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Content

Preface

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Ladies and Gentlemen,
Dear Clients,

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

For the first time the new EU Market Abuse Regulation provides that key aspects of capital market law now also apply to enterprises whose securities form part of the open market. As of July 3, 2016 the same rules will apply to enterprises on the open market as well as to those which are listed on the regulated markets. Issuers and other participants on the open market must therefore adapt their processes to these rules and (further) develop corresponding compliance regulations within the next year.

When a company, which is party to profit and loss pooling agreement, is being acquired by a third party, it is almost unanimously desired to terminate this affiliation agreement – which would for example require the company to transfer its entire profit to its (former) shareholder – before the acquisition is completed. The German Federal Court of Justice (Bundesgerichtshof – BGH), however, has recently clearly rejected the possibility of a mid-year mutual termination of such affiliation agreement. We explain in this issue and how a termination is still possible.

Both the German Federal Court of Justice and the Higher Regional Court of Schleswig have recently passed rulings in one of the most controversial and economically significant question in distribution law – namely, whether upon termination a franchisee may be entitled to claim compensation analogous to § 89b HGB. We present both decisions.

Finally, we keep you updated in terms of the general minimum wage. After it has generally been introduced at the beginning of the year, initial rulings by labor courts of the first instance (Arbeitsgericht – ArbG) now exist which in particular deal with the controversial question of crediting other remuneration components as well as with terminations by the employer in connection with the minimum wage.

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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Effects of the New EU Market Abuse Regulation on Enterprises listed in the Open Market

For the first time the new EU Market Abuse Regulation (hereinafter also referred to as "MAR") will transfer key aspects of capital market law as of July 3, 2016, to enterprises whose securities form part of the open market. While capital market law regulations – namely insider law and the prohibition of market manipulation – previously only applied to these enterprises to a limited extent, the same rules will in future apply both to enterprises on the open market and to enterprises which are listed on the regulated markets. MAR also radically extends the obligations in the German Securities Trading Act (Wertpapierhandelsgesetz – WpHG) and drastically increases the penalties for infringements. Issuers and other participants on the open market must therefore adapt their processes to these rules and (further) develop corresponding compliance regulations within the next year.

I. Validity of MAR, Affected Enterprises and Securities

MAR was adopted in June 2014 and becomes valid on July 3, 2016. The previous relevant national regulations in WpHG (Sec. 14 para. 2 Sentence 2 and Sec. 20a para. 1 Sentence 2 No. 1, Sentence 3 WpHG) will then automatically no longer apply.

Against the background that liquidity has increasingly moved from regulated markets towards alternative market places in the past few years, the German open market, including the various market segments, such as the Entry Standard at the Frankfurt stock exchange or m:access at the Munich stock exchange, for example, which has hitherto only been partially regulated by German legislation will also be subject to the MAR regulations. In future companies, whose securities – either as shares or bonds – form part of the open market, must therefore observe the MAR regulations.

II. Summary of the Effects on Enterprises on the Open Market

1. Ad Hoc Publications

In future issuers on the open market must publicize insider information in an ad hoc manner and also observe obligations for ad hoc publications which hitherto only applied on regulated markets. Up to now the partial ad hoc obligation in the regulations had only applied to the open market of the respective stock exchanges. In future enterprises on the open market must insure that insider information is published so that it can be accessed quickly and analyzed in full, correctly and in due time. MAR includes relevant WpHG regulations as well as the principles which the European Court of Justice established in the "Geltl/Daimler" case whereby required intermediate steps preceding protracted processes can already constitute insider information. Issuers should therefore always check whether the exemption option can be used to be released temporarily from the obligations of publication.

2. Keeping an Insider List

Furthermore companies, whose securities are on the open market, must also keep so-called insider lists in future. Such lists must include everybody who has access to insider information and who works for the issuer, such as employees, consultants, auditors or rating agencies.

3. Notices About Directors' Dealings

MAR extends the obligations to enterprises on the open market to notify directors' own dealings (so-called Directors' Dealings). In future the issuer's directors and associated persons must notify transactions with the issuer's financial instruments both to the regulatory authority and the company. The notification obligation also includes transactions with debt instruments, such as bonds, for example. MAR also shortens the period, within which the notification must be made at the latest, from five to three working days.

A major amendment introduced by MAR in comparison with the previous legal situation is also the introduction of a prohibition on trading limited in time (so-called "Closed Periods") whereby a director may not conduct any transactions on his/her own account or for the account of a third party, directly or indirectly, relating to the relevant financial instruments during a closed period of 30 calendar days before the announcement of a year-end financial report or interim report.

4. Penalties for Infringements

The MAR regulations are supplemented by the EU directive on criminal sanctions for insider dealing and market abuse ("CRIM-MAD"). This directive which must be transposed into national law by July 3, 2016, includes minimum requirements for the member states with respect to criminal and administrative sanctions and fines. In particular radical increases in fines are foreseen so that fines of up to EURO 15 million or 15 % of annual group revenues can be imposed on legal entities and fines of up to EURO 5 million on natural persons.

MAR will also introduce the public announcement of official decisions on sanctions including the names of the responsible people ("naming and shaming") with the

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hope that this will be a further deterrent. Pursuant to this regulation imposed sanctions will be published on the page of the respective regulatory authority for the period of five years.

III. Recommended Action

The new MAR constitutes a radical turning point for the open market. Many enterprises will come into contact with the above requirements and prohibitions for the first time. Particularly due to the strict regulations on penalties in MAR and/or CRIM-MAD it is recommended that the affected enterprises make themselves familiar with the new regulations and align their capital market compliance and internal corporate standards and guidelines to the MAR stipulations in good time.

German Federal Court of Justice: No Mutual Termination of an Intercompany Agreement during the Accounting Year

The question has long been controversial in legal literature and court decisions whether an intercompany agreement with a controlled/dominated limited liability company (Gesellschaft mit beschränkter Haftung – GmbH) can also be terminated by mutual termination agreement (bilateral instrument) during the accounting year, i.e. at a time which is different to the agreed accounting period (generally the end of the accounting year). On June 16, 2015, the German Federal Court of Justice (Bundesgerichtshof – BGH) clarified this legal issue and confirmed the prevailing opinion in legal literature that pursuant to § 296 Subsection 1 Sentence 1 German Stock Corporation Act (Aktiengesetz – AktG) an intercompany agreement with a controlled/dominated GmbH can only be terminated by mutual agreement at the end of the accounting year or an otherwise contractually agreed accounting period (BGH ruling dated June 16, 2015 – Case No.: II ZR 384/13).

I. Overview of the Problem

The German Limited Liability Companies Act does not regulate intercompany agreements (in particular profit and loss transfer and domination agreements). It is nevertheless generally acknowledged that a GmbH in a group relationship can be part of an intercompany agreement both as a dominating company and as a controlled/dominated entity. In practical situations the question is raised which legal rules apply to intercompany agreements with a GmbH. Uncertainties in this regard range from the grounds and conditions for concluding an intercompany agreement through to its termination and are in part highly controversial in legal literature and court decisions. The BGH has now clarified the issue of whether it is permitted to terminate an intercompany agreement with a GmbH during the accounting year, by a mutual termination agreement at a time before the end of a accounting year and/or another contractually specified accounting period.

