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Preface

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Ladies and Gentlemen,
Dear Clients,

We are pleased to provide you with the first issue of our Forum Juris Newsletter in 2015 which deals with current court decisions and other legal topics of high practical relevance.

The Federal Government has recently successfully passed a in Germany highly controversial legislation through the Bundestag – the new mandatory women's quorum quota for supervisory boards of large German companies. As of 2016, a minimum quorum of 30 percent shall apply for the supervisory boards at approximately 100 large German (listed and co-determining) companies and 3,500 additional companies have to set binding targets for increasing the quota of women in management roles in the future.

Because of the minimum wage law which came into force on January 1, 2015 an "area-wide, general minimum wage" applies in Germany However, there are also industry-specific minimum wages because they are not superseded by the general minimum wage. Judicial decisions to industry minimum wages can thereby serve as a model for the general minimum wage – we introduce you to a decision of the Federal Labour Court on the question of the minimum wage for hours of work readiness and on-call service.

Further topics of this issue are:

- Federal Court of Justice rules that company general meeting can be held abroad
- Time Limit for Additional Liability in connection with the Termination of a Domination and Profit and Loss Transfer Agreement
- Liability of a Managing Director of a Limited Liability Company for Infringing Internal Regulations of Responsibility
- German Venture Capital Bill
- Liability Under Anti-Trust Law for Financial Investors and Private Equity Companies

We hope that the aforementioned topics arouse your interest. Should you have any questions on the individual articles in this edition or indeed any other suggestions for our Forum Juris Newsletter, please do not hesitate to get in touch with your contact persons.

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Andreas Jentgens

Federal Court of Justice rules that company general meeting can be held abroad

Facts of the Case

Germany's Federal Court of Justice issued a decision on 21 October 2014 (II ZR 330/13) in which it held that a general meeting of the shareholders can take place abroad if certain conditions are satisfied.

The case involved a European public company ("Societas Europaea") that had its registered office in Germany. The company's articles of association contained a provision that allowed the general meeting of the company to be held abroad; the meeting could be held in any city within the EU that had a population exceeding 500,000 or a stock exchange. Several shareholders sued the company.

Decision

The Federal Court decided that, in theory, such a provision in the articles of association is permissible, but it must limit the competencies of the management board to select the venue of the general meeting. In this case, because there are more than 60 cities in the EU with a population exceeding 500,000, the management directors had too much discretion to define the place where the general meeting would be held. The court stated that the articles must contain clear stipulations on potential meeting locations.

Further, the provision must ensure that the ability of the shareholders to participate in the general meeting is not adversely affected by holding the meeting abroad. The shareholders should know in advance where the meeting will be held and have ample opportunity to prepare to attend and be able to arrange travel without being required to take a disproportionately long trip.

The Federal Court also emphasized that the minutes of a general meeting held abroad must be notarized in the same way and under the same conditions as if the meeting was held in Germany. This assumes that the foreign person notarizing the minutes has a professional education and rank in the legal system in his/her country that is equivalent to a German notary and is required to comply with procedural laws for the notarial deed that correspond to the fundamental principles of German notarization law.

An important aspect of the court's decision is its applicability to German public limited companies ("Aktiengesellschaft"); the articles of association of such companies also may allow the general meeting of shareholders to be held abroad.

Conclusion

The Federal Court decision may be beneficial to European public companies and German public limited companies with many foreign shareholders because they will be able to reduce their efforts and expenses relating to the convening and holding of general meetings. However, this will require clear provisions in the articles of association that comply with the requirements outlined by the Federal Court and the person notarizing the minutes of a general meeting must be equivalent to a German notary.

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Gender Equality in German Management through Mandatory Quorum?

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Background

On March 6, 2015, the German Bundestag passed the Act for Equal Participation of Men and Women in Management Positions for both the private and the public sector. The new Act provides for two models to increase the share of women at management level: (i) mandatory quorum of 30% for stock corporations listed on a stock exchange and with employee involvement on the basis of parity and (ii) introduction of self-determined targets. This article briefly summarizes the main stipulations of the new Act.

