INTERNATIONAL BRIEFING

Dear reader,

Welcome to the Autumn 2019 edition of our International Briefing.

While the Brexit date is fast approaching, it is still not possible to anticipate what precisely will be agreed, if anything. Nevertheless, you must prepare your business for the day when the UK becomes a third country from an EU perspective. We therefore would like to remind you of the Brexit related commercial and corporate law issues.

At the end of July, the EU provided guidance on the participation of third-country bidders and goods in the EU procurement market. You will find an overview of this new guidance in this edition.

If you are involved in the cross-border sale of goods, you should be aware of the restrictions resulting from EU antitrust law. We provide high-level information to help you make sure your business is compliant.

We provide also updates with respect to the planned legislative reform of real estate transfer tax in share deals, on corporate social responsibility matters, as well as on the case law to be aware of if you plan to merge an overindebted limited liability company with another previously solvent limited liability company in Germany.

If a merger has to be notified to the EU Commission and an interim buyer is used for the acquisition, the interim acquisition itself requires merger control clearance under specific circumstances. We look at the fine line between so-called warehousing and gun-jumping.

Moreover, you should bear in mind that group parent companies are liable for the cartel damages caused by their subsidiaries. According to a recent judgment of the European Court of Justice, the entities liable for cartel damages are to be determined on the basis of EU law.

Last but not least, we are proud to announce that the leading German economy weekly *Wirtschaftswoche* ranked BEITEN BURKHARDT in the top tier of the best legal firms in the field of Mergers & Acquisitions for 2019.

We hope that you will find the information provided helpful in your daily business.

Best regards,

Dr Knut Schulte
Head of the Dutch Desk

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Brexit – The United Kingdom lost and business risks significantly increased

The turmoil caused by the referendum on leaving the European Union is far from over. Therefore, our advice (see our last article on Brexit in the International Briefing of December 2018) still holds true: you must prepare your business for the day when the UK becomes a third country.

Brexit may cause the UK to become a third country immediately (so-called hard Brexit) or after a transitory period (in case the EU

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and the UK enter into a Withdrawal Agreement). In either case, the crucial issue of the future trading framework between the EU and the UK remains unresolved. The Withdrawal Agreement does not contain rules for the future trading framework but allows for a transitory period: In this period, the UK would be treated in a similar manner to an EU country and there would be time to agree on the future trading framework. If, however, the UK immediately becomes a third country, the disruption on trade would be straight away.

At this time, it is not possible to anticipate what precisely will be agreed, if anything. This entails serious risks and challenges for your business and we refer to our earlier advice.

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Guidance on the participation of third country bidders and goods in the EU procurement market

On 24 July 2019, the European Commission (Commision) published its Guidance on the participation of third country bidders and goods in the EU procurement market, which aims to foster fair competition and a level playing field in the internal market in the area of public procurement. This should reduce distortions in European procurement markets and strengthen the EU's competitiveness by ensuring that the same, or equivalent standards and requirements apply to both EU and third country bidders.

The Guidance follows the Commission Communication of 2017 "Making Public Procurement work in and for Europe" and a communication from earlier this year on EU-China relations. The Guidance is the first action adopted of the ten set out in the Joint Communication of March 2019 to the European Parliament, the European Council and the Council on EU-China relations.

The EU has the largest open procurement market and therefore a strong interest in reciprocal access to markets of other countries as well as protecting EU standards. In this context, the Commission is examining how to address the distortive effects of foreign State ownership and State financing of foreign companies on the EU internal market, and requests the European Parliament and EU Member States to adopt the international procurement instrument. Finally, the Commission intends to review the entire legal framework before the end of the year with a view to identifying shortcomings and obtaining a more level playing field between EU and non-EU companies participating in tender procedures.

The Guidance focuses on four areas: (1) access of third country bidders and goods to the EU procurement market, (2) abnormally low tenders, (3) quality standards as a strategic approach to public procurement, and (4) practical assistance by the Commission. This article summarises the most important points.

1. ACCESS OF THIRD COUNTRY BIDDERS AND GOODS TO THE EU PROCUREMENT MARKET

The Guidance recalls that the EU is actively pursuing the reciprocal opening of EU and third country procurement markets making commitments under several international agreements. The most important one is the Agreement on Government Procurement (GPA), which was concluded in the World Trade Organisation (WTO) and gives 19 other participating WTO partners reciprocal access to the EU's procurement markets. In addition, the EU has concluded free-trade agreements (FTAs) with several countries across the globe.

However, the EU procurement market is not opened to companies from other countries than the signatories. Therefore, if public buyers receive a tender from a non-EU economic operator, they should verify whether the tender is covered by the GPA or a FTA in order to determine whether the bidder has secured access to this procurement. Moreover, the agreements contain coverage schedules that determine which public entities have to comply and to what extent their procurement of goods and services must be open to the participation of third country bidders. Thus, public buyers have to check both, whether the tender is subject to an international agreement in general, and whether the agreement covers the specific procurement.

If EU Member States plan to award contracts based on intergovernmental agreements with third countries, which have different procurement regimes compared to the European framework, those EU Member States should consider that the procurement rules of the intergovernmental agreement must meet the conditions laid down in the Treaty on the Functioning of the European Union (TFEU) and the directives, especially the principles of transparency, equal treatment and non-discrimination, and that the agreement must be notified to the Commission. Otherwise, the tender procedures are not exempt from the EU public procurement legislation.

Particular rules apply to the utilities sector and to defence and security. By way of example, a tender for utilities submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries (not signatories of the GPA or an applicable FTA) exceeds 50% of the total value of the products constituting the tender. Therefore, public buyers have to verify the origin of the products constituting the tender.