II. The Case of the Federal Court of Justice

In the case which awaited the BGH's decision the defendant company which was the dominating company (parent company/controlling company) at that time had agreed with the controlled/dominated GmbH (a 100% subsidiary of the defendant) on April 25, 2000, when selling its shares in said subsidiary GmbH, to terminate with immediate effect the profit and loss transfer agreement which was concluded on May 2/5, 1996, and which was limited in time to the end of the year 2000. The termination of the intercompany agreement has been registered with the commercial register on July 6, 2000. The defendant parent company and the subsidiary belonged to the same group of companies. The shares in the subsidiary GmbH were sold to a company which also belonged to the same group of companies at the time of the termination agreement.

The subsidiary GmbH later became insolvent. The plaintiff, the insolvency administrator of the subsidiary GmbH, filed a claim against the defendant former dominating parent company for payment to compensate among other things its losses for 2000, in the amount of its pro-rata loss as of the termination date in 2000. The Regional Court (Landgericht (LG) in Munich I, ruling dated December 6, 2011 – Case No.: 33 O 6912/10) and Higher Regional Court (Oberlandesgericht (OLG) in Munich, final ruling dated November 20, 2013 – Case No.: 7 U 5025/11) sentenced the defendant to payment of the balance sheet loss of the controlled/dominated subsidiary GmbH for 2000 as of December 31, 2000, and therefore for the entire accounting year 2000. Both parties filed an appeal on a point of law against the ruling by the OLG in Munich. The legal dispute thus centered on whether the defendant owed payment to compensate losses for the (entire) accounting year 2000 or only until the termination date, which was the question on which the BGH then had to decide.

III. Decision

1. Equivalent Application of § 296 Subsection 1 Sentence 1 German Stock Corporation Act in a Group of Companies of a Limited Liability Company

The appeals by both parties on a point of law were not successful and were dismissed. The BGH confirmed the appellate ruling by the OLG in Munich which had awarded the subsidiary GmbH a claim for payment to compensate its losses for the entire accounting year 2000. The BGH decided that pursuant to § 296 Subsection 1 Sentence 1 AktG an intercompany agreement with a controlled/dominated GmbH could only be terminated by mutual agreement at the end of an accounting year or an otherwise contractually specified accounting period. Therefore the agreed termination of the intercompany agreement on April 25, 2000, was invalid and the intercompany agreement was only effectively terminated on December 31, 2000. The BGH believed that the end of the accounting year on December 31, 2000, was thus decisive and the basis for determining the compensation of losses (§ 302 Subsection 1 AktG).

The BGH applied the regulations in AktG on the conclusion and termination of a domination and profit and loss transfer agreement with a controlled/dominated stock corporation (Aktiengesellschaft – AktG) in an equivalent

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manner to intercompany agreements with a controlled/dominated GmbH insofar as the protective purpose of the regulations applied accordingly to a controlled/dominated GmbH and they were not based on differences in the internal constitution of an AG and GmbH. This should also apply to the regulation in § 296 Subsection 1 AktG on the termination of intercompany agreements. The BGH referred in particular to the protective purpose of § 296 Subsection 1 Sentence 1 AktG and decided that it applies equally to the GmbH as to the AG. Restricting the mutual termination of the agreement to the end of the accounting year or an otherwise contractually determined accounting period generally served the interests of legal certainty and clarity. The point in time of the termination does not have any connection to the internal constitution in the event of a mutual agreement of an intercompany agreement.

The BGH is also of the opinion that a calculation on the basis of a balance sheet at the end of the accounting year or an otherwise contractually determined accounting period simplifies the calculation of any claims by the minority shareholders on the one hand and also the profit and loss transfer on the other hand, especially since a balance sheet at the end of the accounting year is normally audited so that the risk of manipulation is less than for a calculation on the basis of an interim balance sheet or even the risk of neglecting to make the calculation. This legislative value assessment which is expressed in § 296 Subsection 1 Sentence 1 AktG should also be observed in the case of its equivalent application for GmbH's.

Ultimately the loss of contractual freedom resulting from the application of § 296 Subsection 1 Sentence 1 AktG does not weigh particularly heavily since as a majority or sole shareholder of the controlled/dominated GmbH the controlling/dominating company can usually resolve to change the accounting year combined with the creation of a stub accounting year.

2. No Reinterpretation into a Declaration of Termination (Unilateral Termination)

The BGH did not allow the termination agreement to be re-interpreted into an extraordinary termination due to the lack of good cause. The BGH had left it open whether the fact that the controlling company sold its shares could constitute good cause for the controlling company to terminate the profit and loss transfer agreement without notice pursuant to § 297 Subsection 1 Sentence 1 AktG. Good cause only exists according to the BGH – if it is not reasonable for the terminating party to continue with the intercompany agreement until the agreed end or up to the end of the notice period taking all circumstances of the individual case and the interests of both parties into account.

The BGH could not see in the instant case, however, that an end of the agreement at the contractually agreed time, i.e. a continuation until the end of the accounting year 2000, would only have been connected with unreasonable legal and economic difficulties for the defendant at the time of termination even if selling the shares could generally be considered as good cause for ending the intercompany agreement without notice and thus during the accounting year. The BGH pointed out in this context that the shares in the subsidiary GmbH had been sold to a company which had belonged to the group of companies at the time of the termination agreement and thus clarified at the same time that selling the shares to an affiliated company could not at any rate simply be qualified as good cause for an extraordinary termination during the accounting year, which good cause would make it unreasonable to continue the intercompany agreement until the end of the accounting year.

IV. Practical Advice

Pursuant to the BGH a termination of an intercompany agreement by mutual agreement during the accounting year can now only be achieved by creating a stub accounting year for the controlled/dominated company. This can take place through a prior amendment of the articles of association of the controlled/dominated company by changing the accounting year of said company to the desired termination date. However, this amendment of the articles of association must be registered with the commercial register before the end of the stub accounting year and/or before the start of the new accounting year. If the accounting year is changed to a period which is different to the calendar year, the prior consent of the fiscal authorities must be obtained to insure fiscal validity.

The regulation in § 296 Subsection 1 Sentence 1 AktG should also always be observed as a precaution when terminating other intercompany agreements apart from domination and/or profit and loss transfer agreements. Company lease agreements or agreements to lease operating facilities should therefore also only be terminated by mutual agreement at the end of the accounting year. Although the BGH had to decide in this case on the premature termination of a profit and loss transfer agreement, it did not clearly restrict equivalently applying

§ 296 Subsection 1 Sentence 1 AktG in a GmbH group of companies to certain types of intercompany agreements and therefore not to profit and loss transfer agreements but referred generally to intercompany agreements in the instant case at least according to the wording of the ruling. The BGH thus implicitly dismissed the decision by the OLG in Zweibrücken from 2013 which had decided for a company lease agreement that § 296 Subsection 1 AktG did not generally apply in analogy to "other intercompany agreements" for a controlled/dominated GmbH. The question can be posed whether this was done deliberately in view of the BGH reasons for permitting the equivalent application of § 296 Subsection 1 Sentence 1 AktG in the underlying case.

§ 296 Subsection 1 AktG should now in any event also always be observed in practice in a GmbH group of companies for a termination by mutual agreement, irrespective of the type of an intercompany agreement.

