comply with the rules which it itself has promulgated (see circulars from the Federal Ministry of Finance), there might be a possibility for the addressee to obtain a deviating, more positive decision concerning the substance of the case since the competent supervisory authority (normally "Oberfinanzdirektion") ought to take the circulars from the Federal Ministry of Finance into account.

3. Binding ruling

If the shares have not yet been transferred, and at least for as long as the Federal Financial Court (*Bundesfinanzhof - BFH*) has not adopted a final decision in favor of the taxpayer, obtaining a binding ruling within the meaning of sec. 89 para. 2 of the General Tax Code (AO) should be considered. The binding ruling is - as the name suggests - mandatory for the fiscal authorities even if the binding ruling is not legal in favor of the tax payer. It therefore represents a suitable tool to avoid any unpleasant surprises.

4. Wrap-up and other legal strategies

The transfer of shares in a GmbH by way of anticipated inheritance has been frequently executed in recent years with the aim of benefitting from the tax relief granted by sec. 13a of the German Inheritance Tax Act, which allows a tax-neutral

capital transfer from one generation to the next. Today also, as then, income tax effects should be considered (e.g., sec. 8c KStG) before transferring shares. In any case, one should refrain from contractually excluding the application of secs. 2050, 2052 BGB. Moreover, and at least if and when relevant loss carry-forwards exist, a binding ruling should be obtained to have clarity as to whether the fiscal authorities intend to apply sec. 8c KStG.

A negative decision after filing for a binding ruling should not only be challenged by bringing a court action, but also by taking an appeal for subject-specific supervision into consideration in order to achieve a more favorable interpretation of the circulars from the Federal Ministry of Finance. If unsuccessful, a short-term loss utilization before transferring the shares might be considered (sale-and-lease-back-models, transformations with "step-ups" or debt-waivers).

Since sec. 8c KStG requires a (legal) transfer, the rule should not apply in case of succession, so that it might be an option to structure the succession in the proper sense in a proactive way.

Consequently, even after the decision of the court discussed herein there is still a wide variety of possible actions, all of which should be analyzed prior to transferring shares.

Redemption of shares in a German GmbH and remaining shareholders' contingent liability for compensation payments

When shares in a German limited liability company (*Gesellschaft mit beschränkter Haftung – GmbH*) are redeemed, the shareholder affected by such redemption can claim compensation. In the event that the Company cannot make the relevant payments owing to German capital maintenance rules, the other shareholders can potentially be held liable for such compensation payment.

Redemption of shares

The Articles of Association of German limited liability companies (*GmbH*) regularly stipulate that shares in the company held by individual shareholders can be redeemed by/on the basis of a resolution of the shareholders' meeting. The effect of the redemption of a share is that the share itself is cancelled and the shareholder concerned is expelled from the company. Although shares can be redeemed with the consent of the shareholder, the background to such redemption is often to be found in that (a majority of) the shareholders wish to exclude one specific shareholder from the company for good cause.

Compensation by the company

The exiting shareholder is entitled to compensation which is to be paid by the company. Originally, many renowned authors and several Higher Regional Courts were of the opinion that the redemption of shares was subject to the condition (precedent) of the payment of the (full amount of the) compensation to the exiting shareholder. The Federal Court of Justice (*Bundesgerichtshof - BGH*), however, in its decision dated January 24, 2012 (case no. II ZR

109/11) held that there is no such connection between the validity of the redemption and the payment of the compensation. Instead, the redemption takes effect when the shareholder concerned is notified of the resolution of the shareholders' meeting to redeem their shares – even if the compensation cannot be paid by the company owing to the German capital maintenance rules applicable to *Gmbhs*.

Liability of the fellow shareholders for acting in bad faith

According to the BGH's January 2012 ruling, the interests of the exiting shareholder must be protected by granting them a claim for compensation against those fellow shareholders who have taken part in the decision to redeem their share. That liability – which is not stipulated in the Limited Liability Company Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung - GmbHG*) – is based on the reasoning that the remaining shareholders shall not be allowed to keep the value of the cancelled share for themselves as that would represent acting in bad faith. The remaining shareholders are obliged to either ensure that the company is able to pay the compensation or dissolve the company.