2. ABNORMALLY LOW TENDER

The Guidance emphasises the importance of public buyers identifying, investigating and rejecting abnormally low offers. It highlights the importance of the public buyer paying due attention to the expected price or costs of goods or services, knowing the market, being aware of the price of previous procurements, and consulting with specialists and other procurers. As the directives do not provide a definition of or method to calculate an abnormally low tender, public buyers have to consider all the parameters of the offer. This includes the reasonability of the calculation of the offer and the expectation that the bidder is able to perform what it has promised for the expected price, as well as national met-

hods assisting with the identification, assessment, and evaluation of the tender. The public buyer must request information from the bidder and ask the economic operator to demonstrate the soundness of the technical, economic or legal assumptions or practices underlying the tender. The Guidance recalls that Article 69 para. 3 of Directive 2014/24/EU provides that public buyers are obliged to reject a tender in cases where they establish that the abnormally low price, or costs, offered results from the bidder's non-compliance with mandatory Union or national law, collective agreements or international provisions in the areas of social, labour or environmental labour law. If the public buyer is not convinced that the bidder will be able to execute the contract at the price, or cost, offered and in accordance with the tender documents and all applicable legal requirements, it may reject the tender without having to prove this conviction.

3. QUALITY STANDARDS AS A STRATEGIC APPROACH TO PUBLIC PROCUREMENT

The Guidance stresses the fact that currently more than half of the procurement procedures still use the lowest price as the only award criterion instead of using quality considerations, which would, on the one hand, allow public buyers to procure more sustainable and innovative products and services, and, on the other hand, help to guarantee compliance with high environmental, social and labour standards. Therefore, the Guidance calls for public buyers to use procurement as a strategic tool to foster societal goals, to ensure that EU and third county bidders are held to the same standards, to define their tender requirements using technical specifications, exclusions, selections, and award criteria to facilitate high-quality standards, to use contract performance clauses, to ensure that the quality standards are implemented, and to introduce and implement effective monitoring mechanisms. The Guidance highlights that this applies irrespective of the origin of the bidder, product or service.

4. PRACTICAL ASSISTANCE BY THE COMMISSION

Finally, the Guidance provides information on practical assistance to public buyers and EU Member States, such as the Commission Helpdesk, the notification process for large infrastructure projects, a competence centre with support tools, and specific guidance on innovation procurement, green public procurement etc.

CONCLUSION

The Guidance addresses public buyers and offers them assistance by providing them with detailed information about what should be taken into consideration in the organisation of public procurements. It promotes the use of quality considerations rather than focusing on the price, and stresses the importance of same quality standards, criteria and requirements, regardless the bidder's place of origin in order to ensure a level playing field in the internal market in the area of public procurement.

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Cross-border sales restrictions and antitrust law

In principle, companies are free to choose their distribution structure. However, distribution contracts that delineate country borders and limit the rights of consumers to purchase goods in another EU Member State can infringe EU competition law.

Recently, the European Commission (Commission) has imposed fines in a number of decisions for restrictions on cross-border sales: on 24 July 2018, the Commission imposed fines of EUR 10 million against electronics manufacturer Pioneer; the clothing company Guess on 17 December 2018 was charged fines of nearly EUR 40 million; on 25 March 2019, Nike was fined to an amount of EUR 12.5 million and on 9 July 2019, fines totalling EUR 6.2 million were imposed on the Japanese company Sanrio.

The Commission decided that these restrictions applied on traders, which prevent them from selling products in another EU Member State, infringe antitrust law. Moreover, they contribute to the restoration of the partitioning of national markets and result in higher prices and less choice for consumers.

ANTI-COMPETITIVE CROSS-BORDER SALES RESTRICTIONS

In its decisions, the Commission classified both direct and indirect restrictions as anti-competitive.

In the Nike case, the Commission reprimanded the company for contractual clauses that expressively prohibited active and passive sales outside of the contractual territory (or imposed double royalties on out-of-territory sales), for obligations to refer out-of-territory sales to Nike and for clauses clawing back royalties and revenues deriving from out-of-territory sales. Limitations of the language used on "Hello Kitty" branded merchandise in the Sanrio case were also considered to be anti-competitive.

In addition, the Commission categorised the following as infringements of the applicable antitrust laws: restrictions on authorised retailers to sell online and restrictions on online search marketing (Guess); threatening licensees with the termination of their licence agreements (Nike) or the non-renewal of contracts (Sanrio) in the case of infringements of geographic limitation clauses; and carrying out audits to ensure compliance with the restrictions (Sanrio). The same is true for clauses, which require a contractual partner to enforce restrictions for out-of-territory sales. In the Guess and Pioneer decisions, the Commission also found that both companies had engaged in anti-competitive resale price maintenance.

LEGAL BACKGROUND

Agreements between undertakings, which prevent, restrict or distort competition within the EU single market, infringe Article 101 para. 1 Treaty on the Functioning of the European Union (TFEU), unless an exemption applies in accordance with Article 101 para. 3 TFEU. Furthermore, the Vertical Block Exemption Regulation (VBER) applies to agreements between manufacturers and distributors. The Technology Transfer Block Exemption (TTBER) applies to technology transfers between licensees and licensors.

According to the Commission, the prerequisites for an exemption were not fulfilled in any of the above cases. There is no exemption for certain types of competition restrictions (so-called "hardcore restrictions"). Hardcore restrictions include, e.g., resale price maintenance (Article 4 (a) VBER), the restrictions on active or passive sales (Article 4 (c) VBER) and the restriction of cross-supplies between distributors within a selective distribution system (Article 4 (d) VBER). There are very narrowly defined exemptions to restricting the territory into which or the customers to whom the contractual products may be sold (Article 4 (b) VBER).