1. Mandatory Quorum for Large German Companies

This new mandatory quorum affects approximately 110 of the largest German companies, as role models for the entire private sector. Pursuant to § 96 Subsection 2 Sentence 1 of the amended Stock Corporations Act (Aktiengesetz neue Fassung – AktnF) this mandatory quorum shall be binding for companies listed on a stock exchange and with employee involvement on the basis of parity, i.e. companies, to which the Involvement of Employees Act (Mitbestimmungsgesetz) is applicable. Therefore, stock corporations and limited partnerships by shares which generally employ more than 2000 employees have to observe the mandatory quorum in the future. The new Act does not apply to listed companies which are subject to the German One-Third Involvement Act (Drittelbeteiligungsgesetz) or are non-listed stock corporations.

a) Allocation Among Shareholder and Employee Representatives

Pursuant to the new Act the 30% quorum shall generally apply to the entire supervisory board, i.e. shareholder and employee representatives (§ 96 Subsection 2 Sentence 2 AktGnF). Only in case an objection is raised, the two different sides, i.e. shareholder or employee representatives, shall be considered separately (§ 96 Subsection 2 Sentence 3 AktGnF). However, such objection must be raised with the chairperson of the supervisory board before the vote is taken, thus at a time when it is still unclear if the quorum will be reached by one side. It is therefore likely, that such objection right will be used in companies where the quorum is already fulfilled at the side of the employees' representatives.

b) Legal Consequences if the Quorum is not Fulfilled

In case the election of a member of the supervisory board leads to the statutory quorum not being fulfilled, the election is null and void and the supervisory board position remains vacant, a so called "empty chair".

2. Self-determined Targets

In addition to the mandatory quorum, the new Act provides for a model of self-determined targets for the board of management and the two subordinated management levels in companies listed on a stock exchange and with employee involvement on the basis of parity. For companies which are only listed on a stock exchange or subject to employee involvement this also applies to the supervisory board. Unlike the mandatory quorum this regulation also applies to companies which are subject to the One-Third Involvement Act. According to the new Act, companies are obliged to specify a certain number of women for the corporate bodies of the company. In case such self-determined quorum is not fulfilled, the Act does not provide for certain sanctions like in the case of the mandatory quorum; but only triggers reporting duties. Pursuant to the new § 289a Subsection 2 No. 5 German Commercial Code (HGBnF) the companies are obliged to report and publish the targets set and their achievement as part of the management report. According to § 96 and § 111 AktGnF the supervisory board is responsible to determine the target for the supervisory board and board of management. If a target is also to be specified for the management levels below the board of management, the board of management is responsible to determine such targets. Due to the various corporate organization schemes, the definition of the management levels are to be defined on a case-by-case basis since the Act does not stipulate such definition. Pursuant to the new Act the self-determined targets shall be specified by June 30, 2015, for the first time whereby the current status shall apply as a minimum target and may not fall below such minimum if it is under 30%.

3. Mandatory Quorum for the Public Sector

In order to set a good example, the federal government shall also be obliged to observe a 30% quorum for bodies where at least three seats are to be elected by the federal government for new announcement from 2016 onwards. From 2018 such quorum shall be raised to 50%. Further, to raise women's participation, the Federal Equality Act (Bundesgleichstellungsgesetz) is also to be amended and the federal administration shall be obliged to determine targets and to set them out in the respective equality plan.

4. International Companies and Cross-Border Mergers
Pursuant to the new Act the mandatory quorum shall also apply to the European Stock Cooperation (Societas Europaea or SE) and cross-border mergers accordingly. Therefore, the 30% quorum shall apply to listed SEs with employee involvement, of course taking into consideration the organizational specifics with respect to the composition and election of their corporate bodies. Since the European stipulations do not conclusively regulate the composition of the corporate bodies of an SE, national legislation is able to supplement the stipulations. However, the mandatory quorum will have to be applied in a modified way to the one-tier administrative body since its function corresponds more to that of a board of management. Further, the mandatory quorum shall apply to companies which are listed on a stock exchange and which result from a cross-border merger as the corporate law to which the absorbing company is subject to will be applicable. Thus the advantages and disadvantages of the respective legal systems need to be considered before such a merger.

Practical Effects and Criticism
In view of the strict sanction provided by the new Act if the mandatory 30% quorum is not reached, it should be decided whether individual votes or a block vote is preferable when electin supervisory board members. In the case of individual votes, only the election of the supervisory board member which would breach the statutory quorum for the first time would be null and void. By contrast, all the appointments of the over-represented gender would be null and void in the case of a block vote. It is therefore advisable that the chairperson of the general meeting ensures individual votes are taken when electing supervisory board members and generally observes that the mandatory quorum is reached. Since no obligation exits to propose unsuitable persons, compensation claims against the company which is not able to fulfill the quorum required by the new Act seem to be unlikely. To fulfill their obligation to set up a supervisory board observing the mandatory quorum, in particular if the management is not able to find a suitable candidate, the board of management may initiate formal procedures for the appointment of the board member by court (§ 104 AktG). However, in accordance with the new Act the court will also be bound by § 96 Subsection 2 Sentences 1-5 AktGnF for such appointments, and shall therefore ensure that the supervisory board reaches the statutory quorum beyond other corporate interests. Pursuant to the new Act the mandatory quorum shall apply from January 1, 2016, for new elections and appointments. If the quorum cannot be reached with the new appointment, all further vacant seats of the supervisory board shall be filled with the under represented gender. Therefore it is most likely that most of the new supervisory board positions will be occupied by women in the near future. The new Act has been strongly criticized because it does not provide for an exemption in case no suitable female candidates are available. However, this fear seems to be unfounded, since more and more women are being well educated and are willing to accept such position.