No automatic contingent liability of the shareholders in case the company becomes insolvent

Notwithstanding the above principles, even if the company is incapable of paying the compensation and/or becomes insolvent, the remaining



Dr. Georgios Burmeister

Rechtsanwalt, Senior Associate
Service Line Corporate/M&A
Tel: + 49 511 307559 43
gburmeister@deloitte.de

shareholders do not automatically become liable towards the exiting shareholder. As the BGH pointed out in its ruling dated May 10, 2016 (case no. II ZR 342/14), a claim against the remaining shareholders will arise only if and as soon „*as the continuation of the company without ensuring the performance the obligation to compensate the leaving shareholder is to be regarded as acting in bad faith.*“ Thus, the remaining shareholders can meet their obligation to act in good faith by filing for insolvency in good time, i.e. not delay that filing in bad faith.

Consensual redemption of shares: the obligation to act in good faith remains but the shareholders can agree on modifications

In its ruling dated May 10, 2016, the BGH clarified that also in the case of a consensual redemption of shares, the shareholders are still bound by the principle of good faith. Nevertheless, the shareholders are free to agree upon modifications or a replacement of the contingent liability in advance.

Practical advice

When contemplating redeeming a shareholder's shares, the other shareholders should take into consideration and ensure that the company will be able to make all compensation payments owed to the exiting shareholder when due. They may otherwise be subject to contingent liability. In anticipation of a possible redemption of shares, the Articles of Association should provide clauses pursuant to which compensation payments shall not fall due immediately but may be made in instalments, thereby reducing the likelihood that payments to be made conflict with German capital maintenance rules. Whenever shares are redeemed with the consent of the leaving shareholder, it is to be recommended that agreement be reached on the conditions of payment, in particular regulating whether and under what conditions the remaining shareholders shall be liable for compensation.

Legal consequences of concealed temporary personnel leasing



Heike Humpert, LL.M.

Rechtsanwältin, Senior Associate
Service Line Employment
Tel: + 49 40 378538 0
hhumpert@deloitte.de



Daniela Kovacevic

Rechtsanwältin, Associate
Service Line Employment
Tel: + 49 711 66962 0
danikovacevic@deloitte.de

On July 12, 2016, the Federal Labor Court (*Bundesarbeitsgericht – BAG*) decided (9 AZR 352/15) that in the presence of a license for the temporary leasing of personnel in the possession of the lender, no employment relationship between the leased employee and the borrower arises, even in the case of a sham contract for work between lender and borrower.

Facts of the case

The plaintiff is a technical drafts-woman; the defendant is an automobile company for whom the plaintiff worked from 2004 until the end of 2013.

The plaintiff was not employed by the defendant, but by a contractual partner of the defendant. The plaintiff worked for the defendant's company on the basis of agreements entered into between the contractual partner and the defendant and referred to as contracts for work. The contractual employer as lender of the plaintiff possessed a license for the temporary leasing of personnel. The plaintiff is of the opinion that these agreements are to be regarded as sham agreements entered into in order to conceal the temporary personnel leasing. According to the plaintiff, the defendant could therefore not rely on the license for the temporary leasing of personnel granted to the plaintiff's contractual employer.

The BAG agreed with the decision of the courts of lower instance that no employment relationship between the plaintiff and the defendant existed and therefore dismissed the complaint.

BAG judgment

The BAG stated in its decision – so far only available as a press release – that, although the plaintiff had been leased as temporary employee to the borrower on the basis of a sham contract for work, no working relationship had been established between plaintiff and defendant. Decisive was that the plaintiff's contractual employer, the lender, possessed a license for the temporary leasing of personnel. The fiction of para. 10 sec. 1 sentence 1 employee lending law (*Arbeitnehmerüberlassungsgesetz - AÜG*) in conjunction with para. 9 no. 1 AÜG, according to which in the case of the invalidity of the employee leasing agreement an employment relationship comes into being, applies only in cases where the lender's license for the leasing of temporary personnel is absent. However, an unintended regulatory gap would be required for analogous application of this provision to concealed temporary personnel leasing. According to the BAG, the legislator had deliberately not laid down the legal consequences of an employment relationship with the borrower for such concealed temporary personnel leasing. Thus no unintentional regulatory gap existed.

