GIBSON DUNN

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2017 YEAR-END GERMAN LAW UPDATE

To Our Clients and Friends:

"May you live in interesting times" goes the old Chinese proverb, which is not meant for a friend but for an enemy. Whoever expressed such wish, interesting times have certainly come to pass for the German economy. Germany is an economic giant focused on the export of its sophisticated manufactured goods to the world's leading markets, but it is also, in some ways, a military dwarf in a third-tier role in the re-sketching of the new world order.

Germany's globally admired engineering know-how and reputation has been severely damaged by the Volkswagen scandal and is structurally challenged by disruptive technologies and regulatory changes that may be calling for the end of the era of internal combustion engines. The top item on Germany's foreign policy agenda, the further integration of the EU-member states into a powerful economic and political union, has for some years now given rise to daily crisis management, first caused by the financial crisis and, since last year, by the uncertainties of BREXIT.

As if this was not enough, internal politics is still handling the social integration of more than a million refugees that entered the country in 2015, who rightly expect fair and just treatment, education, medical care and a future.

It has been best practice to address such manifold issues with a strong and hands-on government, but – unfortunately – this is also currently missing. While the acting government is doing its best to handle the day-to-day tasks, one should not expect any bold move or strategic initiative before a stable, yet to be negotiated parliamentary coalition majority has installed new leadership, likely again under Angela Merkel. All that will drag well into 2018 and will not make life any easier.

In stark contrast to the difficult situation the EU is facing in light of BREXIT, the single most impacting piece of regulation that will come into effect in May 2018 will be a European Regulation, the General Data Protection Regulation, which will harmonize data protection law across the EU and start a new era of data protection. Because of its broad scope and its extensive extraterritorial reach, combined with onerous penalties for non-compliance, it will open a new chapter in the way companies world-wide have to treat and process personal data.

In all other areas of the law, we observe the continuation of a drive towards ever more transparency, whether through the introduction of new transparency registers disclosing relevant ultimate beneficial owner information or misconduct, through obligatory disclosure regimes (in the field of tax law), or through the automatic exchange under the OECD's Common Reporting Standard of Information that hitherto fell under the protection of bank secrecy laws. While all these initiatives are well intentioned,

they present formidable challenges for companies to comply with the increased complexity and adequately respond to the increased availability and flow of sensitive information.

Even more powerful than the regulatory push is the combination of cyber-attacks, investigative journalism, and social media: within a heartbeat, companies or individuals may find themselves exposed on a global scale to severe allegations or fundamental challenges to the way they did or do business. While this trend is not of a legal nature, but a consequence of how we now communicate and whom we trust (or distrust), for those affected it may have immediate legal implications that are often highly complex and difficult to control and deal with.

Interesting times usually are good times for lawyers that are determined to solve problems and tackle issues. This is what we love doing and what Gibson Dunn has done best time and again in the last 125 years. We therefore remain optimistic, even in view of the rough waters ahead which we and our clients will have to navigate.

We want to thank you for your trust in our services in Germany and your business that we enjoy here and world-wide. We do hope that you will gain valuable insights from our Year-End Alert of legal developments in Germany that will help you to successfully focus and resource your projects and investments in Germany in 2018 and beyond; and we promise to be at your side if you need a partner to help you with sound and hands-on legal advice for your business in and with Germany or to help manage challenging or forward looking issues in the upcoming exciting times.

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1. Corporate, M&A

1.1 Corporate, M&A - Transparency Register – New Transparency Obligations on Beneficial Ownership

As part of the implementation of the 4th European Money Laundering Directive into German law, Germany has created a new central electronic register for information about the beneficial owners of legal persons organized under German private law as well as registered partnerships incorporated within Germany.

Under the restated German Money Laundering Act (*Geldwäschegesetz – GWG*) which took effect on June 26, 2017, legal persons of German private law (e.g. capital corporations like stock corporations (*AG*) or limited liability companies *(GmbH)*, registered associations (*eingetragener Verein – e.V.*), incorporated foundations (*rechtsfähige Stiftungen*)) and all registered partnerships (e.g. *offene Handelsgesellschaft* (*OHG*), *Kommanditgesellschaft* (*KG*) and *GmbH & Co. KG*) are now obliged to "obtain, keep on record and keep up to date" certain information about their "beneficial owners" (namely: first and last name, date of birth, place of residence and details of the beneficial interest) and to file the respective information with the transparency register without undue delay (section 20 (1) *GWG*).

A "beneficial owner" in this sense is a natural person who directly or indirectly holds or controls more than 25% of the capital or voting rights, or exercises control in a similar way (section 3 (2) *GWG*). Special rules apply for registered associations, trusts, non-charitable unregulated associations and similar legal arrangements.

"Obtaining" the information does not require the entities to carry out extensive investigations, potentially through multi-national and multi-level chains of companies. It suffices to diligently review the information on record and to have in place appropriate internal structures to enable it to make a required filing without undue delay. The duty to keep the information up to date generally requires that the company checks at least on an annual basis whether there have been any changes in their beneficial owners and files an update, if necessary.

A filing to the transparency register, however, is not required if the relevant information on the beneficial owner(s) is already contained in certain electronic registers (e.g. the commercial register or the so-called "*Unternehmensregister*"). This exemption only applies if all relevant data about the beneficial owners is included in the respective documents and the respective registers are still up to date. This essentially requires the obliged entities to diligently review the information available in the respective electronic registers. Furthermore, as a matter of principle, companies listed on a regulated market in the European Union ("**EU**") or the European Economic Area ("**EEA**") (excluding listings on unregulated markets such as e.g. the Entry Standard of the Frankfurt Stock Exchange) or on a stock exchange with equivalent transparency obligations with respect to voting rights are never required to make any filings to the transparency register.