Time Limit for Security after Termination of a Domination and Profit and Loss Transfer Agreement

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The claim of a creditor of a dependent company for a security payment for receivables which were generated until the publication that the termination of the domination and profit and loss transfer agreement had been registered with the commercial register but which only became due later is limited to claims which become due before the end of five years after the publication of the termination pursuant to § 26 and § 160 German Commercial Code (Handelsgesetzbuch – HGB) and § 327 Subsection 4 German Stock Corporation Act (Aktiengesetz – AktG).

Facts of the Case

In December 2007 the dependent company rented commercial premises from the plaintiff for a period of 15 years. In April 2006 the defendant as the dominant company and the dependent company had concluded a domination and profit and loss transfer agreement for the period of ten years, but had annulled it in December 2010. The defendant had granted a guarantee (Bürgschaftsversprechen) to the plaintiff (§ 302 Subsection 3 AktG applied by analogy) which was limited to January 2016. With the legal action the plaintiff demanded security payment by January 2017 for its claims from the rental agreement pursuant to § 232 Subsection 1 German Civil Code (Bürgerliches Gesetzbuch – BGB).

Decisions by Previous Instances

The legal action was dismissed in the first instance (Regional Court (Landgericht – LG) in Brunswick, ruling dated December 21, 2012 – Case No. 9 O 2422/11 (352)) and by the appeal court (Higher Regional Court (Oberlandesgericht – OLG), ruling dated October 2, 2013 – Case No. 3 U 34/13); the courts were of the opinion that the additional liability in § 303 AktG which was unlimited in time and asserted by the plaintiff in return for granting the security payment was restricted to a period of five years with § 26 and § 160 HGB being applied accordingly.

Decision by the German Federal Court of Justice

The German Federal Court of Justice (Bundesgerichtshof – BGH) confirmed the opinion of the appeal court and stated that the plaintiff could not claim a security payment pursuant to § 232 Subsection 1 BGB beyond January 2016 until January 2017. The claim for security was also applicable accordingly in limited liability corporate group law pursuant to § 303 Subsection 1 AktG and restricted in analogous application of § 26 and § 160 HGB as well as § 327 Subsection 4 AktG to receivables which are due within five years as of publication that the termination of the domination and profit and loss transfer agreement had been registered with the commercial register.

In its reasons the BGH stated that § 303 AktG included an accidental omission in the regulation which does not foresee a time limit. The BGH believed that this could lead to an indefinite liability for the dominant company which the legislation had overlooked. The risk of indefinite liability resulted for agreements for continuing obligations from the fact that claims could already be generated before publication that the termination of the corporate agreement had been registered with the commercial register while the individual receivables only became due later – long after the end of the corporate agreement. The liability of the dominant company could also insofar still apply although the creditors of a group company did not have a claim to continue both the domination and/or profit and loss transfer agreement and the obligation to compensate losses pursuant to § 302 AktG. This was incompatible with the intention of the claim in § 303 AktG to counteract the risk that the previously dependent company could not exist on its own due to the previous emphasis on group interests nor pay its liabilities as a result of the loss of the obligation by the dominant company to compensate losses (§ 302 AktG) in the course of terminating the corporate agreement. Yet it is precisely this risk which becomes less after the termination of the domination and profit and loss transfer agreement.

The omission in the regulation could be remedied by applying the regulations accordingly when a shareholder leaves a partnership (§ 26 and § 160 HGB) and when the corporate integration is terminated (§327 Subsection 4 AktG). The interests of the creditors when a domination and profit and loss transfer agreement is terminated are comparable here.

This position also reflects the intention of the legislation whereby the new version of § 327 Subsection 4 AktG will transfer the additional liability for leaving a partnership to corporate groups pursuant to § 160 HGB. Insofar the claim pursuant to § 303 AktG could not go beyond the additional liability for the previous dominant company at the time of corporate integration; the risks for the creditors after the end of corporate integration were even greater than after the end of a domination and profit and loss transfer agreement.

Other than as hitherto represented in some of the legal literature and previously decided by the BGH in connection with an agreement for continuing obligations

for a merger (BGH, ruling dated March 18, 1996 Case No. II ZR 299/94) it is not the specific security interest of the creditor which is relevant and which must also be determined in each case, whereby the maximum total amount which will become due in the future is decisive. Such an opinion is too vague and is therefore unsuitable to eliminate the risk of indefinite liability.