Apart from the termination of intercompany agreements by mutual agreement, extraordinary termination during the accounting year is also still permitted in a GmbH group of companies if there is good cause. This right cannot be excluded or prevented in the agreement. An example of good cause is stated in the law in § 297 Subsection 1 Sentence 2 AktG namely that the dominating company will probably not be in a position to fulfill its contractual obligations. Good cause also exists when it is not reasonable for the terminating contractual party to continue with the agreement taking all circumstances of the individual case and the interests of both parties into account. However, the cause may not be within the area of responsibility of the terminating contractual party. From a corporate law perspective it is at the discretion of the parties, however, to define other causes in the intercompany agreement as grounds for good cause, such as selling the shares in the controlled/dominated company, for example. Each individual case must also be examined carefully and in good time, in particular against the wording of the termination regulation in the domination and profit and loss transfer agreement, whether the dominating company selling the participation in the controlled/dominated company constitutes good cause in the specific case allowing extraordinary termination during the accounting year. The in part varying assessment under fiscal law and corporate law must also be noted here. Contractually defined extraordinary grounds for termination thus cannot always constitute good cause in the sense of fiscal law under certain circumstances: if such grounds exist, a premature termination of a profit and loss transfer agreement and therefore of the tax group may indeed be possible without any detrimental tax impacts. On the other hand an otherwise permitted termination by mutual agreement of a profit and loss transfer agreement at the end of an accounting year before the end of the five-year minimum term can be fiscally detrimental and lead to the tax group not being recognized as a whole (i.e. also for the previous years), unless there is also good cause in the sense of fiscal law for the premature termination of the tax group.

Court Ruling on Purchaser Obligations and Translation Issues in SPAs

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In a ruling dated March 13, 2015 – Case No.: 315 O 89/13, the District Court (Landgericht – LG) in Hamburg held that the purchaser of a company is not entitled to claim compensation for damages due to patent right infringements. The claims asserted by the plaintiff were unknown at the time of the acquisition and dated back to the time before the closing of the transaction. The court had to decide whether the plaintiff's claim for damages results from a warranty breach or from a breach of Sections 434, 453 German Civil Code (Bürgerliches Gesetzbuch – BGB) respectively Section 311 Subsection 2 BGB.

I. Facts

As of December 31, 2007 (also referred to as the "Closing Date") the parties entered into a sale purchase and transfer agreement (also referred to as the "SPA") regarding the sale and transfer of all shares of a limited liability company (Gesellschaft mit beschränkter Haftung – GmbH) (also referred to as the "Target") for a purchase price of EURO 1.00. Due to restructuring the Target was to be carved out from the previous corporate group. The Target was mainly responsible for the development and licensing and managed a variety of its own patents, which were licensed to third parties through various patent licensing programs. During the sales process the purchaser had the chance to conduct a due diligence of the Target and was able to place a question list with the Target's management on November 20, 2007. Shortly thereafter, the SPA was signed in English by the parties on November 28, 2007. The SPA provides the following guarantee relating to the Target:

„Permits: The company has all permits and authorisations necessary for the conduct of its business as now being conducted or required for the ownership, lease and/or use and operations of its assets and facilities. All such permits and authorisations are valid and in full force and the company is in material compliance with all such permits and authorisations."

After the Agreement was signed, the Target was faced with several claims caused by patent right infringements, resulting from the time before the acquisition took place. To avoid time consuming court proceedings these claims were settled through settlement agreements. By initiating legal proceedings, the plaintiff claimed its costs for such settlements because of a warranty breach, arguing that if it had been aware of the obligation to make license payments, it would have been insisted that the seller inject more capital into the Target before the execution of the transfer. According to the plaintiff, the seller acted fraudulently during the contractual negotiations because it was obliged to disclose such risk. Pursuant to the defendant the plaintiff had sufficient time to collect information from the Target and to ask relevant questions regarding pending or imminent patent infringements. However, the plaintiff omitted to raise such questions and negligently relied on the sufficiency statements by Target's management and refrained from any further investigations.

II. Decision

The court dismissed the plaintiffs' claims. Pursuant to the ruling, the plaintiff is not entitled to claim damages for any reason. According to the court, the warranty in dispute only contains a regulation for official permits and/or authorizations. The question whether the English term "authorisations" should be translated with "Berechtigung(en)" (entitlement(s)) or "Genehmigungen" (approval(s)) was left open because it was not relevant for the case. The court held that the guarantee only contained the commitment that all public permits for the business are existent on the closing date. This does not include licenses for patents which were required for marketing. Furthermore, the SPA included an explicit regulation on intellectual property rights. Although this covered only trademark rights, it is obvious that the parties intended to separate the topics "public permits" and "intellectual property rights". The court also stated that the warranty in dispute only contained a closing date regulation, which guaranteed that the Target possessed all permits after the closing date. This was not intended to extend the guarantee to the time before the closing date. In the court's view the requirements of a compensation claim (§ 434, § 453 BGB or § 311 Subsection 2 BGB) were not met. According to the court, the plaintiff negligently failed to examine whether there were any third-party claims to patent rights against the Target, although it was aware of other legal proceedings in connection with patent infringements. Furthermore the plaintiff explicitly stated in the SPA that as of the closing date it had sufficient and appropriate information and documentation with respect to the transaction.

III. Practical Effects

The above ruling is of practical interest for several reasons. On the one hand it emphasizes that the warranty entitled "permits" should normally be translated as public "Genehmigungen" and also that the parties of an agreement should clearly distinguish between public permits and licenses under private law. To prevent misinterpretations of the English terminol-

ogy and subsequent disputes it is advisable to insert the German terms in brackets in the text of the agreement. Further, the court clarified that an explicit provision for previous infringements is mandatory, if needed, since a closing date regulation as in the present case only covers the time after the closing date. With respect to purchaser's obligations, the court tightened the requirements compared to existing case-law. In previous rulings the courts imposed higher disclosure obligations on the sellers. The recent ruling now imposes higher obligations on the purchaser to ask for more information, if the due diligence indicates the existence of certain issues. The decision also underlines that precise wording is decisive for the justification of claims and that it is important to clearly distinguish different topics and to address all items which shall be regulated between the parties and to provide for clear exceptions, if needed.

Compensation Claims After the End of Franchise Agreements

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One of the most controversial subjects in distribution law is the question whether and under what preconditions a franchisee is also entitled to compensation for the loss of its clientele (indemnity) after the end of the franchise agreement through applying § 89b German Commercial Law (Handelsgesetzbuch – HGB) by analogy. The most recent decisions by the German Federal Court of Justice (Bundesgerichtshof – BGH) and the Higher Regional Court (Oberlandesgericht – OLG) in Schleswig could provide important conclusions for asserting a claim for compensation (indemnity).

1. General Preconditions of Applying § 89b German Commercial Code by Analogy

Pursuant to the regulation in § 89b HGB a commercial agent (Handelsvertreter) can request appropriate compensation (indemnity) from the entrepreneur after the end of the contractual relationship if and as far as (1) the entrepreneur still enjoys considerable benefits even after the end of the contractual relationship from business relationships with new clients which the commercial agent recruited, (2) the commercial agent loses its claim to commission due to the end of the agreement, which claim to commission it would have had for business it had already concluded or which would have come into existence if the agreement had continued, and (3) the payment of compensation (indemnity) corresponds to equity taking all the circumstances into consideration.

Separate court decisions on applying § 89b HGB by analogy already exist for the considerably older form of distribution through an authorized dealer (Vertragshändler). Pursuant to established BGH practice the authorized dealer is to be awarded compensation (indemnity) "if there is a legal relationship between the supplier and the authorized dealer that is not only limited to a mere buyer/seller relationship but includes the authorized dealer in the distribution organization of its supplier on the basis of contractual agreements in such a manner that it must perform commercial tasks to a considerable extent which are comparable to a commercial agent and that it is obliged to hand the client base over to its supplier at the end of the agreement so that the supplier can immediately enjoy and easily make use of the benefits of the client base" (BGH NJW (Neue Juristische Wochenschrift – new legal weekly magazine) 2011, 848; 1996, 747).