At present, the Commission is considering the fate of the VBER, which will apply only until 31 May 2022. Some modifications for new market developments, especially the increasing importance of online distribution and online platforms, can be expected.

The Regulation addressing unjustified geo-blocking (Geo-blocking Regulation), which has applied since 3 December 2018, should also be borne in mind. This Regulation prevents discrimination in cross-border sales between vendors and customers based on the customer's nationality, place of residence or place of establishment. In contrast to Articles 101 and 102 TFEU, the Geo-blocking Regulation requires the EU Member States to adopt provisions imposing penalties for infringements. Any territorial measures should therefore be assessed not only against their compatibility with EU competition law, but also against their compliance with the Geo-blocking Regulation.

CONSEQUENCES FOR PRACTICE

Restrictions in accordance with Article 101 para. 1 TFEU are possible under strict conditions. The European Court of Justice (ECJ) stated this in the Coty case in 2016. This decision outlined the compatibility of a selective distribution system with EU competition law. According to the ECJ, a qualitative selective distribution system does not fall under the prohibition of Article 101 para. 1 TFEU if (i) it is necessary to preserve the quality and ensure proper use of the product, (ii) the retailers are selected on the basis of objective criteria to ensure the quality, and (iii) these criteria are established in a uniform and non-discriminatory manner.

However, the risk of a competition law infringement remains. This could result in high fines. The distinction between what is permissible and what infringes EU law can be difficult. Since the introduction of the directly applicable exception system, undertakings are required to assess the legality of their actions and agreements and bear the risk of an inaccurate assessment. The most recent decisions and the imposition of fines make it clear that special care must be taken with respect to any possible restrictions of cross-border trade.

This makes it vital to thoroughly assess distribution systems against restrictions of cross-border trade. Indispensable is the examination of the compatibility with both EU competition law and the Geo-blocking Regulation.

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The fine line between "warehousing" and "gun-jumping"

If a merger has to be notified to the EU Commission (Commission) and an interim buyer is used for the acquisition (so-called warehousing), the interim acquisition itself requires merger control clearance. If the sale to the interim buyer is completed and implemented before the Commission has issued a clearance decision, this will constitute an infringement of the notification and standstill obligations under merger control law.

1. FACTS OF THE CASE

On 12 August 2016, Canon submitted a notification to the Commission of its planned acquisition of Toshiba Medical Systems Corporation (TMSC). The Commission unconditionally cleared the merger on 19 September 2016.

However, before notifying the proposed acquisition to the Commission, an interim buyer, which was independent from both Canon and Toshiba, acquired 95% of the share capital in TMSC for a purchase price equivalent to EUR 800. Simultaneously, Canon acquired the remaining 5% of the share capital together with a purchase option for the share package held by the interim buyer for a total price of EUR 5.28 billion. After the Commission cleared the transaction, Canon exercised its share options to then hold 100% of the shares in TMSC as a result.

2. DECISION

On 27 June 2019, the Commission imposed fines of EUR 28 million against Canon. In its reasoning, the Commission stated that both steps of the transaction formed a single takeover process. Although Canon had acquired full control over TMSC only in the second step, the first step already contributed to the acquisition of control and was necessary for Canon to be able to gain control in the second step. As the first step of the transaction was carried out before the transaction was notified to and cleared by the Commission, the takeover by the interim acquirer breached the notification and standstill requirements under competition law.

3. ASSESSMENT

This decision continues a trend that started in 2008: even if it was previously accepted under certain circumstances, since the publication of its jurisdictional notice, the Commission has generally viewed "warehousing" in M&A transactions as one single concentration. The standstill requirement therefore applies to the first of both transaction steps, i.e. the parking of the target company with an interim buyer.

Canon has already announced that it intends to appeal the fine. The appeal is likely to be based on an ECJ judgment of May 2018, which held that the standstill provision under EU merger control law is only infringed if the transaction "*in whole or in part, in fact or in law, contributes to the change in control of the target undertaking*". A number of "warehousing" forms can actually be subsumed under this formulation. That is why it is important to exercise great care when choosing such structures for M&A transactions.

The decision should also be viewed in light of the Commission's greater pursuit of infringements of EU merger control law. In April 2018, the Commission fined the telecommunications company Altice EUR 124.5 million. The Commission accused the Dutch company of exercising decisive influence over PT Portugal before receiving merger control clearance. Fines were also imposed on Facebook (2017) and General Electric (2019) for providing incorrect and misleading information.

4. CONCLUSION

The prohibition against the implementing of a notified transaction before it is cleared by the relevant Competition Authorities is complex and must be taken into account when structuring transactions. Only those who have selected a completely watertight approach from the very start and for all steps of the transaction will avoid substantial fines from the competition watchdogs.

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Update: Reform of real estate transfer tax for share deals – draft bill introduced into the legislative procedure on 9 August 2019

On 31 July 2019, the German Federal Cabinet (*Bundeskabinett*) agreed on revisions to real estate transfer tax for so-called share deals and adopted a draft bill for an "Act on the Amendment of the Real Estate Transfer Tax Act" (see on this our article in the International Briefing of March 2019). The amendments will generally enter into force on 1 January 2020.

The revision of the real estate transfer tax, which has been formally separated from the German Tax Act 2019 and transferred into a separate legislative process, has the aim of curbing the misuse of tax structures in real estate transfer tax for high priced real estate transactions through the transfer of shares in companies which hold real estate (so-called share deals). Despite significant criticism, the elements of the draft have not been reworked and have found their way into the draft bill.