Conclusion

The additional liability for claims of dominant companies for receivables from the dependent company which only become due after the end of a domination and profit and loss transfer agreement is limited to five years after publication of the corporate agreement.

The BGH has distanced itself from its previous decisions whereby the period depends on the security requirements of the creditor and the maximum total amount which will become due in the future is decisive. The decision offers legal certainty: the amount of the security payment can be determined more easily with the relevant period – this is to be welcomed.

However, there are problems with agreements for continuing obligations such as rent: the claims for rent are already generated when the agreement is concluded but only become due at a later time (cf. Mense/Klie in Gesellschafts- und Wirtschaftsrecht (GWR – Corporate and Business Law magazine) 2014, 525 (525)). The dominant company must subsequently continue to provide security for rent liabilities of the dependent company even after termination of the domination and profit and loss transfer agreement. This is also significant for corporate acquisitions (demands on the vendor for security for receivables of the target company) or the employment of workers (pension obligations of the former dependent company and security in the employees' favor) (cf. Mense/Klie in GWR 2014, 525 (525)).

Conversely, for legal transactions with companies which concluded a domination and profit and loss transfer agreement with another company and from the perspective of the creditors it will depend on having corresponding security in advance when the agreement is concluded.

Liability of a Managing Director of a Limited Liability Company for Infringing Internal Regulations of Responsibility

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The managing director represents the limited liability company (Gesellschaft mit beschränkter Haftung – GmbH) pursuant to § 35 Subsection 1 Sentence 1 German Limited Liability Law (Gesetz betreffend die Gesellschaften mit beschränkter Haftung – GmbHG) both in court and out of court and can therefore conclude considerable legal transactions for the company. In practice the managing director is also often released from the prohibition of self-contracting in § 181 German Civil Code (Bürgerliches Gesetzbuch – BGB) so that he/she can even represent the company in business transactions with himself/herself or with third parties which he/she represents. In certain cases the resulting legal ability in an external relationship, i.e. the power of representation of the company, can, however, go beyond the legal admissibility in the internal relationship between the managing director and the company, i.e. the power to manage the business. These situations lead to the question whether carrying out a certain measure is still covered by legal admissibility in the individual case or whether the power to manage the business has already been exceeded.

The ruling by the Higher Regional Court (Oberlandesgericht – OLG) in Naumburg dated January 23, 2014 (Case No. 2 U 57 / 13), shows that the internal distribution of responsibility among the executive bodies can be of crucial importance in this context. The decision gives us the opportunity in this article to summarize the allocation of responsibility between the managing director and the shareholder meeting. The decision by the OLG in Naumburg will then be described and assessed in detail. The article will close with practical advice on how to ensure compliance and mitigate legal risks as a managing director.

Summary of the Allocation of Responsibility Between the Managing Director and the Shareholder Meeting

As the managing body of the company the managing director is responsible for the business activities generally without coordination with the shareholder meeting. The general responsibility of the managing director for the business activities can be restricted, however, by the articles of association or by instructions and resolutions by the shareholder meeting, for example.

Furthermore certain tasks always fall under the responsibility of the shareholder meeting and are therefore not part of the managing director's responsibility. This includes adopting the financial statement and the appropriation of the net distributable profit, requesting payment of contributions and also the appointment and revocation of managing directors and formally approving their actions. An additional responsibility of the shareholder meeting also covers substantiating and terminating the managing director's employment relationship and all legal transactions in connection with the managing director's employment relationship.

The decision by the OLG in Naumburg touches an area of potential conflict between shareholder responsibility pursuant to § 46 No. 5 GmbHG and the general responsibility of the managing director for the entire business activities of the company.

Decision by the Higher Regional Court in Naumburg

The plaintiff, a GmbH, claimed compensation from its former minority shareholder, who was at the same time also its managing director. The defendant who had the power of sole representation and was released from the restrictions of § 181 BGB had concluded consultation agreements with various companies where he was also a managing director and shareholder. One of these agreements which the court called a project management agreement was for consultation services to analyze and optimize existing business processes. It foresaw a flat-rate fee and a minimum term of several years. The defendant transferred an amount of approx. EURO 3,500 to the commissioned company which the plaintiff requested back as compensation through the court.

The OLG in Naumburg sentenced the defendant to pay the compensation in full on the grounds of the managing director's failure to observe his duties, § 43 Subsection 2 GmbHG. The court ascertained that the defendant had not applied the required diligence of a prudent businessman when concluding the agreement since he had not adhered to the allocation of responsibility within the company.