While the BGH had hitherto left it open whether § 89b HGB was at all applicable by analogy in a franchise relationship like in a relationship with an authorized dealer (just see Benetton I, BGH NJW 1997, 170, 175), other courts had mainly utilized the preconditions for analogy primarily developed for agreements with authorized dealers (Regional Court (Landgericht – LG) in Frankfurt, ruling dated November 19, 1999 – Case No.: 3/8 O 28/99; LG in Berlin, ruling dated September 6, 2004 – Case No.: 101 O 23/04; OLG in Dusseldorf, ruling dated April 19, 2007 – Case No.: I-5 U 1/06).

2. Obligation to Transfer Client Base

Apart from the inclusion in the distribution organization of the franchisor, the obligation to transfer the client base appears particularly problematic when applying the principles compiled for the authorized dealer to franchise agreements by analogy.

The commercial agent acts for a third party and is only a broker to conclude the agreement between the entrepreneur and the client so that the clients are to be assigned to the entrepreneur. In contrast the contractual relationship exists directly between the authorized dealer and the client. The recruited clients are thus primarily assigned to the authorized dealer. The obligation of the authorized dealer to transfer the client base is therefore necessary in order to justify interests which are similar to those of the commercial agent.

While the legal situation for franchising is the same as for the authorized dealer, the client's actual perception is different since the similar corporate identity does not usually enable the client to detect from the outside that its contractual partner is not the franchisor but the franchisee. Normally the franchisor therefore actually continues to have direct access to the client base after the end of the franchise agreement. It is thus questionable whether the requirement of having to transfer the client base can be seen as obsolete and it is sufficient for applying § 89b HGB by analogy if the clients who were recruited by the franchisee actually remain with the franchisor.

3. Ruling by the Federal Court of Justice Dated February 5, 2015

The BGH has now clearly dismissed the above opinion in its ruling (BGH ZVertriebsR (Zeitschrift für Vertriebsrecht – Periodical for Distribution Law) 2015, 102 et seq.) on the compensation (indemnity) of a franchisee who had operated two baker shops in a franchise system. A contractual regulation whereby the franchisee was obliged to transfer the client base or hand over client data after the end of the agreement did not exist. The franchisee was obliged to surrender the business premises after the end of the agreement.

In contrast to the commercial agent the BGH stated that the franchisee who acted in its own name and for its own account primarily procured its own business through the recruitment of a client base. It did not matter that the franchisee did not normally appear in an external relationship to the clients under its own trademark but under that of the franchise system. The franchisor cannot easily use a generally anonymous client base recruited by the franchisee after the end of the agreement.

The actual possibility for the franchisor to use such a client base after the end of the agreement is in particular restricted when the franchisee can continue to operate a business from the same location under its own trademark, for example – and makes use of this possibility.

Applying § 89b HGB by analogy to franchise agreements involving anonymous large scale business cannot be justified with the deliberation that the requirement of having to transfer the client base would not make sense for such business. Even if this were true, it would not matter that there would not be sufficient similarity of interests with those of the commercial agent if the client base actually continued.

The BGH's statement is also of practical significance that the protection of § 89b HGB is not affected by the franchisee's obligation to surrender the business premises after the end of the franchise agreement.

4. Ruling by the Higher Regional Court in Schleswig Dated December 11, 2014

The OLG in Schleswig also ultimately argued against compensation (indemnity) (OLG in Schleswig, ZVertriebsR 2015, 48 et seq.). In the underlying facts of the case the plaintiff, subtenant and franchisee distributing animal food asserted a claim to compensation (indemnity) arising from § 89b HGB by analogy. The defendant had previously articulated the termination of the subtenancy agreement which was linked to the franchise agreement. The key aspect of the agreement was the provision of knowledge for the franchisor, the inclusion of the franchisor's own trademarks in the product range and participation in customer loyalty programs.

The OLG believed that an obligation to transfer the client base could not simply be deduced from the link between the subtenancy and franchise agreements which gave the franchisor a claim to the business premises and thus indirectly to the client base. Furthermore the participation in customer loyalty programs which was associated with handing the client data over to the franchisor did not justify such an obligation. Passing on client data was only limited to part of the client base.

Furthermore the OLG already challenged integrating the franchisee in the distribution organization since the agreement also focused on the franchisee giving entrepreneurial advice as well as distributing its own trademarks.

Both courts ultimately applied the analogy preconditions restrictively. The courts were of the opinion that it was not sufficient just to transfer the client base; instead an explicit or implied obligation was required. Providing the business premises could not be a substitute for the obligation to hand over the client data.

Even if the BGH declared an open result and the compensation (indemnity) was dismissed in both cases, it can be concluded from both decisions that the franchisee is generally entitled to compensation (indemnity) which follows the principles drawn up for the authorized dealer. The general drift of the courts is therefore to be welcomed even if it remains to be seen what arrangements will allow the criteria developed for the authorized dealers to be affirmed.

Electricity Market 2.0 – White Paper by the German Federal Ministry for Economic Affairs and Energy from a Legal Perspective

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On July 3, 2015, the German Federal Ministry for Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie – BMWi) presented a white paper entitled „An Electricity Market for Germany's Energy Transition" in which it described specific implementation measures for a new "electricity market design" (after the editorial deadline the BMWi presented the corresponding draft Power Market Act on 14th Sept. 2015 for consultation). The white paper was preceded by an extensive discussion on the design of the future electricity market (cf. the so-called green paper from October 2014 and approx. 700 comments from government authorities, associations, trade unions, companies and individual citizens in a public consultation process).

In its white paper the BMWi presents clear arguments for the electricity market to develop into an "electricity market 2.0" and against the introduction of a capacity market. The BMWi has therefore made a fundamental decision. The white paper also includes the key points for 20 measures with which the electricity market 2.0 is to be implemented in the coming months and years. The main measures and key points are stated in brief below:

Guaranteeing Free Price Formation on the Electricity Market – Measure 1

The free price formation is included as a target definition in the Energy Industry Act (Energiewirtschaftsgesetz – EnWG) in order to emphasize the significance of the market-based electricity price as an important investment signal. The hitherto "target pentagon" in § 1 Subsection 1 EnWG has therefore become a "target hexagon". The absence of state price interventions on the electricity spot market is significant against the background of investment protection and/or investment security. The anti-trust review by the Bundeskartellamt (BKartA – German Federal Cartel Office) of price formation remains unaffected hereby. The previous legal framework therefore remains unchanged.

Anti-Trust Flashpoint: "Electricity Generation" – Measure 2

The supervision of abuse of dominant market positions is to become more transparent. The BMWi intends to achieve this with two measures: on the one hand the BKartA will publish guidelines for the supervision of abuse of dominant positions in electricity generation which will clarify in detail the rules for application and the scope of supervision of abuse of dominant positions under anti-trust law. On the other hand the BKartA will present a report on the market situation in electricity generation every two years. In future the BKartA will insofar also closely monitor the market for initial sales of electricity (in order to prevent deliberate price peaks, for example, in situations of scarcity, which would constitute an infringement against the ban on mark-ups) and at the same time set clear standards regarding the supervision of abuse of dominant positions for the affected companies.