In addition to reducing the shareholding threshold that gives rise to real estate transfer tax from 95% to 90%, the bill still provides for an extension of the period under review from five to ten years, in specific cases to 15 years. In addition, for changes in shareholders in stock corporations that result in a shareholding of at least 90%, the bill provides an additional situation which, together with the basis for calculating the tax applicable to property acquisitions in conversion cases during the retroactive period and the lifting of the limit on administrative fines, is designed to "*stem the use of abusive tax structuring with respect to real estate transfer tax*" (according to the rationale on page 8 of the draft bill). The question whether the heavily criticised share deal transaction is actually an abusive tax structuring should be critically examined since the structure is mentioned within the legal framework of the current German Real Estate Transfer Tax Act (*GrEStG*). The expansion of real estate transfer tax with respect to share deals has been discussed and criticised at length from both legal and economic aspects.

1. LEGAL CONCERNS

The extension of the real estate transfer tax and its possible unconstitutionality has been discussed at length from a legal perspective.

- **Reducing the shareholding threshold may be unconstitutional**

The reduction of the shareholding threshold raises the question whether a shareholding of 90% in a company that owns real estate is economically comparable to a 95% shareholding, and whether the assumption that this asset position is comparable to ownership of the entire real estate is justified. In any case, it is doubtful whether the retention of 10% of the shares can still be called a "tiny shareholding", which would justify an asset treatment that is the same as that of full ownership. Progressively extending the simulated acquisition contradicts the real estate transfer tax system; real estate transfer tax is a transfer tax applicable to the acquisition of real estate and not shares. Critics also expressly refer to the fact that the Federal Republic of Germany does not have the power to legislate on matters of capital transfer tax.

- **Unconstitutionality of the change in shareholders of a stock corporation**

According to the new § 1 para. 2b German Real Estate Transfer Tax Act (*GrEStG*) such changes to the shareholding of a stock corporation shall be subject to the real estate transfer tax, which occur within a ten year period in a scope of 90% of the shares without a shareholder necessarily reaching a specific shareholding threshold. This amendment has been the subject of significant criticism in light of constitutional requirements. On the one hand, it raises the question about the value of levying tax in circumstances, which are not directed at the transfer of the ownership of real estate, and which are therefore are not comparable to what the legislators view as abusive share deals or the defined aim of the legislative change, but will still be subject real estate transfer tax under the changes. In its current form, § 1 para. 2b of the draft bill of the German Real Estate Transfer Tax Act (*GrEStG*), stock market trade in shares in stock corporations that own real property could even trigger the real estate transfer tax. Initial calculations show that approximately every three years real estate transfer tax will be imposed on companies listed on the stock exchange as a result of the new rules. Consequently, contrary to the constitutional law requirements, the norm for typecasting such share deals as an abuse must be considered as not fulfilled.

On the other hand, there is a threat of deficits with respect to the determination of the tax and tax level and the enforcement. Due to the anonymised shareholding structures and the high turnover frequency, is is almost impossible for corporations listed on the stock exchange to monitor changes in shareholders. Accordingly, it is also almost impossible to establish when the circumstances requiring the payment of the real estate transfer tax have been fulfilled. Furthermore, enforcement of the provisions will result in discrimination against domestic stock corporations as the tax authorities will not receive the necessary information from foreign stock corporations.

As a result, those who may be subject to the real estate transfer tax will have the burden of proving that the requirements for taxation are fulfilled and will be obligated to provide the necessary information to the tax authorities. Failure to provide the necessary information in time may result in penalties or administrative fines, and can even lead to criminal penalties.

In addition, the real estate transfer tax can, in part, be very difficult to calculate for stock corporations, especially if they cannot foresee when an event occurs, which triggers the imposition of tax. Therefore, § 1 para. 2b German Real Estate Transfer Tax Act (*GrEStG*) infringes the principle that requires the necessary facts to exist for the tax to be imposed.

Despite this criticism, a discussed interim stock exchange clause might not be included in the draft bill.

- **Insufficient adjustment of the tax exemption rules to take into account the changes to the act**

Until now, the existing tax exemption rules have also not been sufficiently adjusted to take into account the proposed changes on real estate transfer tax. In certain cases, this will lead to an additional or even double tax burden, which is not in line with the true legislative aim, as set out in the German Government Coalition Agreement, namely the curbing of share deals that are understood to be abusive.

2. ECONOMIC EFFECTS

The new real estate transfer tax rules for share deals have also been criticised because their implementation could cause long-term damage to Germany's status as a business location.

It is feared that Germany will become less attractive for real estate investment. Building contractors and real estate developers, in particular, use the design options and often transact their real estate transactions via share deals. The extended holding periods and reduced shareholding thresholds will mean that capital locked up for longer; this capital will be in shortage for subsequent projects.

At a glance, the difficult to control tax burden on companies resulting from the extended new real estate transfer tax rule is also not beneficial to Germany's status as a business location. In comparison to other European countries, Germany is alone in forging a path with the planned taxation of share deals.

3. SUBSEQUENT LEGISLATIVE PROCEDURE AND CONCLUSION

As expected, the real estate transfer tax reform has been split from the draft bill of the 2019 German Tax Act and has been transferred to a separate legislative procedure due to the complexity of the issue. The draft bill was introduced on 9 August 2019 into the legislative procedure. The German Federal Council (*Bundesrat*) gave i.a. the following recommendations due to the deliberations in its committees on 20 September 2019:

- inclusion of a so-called stock-exchange clause (*Börsenklausel*);
- amendment of the group clause (*Konzernklausel*);
- amendment of the transitional scheme.

These recommendations have now been forwarded to the German Federal Cabinet (*Bundeskabinett*) and after a first reading in the German Federal Parliament (*Bundestag*) there will be a public hearing on 14 October 2019.