The exclusive responsibility of the shareholder meeting for all agreements affecting the managing director's employment relationship (§ 46 No. 5 GmbHG) generally also covers other legal transactions which are directly connected to the executive position of the managing director. The OLG in Naumburg stated that if a GmbH managing director concludes an agreement for services with himself/herself or a company in which he/she is a shareholder managing director and where the services are typically regulated in a managing director's employment agreement or at least directly connected in their content to management, said agreement also falls under

the original responsibility of the shareholder meeting like the managing director's employment agreement itself.

These preconditions were fulfilled by the project management agreement. Seen in the cold light of day the agreement namely led to the fact that the defendant received additional payment for services which he had to render anyway based on his position as managing director. A decision by the shareholder meeting was therefore sensible here.

Assessment and Practical Advice

In its decision dated January 23, 2014, the OLG in Naumburg ultimately commented appropriately on the allocation of responsibility between the managing director and the shareholder meeting. With respect to the project management agreement it confirmed the prevailing opinion on the additional responsibility in § 46 No. 5 GmbHG.

Another issue which was picked up by the OLG in Naumburg is also relevant: the OLG pointed out that a managing director who is released from the restrictions in § 181 BGB is also subject to the prohibition of self-enrichment and may therefore not conclude any agreements between himself/herself or a company owned by him/her and the company of which he/she is the managing director if said agreements economically harm the company of which he/she is the managing director.

As the above ruling makes clear, managing directors should always keep in mind not only the limits of legal ability but also those of internal admissibility before concluding self-contracting business transactions – i.e. those between the managing directors and the company or between the company and a business undertaking which is represented by the managing directors. In cases of doubt it is recommended from the managing director's perspective to obtain the consent of the shareholders before concluding a self-contracting business transaction and to document such transactions with care.

German Venture Capital Bill

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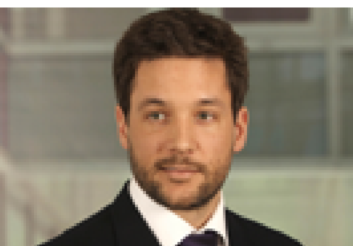

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The number of start-up companies in Germany has been sinking over the past years. This is also true in the hi-tech sector which is particularly important for the future sustainability of a country. A functioning venture capital market could lead to more young innovative companies (so-called start ups) in the internet economy or biotechnology industries of the future, for example. Venture capital plays an important role in financing innovative companies which have a high capital requirement for research and development.

There is also a clear commitment to venture capital in the coalition agreement of the new German federal government, pursuant to which Germany is to become an internationally attractive investment location for venture capital with a separate venture capital law to be passed. Further it shall also become more attractive to invest in young (growing) companies and venture capital investments shall benefit from investment grants.

As yet, however, no action has followed the announcements made in the coalition agreement to pass a venture capital law. In January 2015 the Bundesverband Deutscher Kapitalbeteiligungsgesellschaften (BVK – Federation of German Venture Capital Companies) presented a bill for a venture capital law recommending proposals to improve the framework conditions and to promote venture capital designed to prompt the federal government to take action.

Main Points and Criticism of the Bill by the Federation of German Venture Capital Companies

The BVK bill proposes measures which should have a positive effect on both the start-up companies which are to be financed, the venture capital funds which provide the financing and the investors which provide the investment in such funds.

1. Measures for Young Innovative Companies

a) Research Payment

A so-called research payment anchored in the German Income Tax Act (Einkommensteuergesetz – EStG) would enable companies to be subsidized in their innovation efforts even if they are still making a loss. Young companies in innovative industries would receive a payment on 50% of their expenses (up to a maximum amount of EURO 1 million) for research and development.

The proposed research payment is directly targeted at generating a competitive advantage for start-up companies located in Germany. This measure would increase the funds available to young innovation companies for research and development and therefore have a direct positive effect on promoting innovation.

b) Patent Box

The so-called patent box would generate advantages for innovative companies to choose Germany as their location. Proceeds from utilizing intellectual property should be taxed at a lower rate if there are substantial business activities in Germany.

There are already preference regulations for the fiscal treatment of income from the use of intellectual property (so-called patent boxes) in several countries. Such regulations are therefore an important aspect in the choice of location. The proposed regulation would therefore be a suitable factor in making Germany more attractive as a location for innovative ideas.

c) Maintaining the Possibility to Carry Forward Losses

There are often considerable fiscal losses to be carried forward particularly in the initial phase of capital-intensive start up companies. Such losses tend to decline with investment phases in the initial stages since the new contributions from the investors can be classified as so-called "harmful acquisitions" pursuant to § 8c KStG where applicable. Although the regulation in § 8c KStG was supplemented with the so-called hidden reserves clause, among other things, in December 2009 already whereby losses which are carried forward are maintained in the amount of the hidden reserves and companies with venture capital investments can generally also take advantage thereof. However it is often the case for companies financed with venture capital that such hidden reserves are not present in the early phase due to the lack of foreseeable business prospects or assessing the amount of hidden reserves generates premature potential for conflicts between the start-up company and investors.