Regulating Electricity Generation: Capacity and Grid Reserve – Measures 19 and 20

The German federal government will introduce a so-called capacity reserve rather than a capacity market (see above). This capacity reserve will supplement the already existing "grid reserve" (pursuant to § 13a EnWG and Reserve Power Plant Ordinance (Reservekraftwerksverordnung – ResKV). While the grid reserve serves to secure the functioning of the grid where there are regional congestions (through system relevant power stations which are to be decommissioned), the capacity reserve is intended to safeguard the electricity supply in the case of unbalanced supply and demand (the capacity reserve will only be activated if the demand on the German market cannot be covered by actual supply).

In order to balance both instruments with each other, the regulatory framework for the grid reserve (§ 13a EnWG and ResKV) will also be further developed and particularly ResKV will be extended beyond its previous expiry date in 2017 to 2023. The contract for the capacity reserve is mainly to be awarded by a call for bids from the Transmission System Operators (TSO). Bids can also be made by reserve power stations. The corresponding power stations may not sell the electricity they generate on the market but will only supply electricity as instructed by the TSOs. Power stations which participate in the capacity reserve must ultimately be closed down on a permanent basis.

The systematic separation of capacity and grid reserve will prove to be interesting from a legal perspective. The regulations on remuneration of the capacity reserve on the one hand and the allocation of the costs incurred by activating the capacity reserve on the other hand will also be eagerly awaited, since it is envisaged here to distribute the costs of maintaining the capacity reserve while the costs for the use of the capacity reserve are to be billed to the balance responsible parties in line with the costs-by-cause principle. We can therefore expect a very extensive body of rules and regulations on the capacity reserve.

Further Development of the Balancing Group and Balancing Energy System Through Incentives to Uphold Balancing Group Commitments and Billing Obligation – Measures 3 and 4

The balancing group and balancing energy system are to be redesigned in order to encourage the balance responsible parties to uphold more balancing group commitments. It is particularly the costs of maintaining balancing capacity which should be removed from the grid charges and included in the balancing energy charges. Furthermore calculating the balancing energy prices using other reference prices than the price for intraday trading, among other things, should encourage the balance responsible parties to trade the quantities on the intraday market rather than using balancing energy. Effects such as the so-called zero crossings which lead to high balancing energy prices should also be eliminated. The measures will be implemented by modifying § 8 of the Electricity Grid Access Ordinance (Stromnetzzugangsverordnung – StromNZV) and a stipulation procedure by the Federal Network Agency (Bundesnetzagentur – BNetzA).

Furthermore § 8 Subsection 2 StromNZV will be modified so that balancing groups must be invoiced by the TSOs even if they have to intervene in the electricity system at short notice for reasons of system stability pursuant to § 13 Subsection 2 EnWG or if they have to use the capacity reserve. This obligation of the TSOs to bill the balancing groups for each quarter hour should therefore lead to the suppliers securing their supply obligation to an adequate extent.

Further Development of the Balancing Markets for New Providers – Measures 6 and 10

The balancing markets should be opened up to new providers. A corresponding modification of § 8 Subsection 1 Sentence 2 StromNZV (on the basis of the network code on electricity balancing in the EU proposed by ACER (Agency for the Cooperation of Energy Regulators) on July 20, 2015) should convert the hitherto pay-as-bid procedure into a uniform pricing procedure on the one hand as well as redesign the balancing energy products on the other hand. The access threshold is to be lowered with products being auctioned daily in smaller segments with shorter product lengths. A secondary market for capacity rights is also envisaged. The BNetzA will commence a determination procedure in 2015 already for these measures and the modification of the StromNZV.

A legal framework will also be created for attracting small consumers. The aim of this measure is to integrate medium-sized and small flexible electricity consumers into the market for balancing energy. The balance responsible parties should be obliged particularly with respect to secondary balancing energy to open their balancing groups (this obligation already exists for minute reserves). This measure should above all take place by modifying § 26 Subsection 3 StromNZV. It is to be expected, however, that other regulations will also be implemented.

Focus on State-Induced Price Components and Grid Charges – Measures 7, 8 and 9

Together with the affected stakeholders the BMWi will develop a "target model" for state-induced price components (e.g. EEG (Erneuerbare-Energie-Gesetz – EEG) and CHP (Combined Heat and Power) surcharges, electricity tax, etc.) and grid charges in order to avoid the price signals from the electricity market from overriding as far as possible. The structure and level of state-induced price components and grid charges should be adapted, among other things, so that players orient their operation to the wholesale price as a central steering signal which is as undistorted as possible. Pursuant to the white paper this also requires the "operation of generation facilities for own-consumption which meets the needs of the system", among other things. A stronger orientation of generation facilities for own-consumption to electricity price signals should reduce fuel costs and emissions and open up additional flexibilities. Furthermore the various consumer groups should make an appropriate contribution to the necessary financing, whereby the existing privileges remain in place on the one hand and the broadest possible payment base should be created on the other hand (this tension should be alleviated on the basis of a "macroeconomic view"). Self-suppliers and privileged enterprises should carefully observe whether the stated measures (can) actually be implemented in individual cases without impairing the international competitiveness.

Furthermore there are very specific plans to revise the special grid charges regulated in § 19 Subsection 2 StromNEV to allow for greater demand-side flexibility. The rule is to be adjusted so that grid operators can determine the peak load times on a short-term basis (weekly and/or daily for the next day) and large-scale consumers will be able to participate in the balancing market. Adjusting consumption behavior to high and perhaps also negative electricity prices should also no longer lead to a loss of the special grid charges. Irre-

spective of the specific implementation this measure therefore offers potential for enterprises which profit from special grid charges.

Finally the grid charge system should be further developed with the objective of insuring fair burden sharing in the financing of grid infrastructure and particularly reducing the regional disparities in the level of grid charges. As a first step this measure foresees a national grid charge for the transmission systems. As a consequence the so-called "avoided grid charges" are to be abolished for all new installations which enter into operation from 2021 onwards.

New Legal Framework for Electric Mobility – Measure 11

The framework conditions for the provision of recharging points for electric vehicles are to be improved. On the one hand the Electricity Market Act (Strommarktgesetz) will provide legal certainty by clearly categorizing recharging points in EnWG in terms of energy law – the regulatory qualification was hitherto controversial. On the other hand rules in the so-called AFI directive will be implemented in the form of a legal ordinance insuring in particular interoperable, system-neutral and thus non-discriminatory access for the users of electric vehicles to the charging infrastructure. Furthermore the ordinance is to put the conditions in place for harmonized authentication and billing procedures, direct payment systems and transparent pricing at recharging points. Finally it will be possible to pass on market price signals in order to utilize the flexibility of electric vehicles on the electricity market. The regulations therefore go far beyond the hitherto existing draft of the charging station ordinance (Ladesäulenverordnung).