Practical advice

According to the decision described above, an existing personnel leasing license, possibly only obtained as a precautionary measure, protects the holder against application of the fiction of an employment relationship between the de facto leased person seconded to work and the hiring company, even if an agreement referred to as contract for work is considered to be a sham

contract for work. However, the decision described here refers to the presently valid version of the AÜG. Pursuant to para. 1 AÜG-E of the new draft law agreed upon by the cabinet on June 1, 2016, in future the leasing of temporary personnel will have to be mentioned explicitly as temporary personnel leasing in the contract between borrower and lender (sentence 5) and the person who will be leased will have to be named before leasing commences (sentence 6). Consequently, para. 9 sec. 1 no. 1a AÜG-E will be amended such that the contract is invalid in the event that the explicit reference to temporary leased personnel or the name of the person who will be leased is absent, and therefore the fiction of para. 10 sec. 1 sentence 1 AÜG in conjunction with para. 9 AÜG applies. However, the temporarily leased person shall be provided with the opportunity to object. If the temporary leased person exercises this right, the employment relationship will not come into being. As the new regulation should come into force on January 1, 2017, the above information should be taken into consideration when relying on the BAG decision in future.

Statutory changes to sec. 309 no. 13 German Civil Code



Frauke Heudtlaß.

Rechtsanwältin, Partnerin
Service Line Employment
Tel: +49 211 8772 2587
fheudtlass@deloitte.de



Annina Backhaus

Rechtsanwältin, Associate
Service Line Employment
Tel: +49 211 8772 4378
abackhaus@deloitte.de

Little-noticed in practice, the Act on the Improved Civil Law Enforcement of Customer Protection Rules under German Data Protection Law that became effective on February 24, 2016 also contains changes to sec. 309 no. 13 German Civil Code (*Bürgerliches Gesetzbuch - BGB*) as of October 1, 2016 that will affect the wording of forfeiture regulations in German employment contracts.

Current legal framework

Currently, sec. 309 no. 13 BGB states that any notices or declarations that are to be made towards a user of general terms and conditions [...] may not be bound to a stricter form requirement than the written form [...] in general terms and conditions. Accordingly, forfeiture regulations in standard employment contracts – which generally qualify as such general terms and conditions – usually provide that any claims have to be asserted in writing within a certain period.

New legal framework

According to the amended sec. 309 no. 13 BGB, notices or declarations that are to be made towards a user of general terms and conditions [...] may not be bound to a stricter form requirement than text form. This alteration shall resolve uncertainties of consumers going along with the term "written form".

Implementation and impact on existing employment contracts

If and to what extent the revised sec. 309 no. 13 BGB affects forfeiture regulations in employment contracts mainly depends on the

employment contract's conclusion date:

The revised regulation will become effective as of October 1, 2016. It will only apply to contractual obligations concluded after September 30, 2016. The predominant opinion of German legal scholars is therefore that it will only apply to employment contracts entered into after September 30, 2016. Forfeiture regulations in employment contracts entered into after this key date may not provide for a stricter form requirement than the text form to assert claims.

Written form requirements in forfeiture regulations contained in employment contracts entered into before that key date remain – according to the current view – valid.

What has not yet been clarified is whether existing employment contracts that are amended after September 30, 2016 also require a revised forfeiture regulation. In the event that existing contracts are amended after that date, we therefore advise to also amend any form requirements in forfeiture regulations to reflect the new legal basis as a precautionary measure.

Recommendation

Forfeiture regulations in employment contracts entered into after September 30, 2016 should in any case be adapted to the new legal framework. They may not contain a form requirement that requires the assertion of claims in a stricter form than text form. In order to prevent further uncertainties on the part of employees, we advise listing

examples of an appropriate text form in the relevant provision.