It remains to be seen whether and when the legislator will completely implement the rules, despite the significant criticism from experts.

If, despite this criticism, the rules are implemented, it can be assumed that share deals will become more unattractive for real estate transaction and the use of such structures will, therefore, be curbed, fulfilling the legislative aim.

In the future, the parties to a real estate transaction must examine more closely whether a share deal is still a worthwhile tax structure. Through the extension of the holding period and the reduction of the shareholding threshold, the cost savings in real estate transfer tax must again be weighed up against the rights of minority shareholders and the costs associated with the use of real estate company for a share deal.

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Liability of a shareholder for the merger of an insolvent limited liability company with a previously solvent limited liability company

In its judgment of 6 November 2018 (ref. II ZR 199/17), the Federal Supreme Court of Germany (*Bundesgerichtshof, BGH*) has ruled on the shareholder's liability pursuant to the provisions of the destruction of economic basis (*Existenzvernichtungshaftung*) and the differential liability (*Differenzhaftung*) in the case of merging an insolvent with a previously solvent limited liability company (*GmbH*) by absorption within a capital increase.

1. FACTS

The defendant was the sole shareholder and CEO of the overindebted and insolvent A-GmbH and in addition held the majority of the shares of the previously solvent B-GmbH. The companies – the A-GmbH as the transferring entity – signed a merger agreement. Half a year later, insolvency proceedings were instituted with respect to B-GmbH's assets. The claimant, B-GmbH's insolvency administrator, requested monetary compensation from the defendant, because the A-GmbH was unable to meet its financial obligations at the time of signing the merger agreement. The insolvency administrator claimed that the defendant should be held liable on the basis of the destruction of the economic and the difference liability.

2. GROUNDS OF THE JUDGMENT

NO LIABILITY PURSUANT TO THE PROVISIONS OF THE DIFFERENCE LIABILITY

In accordance with its jurisprudence to the merger of stock corporation (*Aktiengesellschaft, AG*) by capital increase, the BGH's second senate states in an obiter dictum that the principles of the difference liability are not applicable in shareholders of the transferring legal entity.

The shareholder of the transferring company is only liable pursuant to section 55 of the German Transformation Act (*Umwandlungsgesetz, UmwG*) in combination with sections 9 and 56 paragraph. 2 of the German Limited Liability Companies Act (*GmbH-Gesetz, GmbHG*), if the value of the promised contribution does not reach the amount of the initial contribution and the shareholder at the same time is responsible for the value of the transferring legal entity pursuant to a capital cover commitment.

The BGH does not support the argument of the legal literature that the difference liability is applicable because the UmwG does not negate its applicability expressly. The BGH argued that in the case of a merger of a German Limited Liability Company, the shareholder normally has not provided a capital cover commitment, which would be necessary to establish any liability. Likewise, such a commitment cannot be deduced from the merger agreement (section 4 para. 1 sentence 1 UmwG) or the merger resolution pursuant to section 13 para. 1 sentence 2 UmwG.

LIABILITY PURSUANT TO THE PROVISIONS OF THE DESTRUCTION OF THE ECONOMIC BASIS

However, the BGH affirmed the liability of the defendant due to the Existenzvernichtungshaftung pursuant to section 826 of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) and furthermore, extended its applicability.

The BGH argued that there is a destructive interference, if the shareholders immorally withdraw the assets of the company to pay its debts and therefore cause or deteriorate insolvency. In this respect, the shareholders have to act at least with conditional intent.

In particular, the BGH states that an asset deprivation is not only to be understood in accessing the assets but also in an increase in liabilities. As a result, it doesn't make any difference for the creditors whether the recoverable assets of the company are reduced by incurring more debts or by withdrawing the assets.

In the BGH's opinion, the shareholder also violated moral principles with his behaviour. So far such behaviour has only been assumed in the withdrawal of assets that led to the benefit of the shareholder or a third party. From now on, it is also sufficient, if assets are transferred in disregard of the principles of separation of assets and the capital commitment, if this causes the acquiring company's insolvency.

This is not precluded by the fact that the merger did not result in an increase in assets either among the shareholders or among third parties. Although the BGH clarified that a mere impairment to the company assets is insufficient; in the present case, the defendant had used the merger for avoiding insolvency proceedings.

At the same time, the BGH stressed that mergers, as a restructuring measure, are not precluded generally in time of a company crisis. However, the merger should not question the existence of the acquiring company.

3. CONSEQUENCES FOR PRACTICE

Consequently, in order to counter the risks of an extended liability for the destruction of the economic basis, legal advisors and notaries in particular, must carry out a stricter assessment of the existing liabilities of the transferring company and the associated risk of the acquiring company's possible insolvency.

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Update on Corporate Social Responsibility: US companies break away from strict shareholder value approach while binding CSR due diligence obligations are on the rise

1. US COMPANIES SAY GOODBYE TO A STRICT SHAREHOLDER VALUE APPROACH

In the 1970s, Nobel Prize winner for economics, Milton Friedman, wrote the following about Corporate Social Responsibility: "*There is one and only one social responsibility of a business – [...] to increase* its profits." Companies have to follow the law; beyond that, their **purpose** is to **create profits for shareholders**. With this, Friedman expressed the so-called shareholder value approach for the first time.