The BVK bill foresees a modification of § 8c EStG whereby losses which are carried forward will also be maintained if there is a change of shareholder. The competitive conditions for start-up companies in Germany will therefore be brought into line in comparison with other EU states.

2. Measures for Venture Capital Funds

a) Statutory Provision of Fiscal Transparency

The BVK bill foresees a statutory provision on the fiscal transparency of funds in order to improve conditions for the location of venture capital funds. Under fiscal law the activities of venture capital funds will therefore not

be considered as commercial but will instead be classified as asset management which will have significant effects on the fiscal transparency of the fund and therefore on a double tax burden – in part – between the fund and its investors.

Venture capital funds are often not established in the form of a corporation but rather as a partnership where there already is fiscal transparency. However, statutorily regulated transparency of venture capital funds would give greater legal certainty, particularly to foreign investors, without leading to less tax income.

b) VAT Exemption for the Fund Management

An general duty to pay VAT on the management fees of a venture capital fund applies due to the Federal Ministry of Finance classifying the management fees as services due for payment (rather than shareholder contributions). This leads to a definitive tax burden on a venture capital company with asset management due to the lack of a possibility to deduct input tax.

As is also customary in other EU states the BVK bill therefore proposes a VAT exemption for the fund management in order to make Germany more attractive as an economic location for venture capital funds. This would make it more attractive for investors and be an incentive for the fund management to choose Germany as its location.

c) Modifying the Regulatory Framework of the Venture Capital Industry

The venture capital industry recently received a new regulatory framework with the Capital Investment Code (Kapitalanlagegesetzbuch – KAGB). The BVK bill makes proposals about which legal uncertainties based on legal inconsistencies in the national regulations in relation to the European Regulation on European Venture Capital Funds (Regulation No. 345/2013) could be eliminated. Furthermore the KAGB regulations are to be aligned to the requirements of the venture capital industry. This is necessary with respect to transferring corporate interests under hereditary law, for example, from so-called (semi-) professional investors to private investors leading to the heirs leaving the company pursuant to the current legal situation which compromises the continuity of investors that the industry desires.

Aligning national law and EU law from a legal point of view would create legal certainty and thus raise the competitive ability for Germany as a location for venture capital funds. The above regulation on the full heredita-bility of a venture capital interest would allow the continuity of investors to be maintained and therefore lead to the investor basis being strengthened.

3. Measures for Investors

a) Roll-over and Accelerated Depreciation

In the USA investors in start-up companies often make use of the possibility to obtain a tax deferral or even exemption for profits from the sale of so-called "qualified small business stocks" as long as said profits are in turn re-invested in such "qualified small business stocks". There are also similar incentives in Great Britain for investments in young companies with the SEIS ("Seed Enterprise Investment Scheme").

In fact applicable German law does offer possibilities to transfer sales proceeds either to new investments and therefore effectively obtain a tax deferral or pocket them tax-free. A commercial business angel can therefore transfer to new interests its profit up to an amount of EURO 500,000 from the sale of an interest in domestic business assets held for at least six years pursuant to applicable law under the terms of § 6b Subsection 10 EStG (so-called roll-over) and therefore postpone paying tax on the profit until the time of the sale of the re-investment.

Pursuant to the proposed BVK bill tax incentives should motivate investors to make more venture capital investments. A roll-over of sales profits in the event of re-investments should motivate the investors to continue investing. The regulation foresees that sales profits can be transferred to a new interest up to an amount of EURO 1 million with the sales profits initially not being taxed. Taxes on profits should therefore be deferred as long as there are re-investments in other start-up companies until the profits are no longer invested in new start-up companies.

As an alternative to the roll-over possibility the BVK bill also proposes accelerated depreciation on investments. It will therefore be possible to obtain straight-line depreciation on investments for five years which should lead to more investments.

It is of particular importance to create incentives for investors to invest in such companies. The possibility of rolling over sales profits if they are re-invested as well as the alternative proposal of accelerated depreciation on investments in young companies is designed to generate more private capital. Both proposed measures would not lead to taxes being lost but only to them being deferred.

Assessment

It should be emphasized in a very positive sense that the BVK bill deals with important parameters in the venture capital market. The proposed measures encourage young innovation companies, venture capital companies and investors to an equal extent. Introducing such a venture capital law could make Germany more attractive as a location for investment and innovation on an international level and in the longer term and stimulate the market for young and growing companies as well as generate increased investment and innovation in Germany.