Beyond the influence on forfeiture regulations in employment contracts, further amendments as to contractual arrangements might become necessary. From an HR perspective, this could, e.g., affect sample additional agreements to employment contracts or even managing director service agreements with third party managing directors.

We are happy to discuss with you the question of whether the adaptation of your sample contracts to these new standards is to be recommended.



Inability to work during exemption from work duties after dismissal

The higher labor court of Rheinland-Pfalz (*Landesarbeitsgericht - LAG*) confirmed on November 19, 2015 (5 Sa 342/15) that the unilateral exemption of the employee from their work duties during the dismissal notice period, less overtime hours, does fulfill their claim to paid compensation even in case of illness during this period.

Facts of the case

The employment agreement of the plaintiff, an industrial mechanic, was terminated with notice by the employer. For the duration of the dismissal notice period, the plaintiff was irrevocably exempted from his work duties, deducting existing vacation claims as well as overtime hours on his working time account. This exemption was confirmed again by the defendant in writing during the following dismissal protection proceedings. After an amicable agreement on the termination of the employment relationship could not be reached, the employer revoked the dismissal and requested the plaintiff to reassume his work. The plaintiff provided a certificate of incapacity for the time period between the confirming exemption letter until the day the dismissal declaration was revoked and continued to be on sick leave thereafter. The employer reduced the credit on the working time account for the duration of the exemption from the work duties, despite the existing inability of the plaintiff to work. The plaintiff subsequently sued for the credit of 66.75 overtime hours to his working time account.

The LAG dismissed the case, as in the previous instance, and did not allow an appeal.

LAG judgment

The LAG based its decision on the entitlement of the employer to unilaterally offset the overtime hours on the working time account with paid time off, invoking the employer's general right of direction in accordance with sec. 106 Industrial Code (*Gewerbeordnung - GewO*). It was therefore irrelevant whether the contractual exemption clause was valid. Generally, overtime hours have to be compensated for financially, however, it is also possible to agree on compensation by way of paid time off, in this case in terms of the working time account. Reasonable discretion was used in exercising the right of direction, since - after issuing a dismissal with notice - the defendant had a legitimate interest to compensate the extra hours credited on the working time account by granting paid time off until the expiry of the dismissal notice period. Referring to the jurisdiction of the Federal Labor Court (*Bundesarbeitsgericht - BAG*) (judgment dated September 11, 2003, 6 AZR 347/02), the LAG denied an analogous application of sec. 9 Federal Vacation Act (*Bundesurlaubsgesetz - BUrlG*), which provides that the claim to vacation is not extinguished during days of inability to work. Unlike the granting of vacation, the compensation by paid time off does not serve an additional need for recovery, but compliance with the contractual working time. Furthermore, a breach of the Continued Remuneration Act (*Entgeltfortzahlungsgesetz - EFZG*) was not recognized, since the EFZG protects the employee's claim to remuneration against their



Dr. Julia Sierig, LL.M.

Rechtsanwältin, Partnerin
Service Line Employment
Tel: +49 711 66962 0
jsierig@deloitte.de



Heike Humpert, LL.M.

Rechtsanwältin, Senior Associate
Service Line Employment
Tel: +49 40 378538 0
hhumpert@deloitte.de

loss as a consequence of the inability to work, however, it does not protect the use of their spare time.

Practical advice

The LAG strengthens the employer's right of direction with respect to the timing of the working time, confirming that the employee's entitlement to compensation for overtime hours with time off may be fulfilled by an irrevocable revocation of his work duties, deducting vacation claims and other claims for compensation by time off despite the inability of the employee to work. A deduction of credit on the working time account is possible despite the inability to work and leads to the credit on the working time account becoming extinct. Should an employee be exempted from their work duties while having a positive balance on their working time account, in any case a deduction of this positive balance should be declared.

New law against corruption in healthcare

With adoption of this law, two new criminal offences of active and passive bribery in healthcare (secs. 299a and 299b) were added to the German Criminal Code (*Strafgesetzbuch - StGB*). These new regulations primarily prohibit the activities of the pharmaceutical sector (e.g. discounts and kickbacks for prescribing medicines and also visible or hidden "assignment bonuses").