This was subsequently the leading approach in the United States for many years. In the 1990s, the influential US **Business Roundtable** (BTR), to which the CEOs of around 200 prominent US companies belong, confirmed this approach with the following statement: "*The paramount duty of management and boards of directors is to the corporation's stockholders.*" "*The interests of other stakeholders are relevant as a derivative of the duty to stockholders.*"

The new "*Statement to the Purpose of a Corporation*"

A good 20 years later, the BTR said goodbye to this concept. In the new "*Statement to the Purpose of a Corporation*", it modernised the principles on the role of the company (see https://opportunity.businessroundtable.org/ourcommitment/). The CEOs no longer view their duty as solely a duty towards shareholders. Instead, they affirm a **fundamental commitment** to **all stakeholders**. This lies in:

- creating value for **customers**;
- investing in **employees**;
- dealing fairly and ethically with **suppliers**;
- supporting the **regions** in which the company is active and protecting the **environment**; and
- creating **long-term added value for shareholders**.

As justification for this modernisation, the CEOs cited: "*We know that many Americans are struggling. Too often, hard work is not rewarded and not enough is done to help employees adapt to the rapid pace of economic change. If companies fail to recognise that the success of a system is dependent on integrative long-term growth, many will justifiably question what the role of large employers is in our society.*" This Statement was signed by the CEOs of companies such as Apple, Amazon, Bayer USA, Blackrock, BP, Exxon, Ford, GM, Goldman Sachs, IBM, JP Morgan, Pepsi, Pfizer, Siemens USA, UPS and Walmart, to name just a few.

THE GERMAN LAW PERSPECTIVE

From a German law perspective, these developments could be considered unspectacular and, legally, almost self-evident. For German companies, the long prevailing view is that the stakeholder approach – which has now been adopted by the BTR – is definitive, not only in light of the 'link to the social environment' that is embodied in the ownership of shares in accordance with Article 14 para. 2 of the German Constitution, as emphasised by the Federal Constitutional Court (*Bundesverfassungsgericht*). "*Target conception that takes into account a plurality of interests*" (*Interessenplurale Zielkonzeption*) is what the German lawyers for stock corporation law call this.

Of note is the fact that numerous prominent US CEOs have explicitly professed this understanding of their duty to stakeholders. Even more noteworthy – if these statements are allowed – is the justification that they provide for this approach.

INCREASING ROLE OF CSR

Furthermore, this confirms that **CSR aspects are playing an increasingly important role** in **business decisions** where a broad business judgment rule applies. Recent examples of this approach involve companies that have introduced measures to become CO2 neutral (or have already reached this target), as well as the six largest European banks, which announced at the end of 2018 that they would be orienting their loan decisions based on factors, which are relevant to climate. In other words, not just binding (i.e. statutory) CSR due diligence obligations are on the rise (for more information, see below under 2).

In any case, the shareholder value and stakeholder approaches are not irreconcilable opposing approaches. Decisive in this respect is the fact that the US CEOs explicitly referred to the creation of long-term added value for shareholders. Not all short-term profit also creates long-term added value for shareholders. On the contrary, the assumption suggests that sustainable corporate governance contributes to ensuring and increasing the long-lasting profit of a company. From a legal perspective, this approach comes full circle and we arrive back at the German stock corporation law obligation on the executive board to ensure the sustained existence and profitability of the company.

In addition, the fast increasing number of investors focussing on sustainable investments leads to the realisation that shareholder interests are not limited to profit "at any price". If companies don't wish to risk blocking their access to such investors, they should orient their activities accordingly. The issue of sustainable investors is already being viewed in the finance sector as the big issue of the 21st century. This, in turn, is based on the assumption that taking sustainability factors into account has a positive effect on returns. In addition, at a political level, the EU Commission defined the greater consideration of sustainability criteria on the financial market, in particular, as a central aim of its Sustainable Finance Action Plan.

All in all, the following is retained: executives and executive boards of German companies would do well to pay careful attention to Corporate Social Responsibility in their company and not to neglect these aspects. This is unmistakably expressed in the new second subsection of the foreword to the German Corporate Governance Codex 2019: "*By their actions, the company and its governing bodies must be aware of the enterprise's role in the community and its societal responsibility. Social and environmental factors influence the enterprise's success. In the enterprise's best interests, Management Board and Supervisory Board ensure that the potential impact from these factors on company strategy and operating decisions is identified and addressed.*"

On this issue, the Rationale states: "*Paragraph 2 highlights the societal responsibility of companies and their governing bodies, the importance of social and environmental factors for the company's success, and the requirement to consider risks and opportunities in the strategy.*"

2. BINDING CSR DUE DILIGENCE OBLIGATIONS ON THE RISE

Corporate Social Responsibility is becoming increasingly important. Things are developing at breath-taking speed (see on this the article "Rapid developments in Corporate Social Responsibility" which was published in the September 2018 edition of our International Newsletter). A current account shows that the list of countries with binding CSR due diligence obligations for companies is growing. This also impacts upon German companies. The number of CSR obligations, which potentially have to be taken into account, is increasing. There is evidence that there will be more such obligations in the future. Will it soon be the hour of the "CSR Compliance Manager"?

THE EU

Throughout the EU, the **Guidelines on non-financial reporting** already apply to large companies. Recently, the EU Commission adopted new **Guidelines for reporting climate-related information** (Official Journal C 209/01 of 20 June 2019). This implemented one point of its Action Plan: Financing Sustainable Growth from 2018. The Guidelines – which are explicitly non-binding – are still directly relevant for all undertakings, which are required to report. This includes numerous banks and insurance companies (further Guidance for these entities can be found in Annex I of the guidelines). Yet the Guidelines also provide valuable guidance for companies that are not required to report on their management of the climate-related opportunities and risks arising in their business activities. In addition, the Guidelines allow us to anticipate which requirements investors, banks and insurance companies may place on companies in the future. The EU Commission's Guidelines are based on the recommendations of the *Task Force on Climate-related Financial Disclosures* (TCFD) established by the Financial Stability Board of the G20 in 2017; the Guidelines are directed at companies active in the financial sector and all other companies in general. In the wake of its Action Plan: Financing Sustainable Growth, the EU Commission is also intending to assess whether companies need **to be required**, by law, to develop and publish a **sustainability strategy** (including appropriate due diligence obligations and measurable sustainability targets). In any case, as of 1 January 2021, binding due diligence obligations apply with respect to supply chains for EU importers of conflict minerals. In addition, a number of national laws may also be relevant to German companies.