Smart Meter Roll-Out – Measure 13

In February 2015 the BMWi had already presented key points for a "smart grids" package of ordinances which included details of a planned smart meter roll-out, among other things. Other than as planned in the white paper the BMWi is currently working on a package of laws to implement the "digitalization of the energy transition". An initial working draft was already presented by the BMWi on August 7, 2015: the omnibus law foresees an extensive legal (regulatory) framework for smart grids and smart meters. The German federal government evidently considered a further legal anchor necessary due to the intensity of the proposed legislation and the fundamental right to the regulations on data protection. This omnibus law regulates data protection, data security and interoperability of smart meters, among other things. Furthermore the deadlines, consumption limits and maximum prices for installing smart measurement systems and corresponding regulations on costs are stipulated. The following laws and ordinances are to be amended or even abolished here: EnWG, EEG, German Combined Heat and Power Act (Kraft Wärme Kopplungsgesetz – KWKG), metering point operation act (Messstellenbetriebsgesetz) (new), Metering Access Ordinance (Messzugangsverordnung) (to be abolished), Incentive Regulation Ordinance (Anreizregulierungsverordnung – ARegV), Electricity and Gas Grid Access Ordinance (Strom und Gas Netzzugangsverordnung – NZV), Electricity Grid Charge Ordinance (Stromnetzentgeltverordnung – StromNEV), Electricity and Gas Basic Supply Ordinance (Strom und Gas Grundversorgungsverordnung – Strom und Gas GVV), ordinance on a low voltage connection (Niederspannungsanschlussverordnung – NAV) and ordinance on a low pressure connection (Niederdruckanschlussverordnung – NDAV) as well as Weights and Measures Ordinance (Mess- und Eichverordnung – Mess- und EichVO).

Reducing Costs of Expanding the Power Grid via Peak Shaving of Renewable Energy Facilities – Measure 14

The TSOs must build a curtailment of max. 3 percent of annual feed-in of wind and photovoltaic (PV) energy into their grid planning in order to reduce the necessity to expand the power grid to a needs-based and economically sensible level (the scenario framework for the 2025 grid development plan approved by the BNetzA already includes this requirement). The distributing grid operators have the option of peak shaving. Therefore nothing changes in actual operations. The grid operators will carry out the feed-in management measures in accordance with the usual ranking. The priority feed-in of renewables-based and CHP electricity will in particular not be altered. Furthermore the current redispatch and compensation rules will also remain in place.

Integrating Combined Heat and Power Generation into the Electricity Market – Measure 16

The white paper foresees extensive revision of the CHP Act in order to integrate CHP into the electricity market. There are to be particular improvements in the prospects for maintaining and expanding CHP, specific funding for conversion from coal to gas and a consistency maintained with other objectives and measures of the energy transition process. The BMWi has already presented a ministerial draft for a law to maintain, modernize and expand CHP (as of August 28, 2015) which is currently at the interdepartmental coordination stage. The current KWKG will be abolished completely and completely revised due to the extensive need for modification.

Outlook

The BMWi has announced that it still intends to present its proposals for the corresponding amendments of the laws and ordinances in this year. The omnibus Electricity Market Act which will in particular amend the EnWG will be the center of this legislative package. The electricity market bill is to be passed by the cabinet in the fourth quarter of this year and the corresponding legislative process will be completed in the spring of 2016. The BKartA and BNetzA will commence work on the planned guidelines and stipulations at the same time. We shall continue to pay close attention to the conversion and design of the electricity market 2.0 and report on it again for you in the future.

Increases in Rent for Residential Properties: Right of Revocation – Yes or No?

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In the middle of 2014 the legal provisions for consumer agreements and the right of consumers to revoke certain agreements were extensively reformed with the scope of application being considerably extended. A significant amendment is in particular that the right of revocation can now also be applied to rental agreements for residential properties, pursuant to § 312 Subsection 4 German Civil Code (Bürgerliches Gesetzbuch – BGB).

This amendment has caused considerable unease among landlords and real estate associations. The "Tagesspiegel" newspaper even dedicated an entire article to the subject entitled "Commercial or Not Commercial – That is the Question. The New Law on Revocation" (Gewerblich oder nicht gewerblich – das ist hier die Frage. Das neue Widerspruchsrecht).

The reasons for the insecurity are ambiguities with respect to the exact scope of application of the right of revocation for tenants as well as the far-reaching consequences if it is not observed.

It is particularly still not clarified whether the right of revocation applies to increases in rent. As far as tenants of residential properties are entitled to a right of revocation regarding an increase in rent, landlords would be obliged pursuant to § 312 d BGB to advise the tenants of their 14-day right of revocation. If such advice is not forthcoming, the respective tenant could revoke an already effective increase in rent up to one year and 14 days after it came into effect. The landlord would then be obliged to return the "excess" rent without receiving any compensation from the tenant for the use of the property.

Although there appears not to be any court decisions as yet on whether tenants of residential property are entitled to a right of revocation in the event of an increase in rent, brief details of the current opinion in literature on tenancy law and practical advice will be given below in view of the considerable economic significance of this subject for the parties of a tenancy agreement:

I. General Preconditions for the Right of Revocation for Consumers

Pursuant to § 312 Subsection 1 BGB a precondition for the right of revocation for tenants is the existence of a consumer agreement on services by an entrepreneur in return for payment and the existence of facts entitling revocation pursuant to § 312 b and c BGB.

1. Consumer Agreement

Pursuant to § 310 Subsection 3 BGB a rental agreement is a consumer agreement if the landlord is an entrepreneur (cf. § 14 BGB) and the tenant is a consumer (cf. § 13 BGB). While the consumer characteristic is generally undisputed for tenants of residential property, there have hitherto been different court decisions on the entrepreneur characteristic for (private) landlords. Landlords should therefore analyze carefully on a case by case basis whether they count as entrepreneurs and in a case of doubt assume that they will be characterized as entrepreneurs.

2. Facts Entitling Revocation

A further precondition for a tenant having a right of revocation in the event of an increase in rent is that the increase in rent is settled a) outside an office (§ 312 b BGB) or b) by way of a distant sales transaction (§ 312 c BGB). The alternative b) will probably be of most practical relevance whereby the existence of a distant sales transaction is controversial. There is one view that the landlord must actually "sell" something so that the mere systematic realization of subsequent contractual modifications by means of telecommunication is not sufficient for affirming facts entitling revocation (cf. Schmidt-Futterer, tenancy law (Mietrecht), 2015, § 558b margin No. 35b). Pursuant to another opinion a distant sales transaction already exists whenever the request for an increase in rent is communicated without personal contact, i.e. through an exchange of correspondence, for example (cf. Schüller, Beck Online Commentary (BeckOK) BGB, 2015, § 557, margin No. 10).

However, the second opinion only appears justifiable when means of telecommunication are used frequently and offer entrepreneurs the organizational preconditions to manage distant sales transactions on a regular basis.

II. Right of Revocation and the Individual Sections Allowing Increases in Rent

The subsequent question whether the tenant is entitled to a right of revocation in the event of an increase in rent is answered differently depending on the type of increase:

1. Increase in Rent through Agreement Pursuant to § 557 Subsections 1 and 2 BGB

With a contractually agreed increase in rent pursuant to § 557 Subsections 2 and 2 BGB the tenant should have a right of revocation since the statement of reasons for the law says that in all cases of a subsequent modification of the lease contract the tenant has a justified

interest in revoking agreements which have been settled outside an office or by way of a distant sales transaction (cf. Blank/Börstinghaus, Rent (Miete) 2014, § 557 margin No. 6).