Liability Under Anti-Trust Law for Financial Investors and Private Equity Companies

A large number of financial investors are still unaware of the fact that even purely financial interests run the risk of liability under anti-trust law. If the portfolio company acts contrary to anti trust law and such action is carried out and not stopped because it is not discovered, the parent private equity company also risks incurring a fine.

Introduction

Last year the decision by the EU Commission (Case No. AT.39610 – Power Cables) caused an uproar by imposing a fine on a private equity company. The company itself had not violated the cartel ban but was liable due to its (at least sometime) financial interest in one of the cartel members.

"I would like to highlight the responsibility of groups of companies, up to the highest level of the corporate structure, to make sure that they fully comply with competition rules. This responsibility is the same for investment companies, who should take a careful look at the compliance culture of the companies they invest in."
(Introductory remarks on two cartel decisions: Power Cables and Steel Abrasives by Joaquin Almunia, EU Commission, Brussels, 2 April 2014)

A similar development is now also becoming apparent at national levels. For the first time the Dutch anti trust authority (Authority for Consumers and Markets – ACM) has recently imposed fines on three financial investors due to anti-trust violations by the portfolio companies. Similar action is also becoming apparent in Germany – at least this can be understood from statements by the Bundeskartellamt (BKartA – German Federal Cartel Office). It is to be feared that in future financial investors and private equity companies will be held increasingly responsible for the anti-trust violations of the portfolio companies even if they (only) hold a purely financial interest.

"Investment firms usually manage one or more funds. Funds hold shares of businesses, and these shares are usually resold after a while. However, ACM is of the opinion that investment firms, too, can be held responsible for the behavior of the firms they own (through those funds), particularly if the investment firm in question has decisive influence."
(Press release of the Authority for Consumers and Markets, The Netherlands, 30 December 2014)

Status Quo at EU Level

The companies which are initially responsible for anti-trust violations are those which carry out direct actions. However, the European Commission also holds parent companies responsible at a European level through the use of the single economic entity concept. The attribution depends on how much the shareholder was able to influence the portfolio company. It is assumed with an 100% interest that there is dominating influence and that the parent company and subsidiary form an economic unit.

Yet the specific arrangement of the corporate group can also support liability beyond this general assumption. If the parent company steers the fortune of the portfolio company so that the subsidiary no longer acts in the market independently, the preconditions exist for attribution. It is precisely this which now applies to purely financial interests pursuant to the decision by the European Commission. The financial investor cannot claim ignorance with respect to the conduct of the portfolio company which was contrary to anti-trust law. Selling the respective portfolio company does not release the parent company from liability either.

Developments on a National Level

Although the national anti-trust law also recognizes the principle of economic unity, German administrative fine proceedings for anti-trust law, unlike European anti-trust law, can initially only be aimed at the legal entity, to which the actions of a natural person are attributed. Citing the European principles of effectivity and consistency the BKartA has thus been requesting alignment to the European system of liability for some time now already.

It is already possible, however, to consider holding the group parent company responsible with an administrative offense of a breach of its supervisory duty (§ 130 German law on administrative offenses (Gesetz über Ordnungswidrigkeiten – OWiG)).

Recommended Action

A financial investor is exposed to the risk of being held (jointly) liable on a European level but also increasingly at a national level for continued anti-trust violations by the portfolio company.

A legal due diligence investigation before acquiring an interest only offers limited protection since many processes which are relevant under anti-trust law cannot usually be identified in the data room. However, a more