THE NETHERLANDS

In May 2019, the Senate of the Netherlands adopted the **Child Labour Due Diligence Act** (*Wet Zorgplicht Kinderarbeid*). According to the draft bill, the explicit aim of the act is to anchor in law the requirement that companies, which sell goods or services on the Dutch market, must do everything in their power to prevent child labour being involved in the production of their goods and services. The Dutch Parliament already assented to the law in 2017.

The Dutch law defines child labour. It refers essentially to the "*Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*" from 1999 and the "*Convention concerning the Minimum Age for Admission to Employment*" from 1973. For any labour that is not performed within the territory of a signatory of the Convention, the law defines child labour as labour performed by

- persons, who are still subject to compulsory schooling or who are still **under 15 years**; and
- persons, who are still under **18 years**, where, due the nature or conditions under which it must be performed, the labour is likely to endanger health, security or morale;
- light labour by persons, who have turned 13, is not considered child labour providing that labour totals fewer than 14 hours per week (Article 2).

In order to prevent child labour, the Dutch law stipulates **obligations to make declarations, to investigate and to take action**:

- In the future, every company, which sells or supplies goods or services to Dutch consumers, must **declare** that it applies the due diligence, in line with Article 5 of the Dutch Act, in order to prevent said goods or services being produced using child labour. This applies not just for companies established in the Netherlands, but also for companies established in another country – and thus also for German companies, as soon as they supply goods or services to Dutch consumers for the second time within a year. A supervisory authority will publish the declarations of companies (Article 4). According to the legal definition, consumers include not only natural but also legal persons, which utilise or consume the goods or purchase the services (Article 1);
- Companies, which are required to make a declaration, must, in principle, **investigate** whether there are reasonable grounds for suspecting that child labour was involved in the production of the goods or services to be supplied;
- If there is such a suspicion, an **action plan** must be **developed and implemented** (Article 5). The Dutch Act does not specify a limitation of the due diligence obligation to the first link or links in the supply chain. The duty therefore relates to the whole supply chain.

If a company fails to fulfil its obligations to make a declaration and perform due diligence, it may face fines. Should companies fail to fulfil these duties for a second time within five years, the failure to fulfil the due diligence obligation designed to avoid the use of child labour will become a criminal offence; in the worst case, this can even result in imprisonment (Article 7).

Some of the details in the Dutch Act still need to be refined through implementing decrees. This includes the requirements that the due diligence assessment and, where necessary, the action plan have to fulfil (this should be established in consideration of the ILO-IOE Child Labour Guidance Tool), whether certain (e.g. small) undertakings are exempt from the Dutch Act, and when it will actually enter into force. The Dutch Act itself merely states that it will not enter into force before 1 January 2020.

The Dutch Child Labour Due Diligence Act is in line with the UK Modern Slavery Act of 2015, the French Due Diligence Act of 2017 and the Australian Modern Slavery Act of 2018.

FRANCE

The **French Due Diligence Act** (*loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*) has the broadest scope. The French Act directly addresses around 100 of the largest French companies and requires them to develop a "vigilance plan" (*plan du vigilance*). The plan must outline appropriate vigilance measures designed to identify risks and serious infringements of **human rights law** and the **fundamental freedoms**, or to the **health** and **safety of persons** or the **environment**. This applies to risks and infringements that stem directly or indirectly from the activities of these companies or the companies that they control, and also to risks that stem from the activities of subcontractors or suppliers, where these activities are carried out in connection with the business relationship between these subcontractors or suppliers and the companies. In this way, the French Act has an indirect impact on German companies, which have business relations with French companies that fall under the French Act.

The French Act expressly provides that, when certain conditions are fulfilled, claims can be brought against companies that fall under the French Act for damages which would not have occurred had the company exercised care when preparing and implementing its vigilance plan. According to media reports, the first such damages claim was recently brought against a French company.

UK

Companies which do business in the UK and have an annual turnover of more than GBP 36 million must provide a report, in accordance with the **UK Modern Slavery Act**, on the risks that arise with respect to slavery and human trafficking throughout their supply chain and which measures they have taken in order to prevent said risks. Until now, it has been sufficient to report that the company has not taken any steps in this respect.

Currently, an investigation commission is assessing whether the UK Modern Slavery Act needs reform. According to the commission, only 57% of the 19,200 companies, which are required to submit reports under the UK Modern Slavery Act, have actually submitted the required reports. One of the reasons often cited for this discrepancy is that the reporting obligations are not sufficiently enforceable. That is why the possible legal consequences of failing to comply with reporting obligations in the future are currently being discussed. These reform discussions are also relevant for German companies, which are active in the UK and are already required to submit a report or will be required.

AUSTRALIA

The **Australian Modern Slavery Act**, which entered into force in 2018, is similar to the UK Modern Slavery Act. It applies to companies with an annual turnover in excess of AUD 100 million. Undertakings concerned must provide a report within six months of the end of the financial year about the structure of the supply chain, the risks associated with modern forms of slavery and the measures taken to assess and combat these risks. The sole penalty for violating the Australian Modern Slavery Act is the publication of that information.