New criminal offences

On June 4, 2016 a new law against corruption in healthcare was ratified. Secs. 299a and 299b were added to the German Criminal Code (*Strafgesetzbuch - StGB*). In accordance with sec. 299a, corrupt behavior of doctors and practitioners of other medical/ healthcare professions is now subject to sanctions in the event that they demand or accept advantages for prescribing medicines or non-physician therapies or medical products or assigning patients or study material. According to sec. 299b StGB, the pharmaceutical sector as well as medical device manufacturers can also be punished in the event that they offer, promise, or grant such advantages. The criminal offences apply to all medical professions that require a government-regulated education (e.g. nurses, midwives and speech therapists). It is further to be noted that the complaint requirement for bribery in healthcare has been waived.

The background to the new regulation

The new law is the result of a decision of the German Federal Court of Justice dated May 29, 2012 in which the Grand Criminal Panel

refuted the public-official status of practicing doctors and also specified that practicing doctors are not associated persons for business purposes (*Beauftragte*) within the meaning of sec. 299 StGB. This meant that inadmissible payments to practicing doctors were never defined as bribery, even if they influenced medical conduct, although hospital doctors were covered by general provisions against corruption. This criminal preferential treatment of practicing doctors was considered unjustified and therefore had to be abolished.

Changes and challenges

In future, the common practices with practicing doctors in the form of consultancy agreements or paid lectures ("sponsoring") as well as "referral bonuses" from hospitals and doctors should be viewed critically. The rebates on the purchase of medicines or medical products intended for direct use by doctors or practitioners of other medical/ healthcare professions (e.g. dental implants or prostheses) should be checked under the new law as they might be inadmissible.

Practical advice

Against the background of the impending high fines and imprisonment of up to three years – and even up to five years in serious cases - pharmaceutical companies, doctors, and practitioners of other medical/healthcare professions as well as other companies in the healthcare sector should critically assess their corporate practices regarding the legal validity and admissibility and change any



Tatiana Getman

Rechtsanwältin, Senior Associate
Service Line Commercial
Tel: + 49 511 307559 3
tgetman@deloitte.de

behavior not permissible under the new legal framework, and, if necessary, oblige their business partners to implement the new regulations as well.



Contacts and offices

Berlin

Neues Kranzler Eck
Kurfürstendamm 23
10719 Berlin
Tel: +49 30 25468 04
Fax: +49 30 25468 136

Torsten Bloch

RA/Notar, Partner
tbloch@deloitte.de

Hamburg

Dammtorstraße 12
20354 Hamburg
Tel: +49 40 378538 0
Fax: +49 40 378538 11

Dr. Matthias Mielke

RA, Partner
mmielke@deloitte.de

Stuttgart

Löffelstraße 42
70597 Stuttgart
Tel: +49 711 66962 0
Fax: +49 711 66962 62

Dr. Peter Maser

RA, Partner
pmaser@deloitte.de

Dusseldorf

Schwannstraße 6
40476 Düsseldorf
Tel: +49 211 8772 04
Fax: +49 211 8772 2537

Klaus Heeke

RA, Partner
kheeke@deloitte.de

Hanover

Aegidientorplatz 2 a
30159 Hannover
Tel: +49 511 307559 3
Fax: +49 511 307559 50

Dr. Harald Stang

RA/StB, Partner
hstang@deloitte.de

Frankfurt am Main

Franklinstraße 48
60486 Frankfurt am Main
Tel: +49 69 7191884 0
Fax: +49 69 7191884 4

Andreas Jentgens

RA, Partner
ajentgens@deloitte.de

Munich

Rosenheimer Platz 6
81669 München
Tel: +49 89 29036 8901
Fax: +49 89 29036 8911

Thomas Northoff

RA, Partner
tnorthoff@deloitte.de

Dr. Michael Fischer

RA, Partner
mifischer@deloitte.de

Editor

Frauke Heudtläß

RAin, Partnerin
fheudtllass@deloitte.de

Key: RA, RAin (Rechtsanwalt, Rechtsanwältin) = Attorney at law
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