2. Increase in Rent up to the Local Comparable Rent Pursuant to § 558 et seq. BGB

It is currently controversial whether the tenant is entitled to a right of revocation in the event of an increase in rent up to the local comparable rent pursuant to § 558 et seq. BGB. One opinion is to dismiss this (Lützenkirchen, Tenancy Law (Mietrecht) 2015, § 558b; margin No. 48h) since the 14-day period of revocation serves to give the tenant time for consideration which is already insured with the two month period of consideration for such increases in rent pursuant to § 558b Subsection 2 BGB. Another opinion states that § 312 et seq. BGB also applies to increases in rent up to the local comparable rent (cf. Schüller, l.c., § 558a, margin No. 3). This results from the fact that the statutory right of revocation does not refer to the length of the tenant's time for consideration but to the importance of a binding declaration of intent. The tenant could therefore revoke his/her consent to the increase in rent although he/she is obliged to consent pursuant to § 558 et seq. BGB.

3. Increase in Rent because of Refurbishment Pursuant to § 559 BGB

The tenant has no right of revocation for increases in rent because of refurbishment pursuant to § 559 BGB since it is only a right to increase the rent which is declared unilaterally by the landlord (cf. Frieser, New Laws (Neue Gesetze) 2015, page 11).

III. Conclusion and Practical Advice

The question whether the tenant is entitled to a right of revocation in the event of an increase in rent and whether the landlord has an obligation to advise the tenant of a right of revocation is currently answered differently depending on the type of increase. It remains to be seen how the courts will make their respective decisions. In view of the considerable economic consequences if advice is not given on a right of revocation although necessary, landlords who do not wish to run any risk are recommended to advise tenants (effectively) on a right of revocation at least in the event of an increase in rent pursuant to § 557 and § 558 et seq. BGB.

Latest News on the Minimum Wage – Three Court Decisions of the First Instance

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Since January 1, 2015, all employees working in Germany are generally entitled to payment of the statutory minimum wage in the amount of EURO 8.50 per hour. Initial rulings by labor courts of the first instance (Arbeitsgericht – ArbG) now exist which in particular deal with the controversial question of crediting other remuneration components as well as with terminations by the employer in connection with the minimum wage.

I. Labor Court in Berlin, Ruling dated April 17, 2015, Case No.: 28 Ca 2405/15

The Labor Court in Berlin had to deal with a case where, on the occasion of the plaintiff asserting the minimum wage, the defendant owners' association presented a draft agreement which foresaw regular working hours of 32 hours per month from January 1, 2015, retrospectively as well as remuneration in the amount of EURO 325.00 (= EURO 10.16 / hour). The previously foreseen 14 hours per week with monthly remuneration of EURO 315.00 (= EURO 5.63 / hour) were not needed for the caretaker services which the plaintiff took on. After the plaintiff did not sign the agreement, the defendant terminated the existing employment relationship with due notice and was of the opinion that the plaintiff had "provoked" the termination by not accepting the amendment agreement and asserting higher remuneration.

The Labor Court in Berlin considered the articulated termination to be the defendant's answer to the asserted statutory minimum wage and evaluated the employer's reaction as an infringement against the ban of disciplinary treatment in § 612a German Civil Code (Bürgerliches Gesetzbuch – BGB) which prevents the employer from making an agreement or taking a measure to place an employee at a disadvantage if the employee exercises his/her rights in an admissible manner. A termination is precisely such a "typical" disadvantage. The presented draft agreement also raised the question for the court why the defendant cited that the time allocation in the employment agreement was too generous at exactly the same time when the plaintiff asserted a claim to the minimum wage. This coincidence of time sufficed for the assumption of a disciplinary measure especially since the defendant should first have issued a caution, among other things, requesting the fulfilment of contractual obligations from its employee.

As already with its ruling dated March 4, 2015, Case No.: 54 Ca 14420/14, the Labor Court in Berlin has now also shown with this decision that a dismissal (with the option of altered conditions of employment) ((Änderungs)kündigung) in association with asserting a claim to the minimum wage is probably only conceivable in exceptional cases. The statutory regulation applies that agreements which are less than the minimum wage are invalid and the employee has a statutory claim to remuneration of at least EURO 8.50 per hour and/or to the customary remuneration. If the employer intends to modify contractual agreements, this is generally only possible with the employee's consent.

II. Labor Court in Dusseldorf, Ruling Dated April 20, 2015, Case No.: 5 Ca 1675/15

Underlying the ruling by the Labor Court in Dusseldorf was an employment agreement which foresaw gross basic remuneration of EURO 8.10 per hour and also the payment of a "voluntary gross performance bonus" of max. EURO 1.00, the payment of which was to depend on the "respectively applicable bonus regulation (…)". On the occasion of the introduction of the statutory minimum wage the defendant wanted to leave the basic remuneration of EURO 8.10, whereby the performance bonus would in future be paid with max. EURO 0.40 per hour as a fixed gross amount – after it had tried unsuccessfully with the plaintiff's consent to change the basic remuneration to EURO 8.50 per hour and reduce the performance bonus to max. EURO 0.60. The plaintiff objected to this with legal action to ascertain, among other things, that gross basic remuneration of EURO 8.50 per hour was to be paid in future in addition to the previous bonus regulation (EURO 1.00 / hour). It should in particular not be possible to use the stated bonus payments in the calculation to determine whether the statutory minimum wage had been observed.

The court dismissed the legal action as unfounded. The court was of the opinion that the minimum wage law was to be interpreted so that both salary components, i.e. basic wage and performance bonus, were to be used in the calculation to determine whether the minimum wage had been observed. The court stated that the performance bonus in the instant case was part of the salary and was directly related to the work performed. With respect to the question whether a salary component is compensation for "normal work" and therefore constitutes remuneration (which can be credited to the minimum wage) the court referred to the statements by the European Court of Justice (ECJ) (NZA (Neue Zeitschrift für Arbeitsrecht – new magazine for labor law) 2013, 1359), pursuant to which the national interpretation of remuneration elements is decisive. The court emphasized here that German labor law generally categorizes payments as remuneration for

work rendered, which payments are then to be treated as applicable for the minimum wage if they were paid at the due time as a salary to compensate for work rendered.

The content of the decision follows the same line which the German Federal Labor Court (Bundesarbeitsgericht – BAG) took, among other things, in its ruling dated April 18, 2012, Case No.: 4 AZR 139/10, on the calculation of a minimum wage in a collective bargaining agreement. Fringe benefits and/or other remuneration components apply to the minimum wage pursuant to the differentiation made by the BAG when they have a "salary character" with respect to the "normal performance" rendered by the employee, i.e. compensation is to be given for this particular normal performance – and not any other special circumstances.

III. Labor Court in Bautzen, Ruling dated June 25, 2015, Case No.: 1 Ca 1094/15

In this case the Labor Court in Bautzen dealt with the treatment and/or calculation of vacation pay and night work supplements against the background of the German Minimum Wage Act (Mindestlohngesetz – MiLoG): the plaintiff, a member of the IG Metall trade union, had been employed with the defendant since 1990 with a gross salary of EURO 7.00 per hour. A collective bargaining agreement which was retrospectively applicable to the employment relationship foresaw a regulation on night work supplements (25 % of the hourly earnings) and vacation pay ("1.5 times the average employment earnings"). Even after MiLoG came into force the defendant continued to pay salaries of approx. EURO 7.00 and/or calculated vacation pay and night work supplements on the basis of this salary. The plaintiff objected to this with legal action regarding payment of gross wages. Too little salary had been paid since the minimum wage of EURO 8.50 should have been taken into account in each case. The defendant was of the opposing opinion stating that it was permitted to calculate the night work supplement on the basis of the previous salary; MiLoG was not applicable to a supplement which was to be paid in addition to the minimum wage. Furthermore the vacation pay which had been paid was to be credited to the minimum wage since it was a salary component in a further sense.