GERMANY

A comparable due diligence law has not yet been adopted in **Germany**. At the start of this year the Federal Ministry for Economic Cooperation and Development announced that it is working on a **draft bill for a sustainable value-added chain law**. According to the draft bill, companies will be required in the future to take appropriate measures in order to protect human rights within the supply chain. This announcement triggered some strong protests. These protests were somewhat surprising because the German Federal Government is currently assessing the implementation of the National Action Plan Business and Human Rights (NAP). In the 2018 German Government Coalition Agreement it states: "*Should the effective and comprehensive assessment of the NAP 2020 come to the conclusion that the voluntary commitment of companies is insufficient, we will adopt a national law and push for EU-wide regulation.*" This fits well with the EU Commission's announcement that it would be examining whether companies should be obliged to establish a sustainability strategy, as we mentioned in the introduction. Great importance is expected to be attached to climate protection. However, to calm down the discussion about establishing even further legal obligations the Federal Government recently declared to a parliamentary question that it will not further work on a sustainable value chain law until the monitoring of the NAP has been completed.

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Group liability for cartel damages claims

Parents are liable for their children; group parent companies are liable for the cartel damages caused by their subsidiaries. At the same time, legal successors are liable for the misconduct of their predecessors. This has long been the approach under the European antitrust law applicable to fines due to the very broad interpretation of the term undertaking under antitrust law. Now the European Court of Justice (ECJ) has held that the broad interpretation of the term undertaking also applies to the question of who, in addition to the company that actually committed the infringement, can be held liable for cartel damages.

1. THE *SKANSKA* CASE

The preliminary ruling in the Skanska case concerned the Finnish "sausage gap", i. e. a legal gap that takes its name from the German sausage cartel.

Sata-Asfaltti participated in a cartel on the Finnish asphalt market for many years. The Highest Administrative Court in Finland imposed fines on Skaska based on the economic continuity principle, because it took over and continued the economic activities of Sata-Asfaltti. Subsequently, injured parties sought compensation from Skanska for the damage suffered as a result of the excessive prices for asphalting works caused by the cartel. The Finnish civil court asked for a preliminary ruling on the question of whether and to what extent the broad definition of undertaking under antitrust law in cases concerning fines is also decisive for the question of who is liable to pay compensation in cartel damages claims.

2. JUDGMENT OF THE ECJ

The ECJ's response is clear: the entities liable for cartel damages are determined on the basis of EU law. The entity liable for damages is the undertaking within the meaning of Article 101 Treaty on the Functioning of the European Union (TFEU). The concept of "undertaking" must be interpreted as an autonomous concept under EU competition law, which means in particular that it should be interpreted without recourse to the separation principle under the company law of the EU Member State. Under Article 101 TFEU, an undertaking is an economic entity, which can consist of several legal persons or unincorporated firms. The "undertaking" so defined bears responsibility under civil and fining law for antitrust infringements.

In other words: a parent company is liable – where there is a single economic entity – not only for fines but also for civil law damages associated with antitrust infringements committed by group subsidiaries. Equally, a legal successor – providing the economic continuity requirement is fulfilled – will be liable for fines and any civil law cartel damages claimed against its legal predecessors.

3. IMPACT ON GERMAN CARTEL DAMAGES CLAIMS

According to § 33a para. 1 of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*), "whoever" is guilty of an antitrust infringement will be liable to pay compensation for damages. In the case of infringements of the EU cartel prohibition in Article 101 TFEU, this "who" is not only the company involved in the cartel but also the group parent company that forms an economic entity with the company – as well as any legal successor which pursues its business as a continued economic entity. The addressee of any decisions imposing fines and the entity that is liable to pay compensation for any cartel damages claims are also always the undertaking in an economic sense of Article 101 TFEU. In order to avoid splitting the definition, it is assumed that the German civil courts will apply this broad definition of undertaking in the future when they decide cases concerning the civil law liability for infringements of German competition law.

4. PRACTICE TIP

Have you suffered damage as a result of a cartel? Under certain circumstances, you can claim damages not just from the company that was directly involved in the cartel, but also from a legal successor or the parent company of the group. This allows you to bring a claim before the court where the parent company or legal successor is located if there are (procedural) difficulties with legal enforcement before the courts where the company that was directly involved in the cartel is located.

Are you planning a corporate acquisition? Remember that the acquirer of an undertaking that participated in a cartel will, if the economic continuity test is fulfilled, not "only" be liable for any fines imposed for the involvement of the target company in the cartel. Those that suffer damage as a result of the cartel will also be able to claim damages from the acquirer. These risks must be taken into account when performing the due diligence and appropriate guarantees should be included in the sale and purchase agreement to mitigate risks.

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BEITEN BURKHARDT ranked in the top tier of best M&A legal firms 2019 by Wirtschaftswoche

The leading German economy weekly *Wirtschaftswoche* recently ranked BEITEN BURKHARDT in the top tier of the best legal firms in the field of Mergers & Acquisition for 2019. A three level procedure involving market analysis by the Handelsblatt Research Institute, a survey and recommendations of an expert jury formed the basis for this ranking.

BEITEN BURKHARDT event

Meet BEITEN BURKHARDT partners at this upcoming event:

EXPO REAL, 7–9 OCTOBER IN MUNICH

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

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

About the Dutch Desk

The economic relations with The Netherlands are at the centre of our "Dutch Desk" in Dusseldorf, where we manage the cases also in Dutch. Our support goes well beyond pure legal advice, as we also provide contacts to politics and economy. Dutch enterprises who want to be active in Germany receive comprehensive advice on all stages of their business activities, with a particular focus on corporate and employment law. Projects in the Netherlands are being managed in cooperation with our colleagues in Dutch partner firms.

In order to support our clients in general economic issues and in establishing contacts, we network with chambers of commerce, business associations and the Consulate General.

About the Corporate / M&A practice group

CORPORATE

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

M&A

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

AWARDS

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