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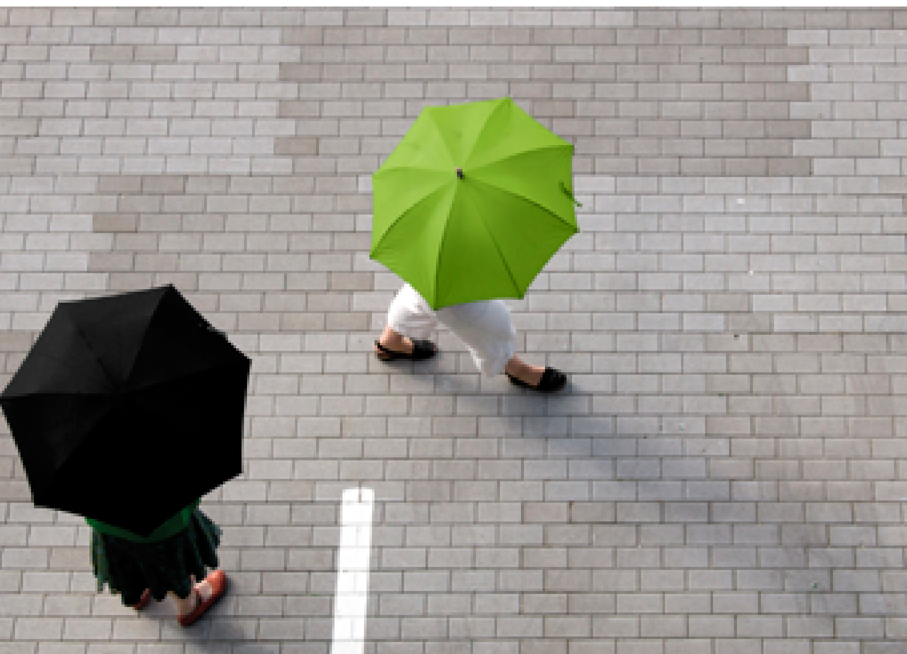
reliable assessment of anti-trust violations can be made with a post-merger due diligence investigation – supported by forensic measures, if necessary. Any anti-trust violations which are discovered should be stopped and a whistleblower application should be considered for the past depending on the individual case.

A subsequent due diligence investigation with respect to anti-trust issues should not take place in an isolated manner, however, but be combined with preventative measures, in particular the implementation of compliance structures. This is sensible not only so that any past violations are discovered and stopped but also future misconduct can be prevented. The introduction of effective compliance structures can reduce the risk of liability based on a breach of the financial investor's supervisory duty, particularly under German anti-trust law. The development and implementation of appropriate compliance structures in the individual portfolio companies are above all also necessary besides raising awareness and offering corresponding training sessions for the investment company (business management, investment management, etc.).



Minimum Wage For On-Call Services and On-Site Stand-By Times

Facts of the Case

The plaintiff who was born in 1954 was employed as a care assistant by the defendant, a private company providing care services, for a gross monthly salary of EURO 1,685.85. Her responsibilities included, among other things, looking after and caring for two nuns of a Catholic sisterhood who were both wheelchair bound and suffering from dementia. The plaintiff also had housekeeping duties as well as actual care duties for the nuns. She worked in round-the-clock shifts each lasting for two weeks, during which she was obliged to be present at the place of care. To this end she had a room on the premises of the sisterhood. The nuns ate their lunch with the sisterhood from 11:45 to 12:45 hours and attended the church service from 17:50 to 18:50 hours every day.

With her legal action the plaintiff wanted to obtain an additional gross payment totaling EURO 2,198.59 for the months from August to October 2010 claiming that the then minimum wage in the care industry of EURO 8.50 per hour was to be paid for any type of work pursuant to § 2 Subsection 1 Regulation on Working Conditions in the Care Industry (Pflegearbeitsbedingungenverordnung – PflegeArbbV). She was of the opinion that she had worked for 24 hours continuously without a break and a deduction for breaks should not be made. The defendant objected that the minimum loan did not have to be paid for on-call times on the premises pursuant to PflegeArbbV. The employment agreement could include compensation for on-call times on the premises at a lower rate.

Decision

The labor court in Stuttgart principally dismissed the legal action. Following the plaintiff's appeal the Higher Labor Court (Landesarbeitsgericht) in Baden-Wuerttemberg allowed the legal action on the basis that the minimum wage should be paid for 22 hours per working day in the round-the-clock shift. The Landesarbeitsgericht evaluated the times for lunch and attending the church service as unpaid breaks. The defendant's appeal on a point of law was unsuccessful before the Federal Labor Court (Bundesarbeitsgericht – BAG). The judges in Erfurt ascertained that the minimum wage was specified "per hour" pursuant to § 2 PflegeArbbV and was therefore linked to working time which required compensation. This did not only include actual duties but also on-call services and on-site stand-by times when the employee had to remain on stand-by duty at a place determined by the employer so that he/she could work without delay, if necessary. Although a lower salary was specified here than for actual duties, this possibility was not utilized in the care industry. Agreements which foresee a salary for on-call services on the premises in the care industry which is lower than the minimum wage pursuant to § 2 PflegeArbbV are therefore invalid according to the BAG.

Conclusion

The ruling could have wide-ranging effects on the statutory minimum wage which came into force on January 1, 2015, pursuant to § 1 Subsection 2 Minimum Wage Act (Mindestlohngesetz – MiLoG). This too is specified per hour and does not make a distinction between actual duties, on-call services and stand-by times on the premises. MiLoG does not apply to on-call times off the premises. It remains to be seen whether the principles of the above decision will also be transferred to § 1 Subsection 2 MiLoG. Affected employees should at any rate keep this issue in mind since considerable additional payments could be the result.

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