The court allowed the legal action. The vacation pay which had been paid to the plaintiff did not affect the minimum wage. Using the BAG court decision (ruling dated June 16, 2014, Case No.: 4 AZR 802/11) as a basis the payments made by the employer only affected the minimum wage if they were paid as compensation for "normal performance" rendered by the employee. In contrast the vacation pay served as compensation for the employee's additional costs which were incurred in the recovery of the employee's working capacity. It was not therefore any remuneration. Finally the night work supplement was to be calculated on the basis of the minimum wage. Pursuant to the underlying regulation in the collective bargaining agreement and the evaluation in § 6 Subsection 5 German law on working time (Arbeitszeitgesetz – ArbZG) the "hourly earnings" and/or the "gross working salary to which he is entitled (…)" were therefore decisive. Against the background of MiLoG this could only be the minimum wage. Nor did the supplement affect the minimum wage (similar to vacation pay); the BAG also apparently assumed this in its court decision (see above). It was therefore not compensation for normal work rendered but for a particular difficulty which the employee had. However, the ruling by the Labor Court in Bautzen is not yet final and absolute.

The arguments by the Labor Court in Bautzen show parallels with that of the Labor Court in Dusseldorf in its above decision even if in the reverse case. The content of the ruling clarifies that other remuneration components which are supposed to take account of special circumstances or difficulties which the employee has are not therefore to be seen as compensation for normal work by the employee in future either and must remain unconsidered in the calculation of the minimum wage. The previous line of court decisions by the BAG is therefore strictly followed whereby a differentiation was made in the "salary function" of the payments.

IV. Conclusion

The above three court decisions of the first instance provide clear information on the current trend of labor court decisions since MiLoG came into force on January 1, 2015. A fundamental change in court decisions does not currently appear likely as the strong orientation to previous court decisions by the BAG on minimum wages in collective bargaining agreements shows and as is particularly clearly expressed by the decisions of the Labor Courts in Dusseldorf and Bautzen. Timely clarification by the BAG would, however, be welcome in view of the considerable practical relevance of whether supplements or performance bonuses affect the minimum wage.

German Federal Labor Court ruling regarding transaction resulting in creation of a "Pensioners Company"

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With its ruling dated March 11, 2008 (Case No.: 3 AZR 358/06), the German Federal Labor Court (Bundesarbeitsgericht – BAG) had clarified that a "pensioners limited liability company" (Renter GmbH) which comes into existence by spinning off pension obligations must be sufficiently equipped with financial means to be able to fulfill the pension obligations it assumes. The BAG stated that the financial means must also enable adjustments to be made pursuant to § 16 Company Pension Act (Gesetz zur Verbesserung der betrieblichen Altersversorgung – BetrAVG) as well as the current pensions to be paid. Insufficient financial means can lead to the pensioners claiming compensation. The BAG has now come to a surprising decision in its ruling dated June 17, 2014 (Case No.: 3 AZR 298/13, DStR (Deutsches Steuerrecht – German fiscal law) 2014, page 2350), that such requirements do not apply to capital if the pensioners company did not come into existence through the pension obligations themselves being transferred but ("vice versa") by the entire business operation being transferred to another group company pursuant to § 613 a German Civil Code (Bürgerliches Gesetzbuch – BGB) with only the pension obligations towards the pensioners remaining with the transferring enterprise. Pursuant to the BAG ruling the seller could also cite insufficient capacity for adjusting company pensions pursuant to § 16 Subsection 1 and 2 BetrAVG in such a case when the pensioners company was not equipped so that it was also in a position to make the adjustments foreseen by law.

I. Facts of the Case

The plaintiff filed for payment of a company pension which was adjusted pursuant to § 16 BetrAVG since he had been refused the adjustment of his company pension with reference to his former employer, a group insurance company, not having the economic capacity to make the adjustment of his company pension. After the plaintiff had retired, the corporate group had been restructured whereby the company where he had last been employed transferred its business sector with the associated assets to several successor companies. The employment relationships of the active employees were transferred to these companies pursuant to § 613a BGB and only the pension obligations towards the company pensioners and the vested pension entitlements of employees who had left the company remained with the company which in future no longer employed any of its own active employees. Its business activities were then limited to the management of its own assets.

II. Decision

The BAG initially ascertained that so-called pensioners companies generally also had to examine the possibility of adjusting company pensions pursuant to § 16 Subsections 1 and 2 BetrAVG whereby they are not obliged to raise the funds for the adjustment of the company pensions from their assets. However, pensioners companies or winding-up companies must also be granted an appropriate equity yield rate corresponding to the current yield of public-sector bonds. There is no reason for a premium of 2 % as is applicable to operational trading companies whose equity invested in the company is subjected to greater risk.

However, the BAG is of the opinion that a company owing pensions which transfers its operative business to a buyer by means of a transfer of an undertaking (and thus becomes a pensioners company) and which later cites insufficient capacity (because not enough assets were left in the pensioners company so that it was also in a position to make the adjustments foreseen by § 16 Subsections 1 and 2 BetrAVG) does not act unlawfully per se.

If the company owing pensions becomes a pensioners company through selling its operative business to a buyer by means of a transfer of an undertaking and if the pensioners company is not equipped so that it is also in a position to make the adjustments foreseen by § 16 Subsections 1 and 2 BetrAVG, the company pensioners cannot generally request an adjustment of the company pensions as compensation. The employer which held the pension obligations was in this case not obliged to equip the pensioners company so that it was also able to make the adjustments foreseen by law as well as to pay the current company pensions.

Such an obligation did not result from § 613 a BGB. The principles which the BAG had developed to equip a pensioners company where the pension obligations had been transferred by means of a spin off pursuant to the German law regulating the conversion of companies (Umwandlungsgesetz – UmwG) were not applicable to a pensioners company which came into existence by transferring its operative business to a buyer by means of a transfer of an undertaking. Said principles were based on a change in the legal entity owing the pensions in connection with spinning off the pension obligations. After the transfer the pensioners company as the new company owing the pensions had not only to pay the current pensions but was also obliged to examine the possibility of an adjustment pursuant to

§ 16 Subsections 1 and 2 BetrAVG and could dismiss an adjustment if its own economic situation did not allow it. There was therefore the risk that the possibilities of the UmwG would be used to transfer the pension obligations to an insufficiently equipped company and therefore harm the interests of those entitled to pensions which were worthy of protection. There was no comparable risk, however, if the former employer and – subsequent – company owing the pensions sold its operative business to a buyer by means of a transfer of an undertaking since the pension obligations remained with the original company owing the pensions.

III. Practical Advice

With its decision the BAG clarifies the question whether the same standards apply to equipping a pensioners company which came into existence by transferring the operative business as those which apply to a pensioners company which came into existence through a spin-off and negated it. In future when thinking about separating pension obligations in a corporate group, there will therefore probably be considerations to transfer the operative business to another group company rather than the pension obligations themselves. It will probably not matter here whether this happens by means of an asset deal or a spin-off pursuant to the UmwG since the BAG clearly focused in its different assessment of the obligations to equip the company on the fact that there was not a change in the legal entity owing the pensions. It should therefore suffice if enough financial means remain in the original company to fulfill the pension obligations but without being able to adjust them pursuant to § 16 Subsection 1 and 2 BetrAVG. It remains to be seen, however, whether the BAG will revise its decisions if this alternative method is abused.

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