In order to enable the relevant entity to comply with its obligations, shareholders who qualify as beneficial owners or who are directly controlled by a beneficial owner, irrespective of their place of residence, must provide the relevant entity with the relevant information. If a direct shareholder is only

indirectly controlled by a beneficial owner, the beneficial owner himself (and not the direct shareholder) must inform the company and provide it with the necessary information (section 20 (3) sentence 4 *GWG*).

Non-compliance with these filing and information obligations may result in administrative fines of up to EUR 100,000. Serious, repeated or systematic breaches may even trigger sanctions up to the higher fine threshold of EUR 1 million or twice the economic benefit of the breach.

The information submitted to the transparency register is not generally freely accessible. There are staggered access rights with only certain public authorities, including the Financial Intelligence Unit, law enforcement and tax authorities, having full access rights. Persons subject to know-your-customer ("**KYC**") obligations under the Money Laundering Act such as e.g. financial institutions are only given access to the extent the information is required for them to fulfil their own KYC obligations. Other persons or the general public may only gain access if they can demonstrate a legitimate interest in such information.

Going forward, every entity subject to the Money Laundering Act should verify whether it is beneficially owned within the aforementioned sense, and, if so, make the respective filing to the transparency register unless the relevant information is already contained in a public electronic register. Furthermore, relevant entities should check (at least) annually whether the information on their beneficial owner(s) as filed with the transparency or other public register is still correct. Also, appropriate internal procedures need to be set up to ensure that any relevant information is received by a person in charge of making filings to the registers.

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1.2 Corporate, M&A - New CSR Disclosure Obligations for German Public Interest Companies

Effective for fiscal years commencing on or after January 1, 2017, large companies with more than 500 employees are required to include certain non-financial information regarding their management of social and environmental challenges in their annual reporting ("**CSR Information**"). The new corporate social responsibility reporting rules ("**CSR Reporting Rules**") implement the European CSR Directive into German law and are intended to help investors, consumers, policy makers and other stakeholders to evaluate the non-financial performance of large companies and encourage companies to develop a responsible and sustainable approach to business.

The CSR Reporting Rules apply to companies with a balance sheet sum in excess of EUR 20 million and an annual turnover in excess of EUR 40 million, whose securities (stock or bonds etc.) are listed on a regulated market in the EU or the EEA as well as large banks and large insurance companies. It is estimated that approximately 550 companies in Germany are covered. Exemptions apply to consolidated subsidiaries if the parent company publishes the CSR Information in the group reporting.

The CSR Reporting Rules require the relevant companies to inform on the policies they implemented, the results of such policies and the business risks in relation to (i) environmental protection, (ii) treatment

of employees, (iii) social responsibility, (iv) respect for human rights and (v) anti-corruption and bribery. In addition, listed stock corporations are also obliged to inform with regard to diversity on their company boards. If a company has not implemented any such policy, an explicit and justified disclosure is required ("comply or explain"). Companies must further include significant non-financial performance indicators and must also include information on the amounts reported in this respect in their financial statements.

The CSR Information can either be included in the annual report or by way of a separate CSR report, to be published on the company's website or together with its regular annual report with the German Federal Gazette (*Bundesanzeiger*).

The CSR Reporting Rules will certainly increase the administrative burden placed on companies when preparing their annual reporting documentation. It remains to be seen if the new rules will actually meet the expectations of the European legislator and foster and create a more sustainable approach of large companies to doing business in the future .

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1.3 Corporate, M&A - Corporate Governance Code Refines Standards for Compliance, Transparency and Supervisory Board Composition

Since its first publication in 2002, the German Corporate Governance Code (*Deutscher Corporate Governance Kodex – DCGK*) which contains standards for good and responsible governance for German listed companies, has been revised nearly annually. Even though the *DCGK* contains only soft law ("comply or explain") framed in the form of recommendations and suggestions, its regular updates can serve as barometer for trends in the public discussion and sometimes are also a forerunner for more binding legislative measures in the near future. The main changes in the most recent revision of the *DCGK* in February 2017 deal with aspects of compliance, transparency and supervisory board composition.

Compliance

The general concept of "compliance" was introduced by the *DCGK* in 2007. In this respect, the recent revision of the *DCGK* brought along two noteworthy new aspects. On the one hand, the *DCGK* now stresses in its preamble that good governance and management does not only require compliance with the law and internal policies but also ethically sound and responsive behavior (the "reputable businessperson concept"). On the other hand, the *DCGK* now recommends the introduction of a compliance management system ("**CMS**"). In keeping with the common principle of individually tailored compliance management systems that take into account the company's specific risk situation, the *DCGK* now recommends appropriate measures reflecting the company's risk situation and disclosing the main features of the CMS publically, thus enabling investors to make an informed decision on whether the CMS meets their expectations. It is further expressly recommended to provide employees with the opportunity to blow the whistle and also suggested to open up such whistle-blowing programs to third parties.

Supervisory Board

In line with the ongoing international trend of focusing on supervisory board composition, the *DCGK* now also recommends that the supervisory board not only should determine concrete objectives for its composition, but also develop a tailored skills and expertise profile for the entire board and to disclose in the corporate governance report to which extent such benchmarks and targets have been implemented in practice. In addition, the significance of having sufficient independent members on the supervisory board is emphasized by a new recommendation pursuant to which the supervisory board should disclose the appropriate number of independent supervisory board members as well as the members which meet the "independence" criteria in the corporate governance report. In accordance with international best practice, it is now also recommended to provide CVs for candidates for the supervisory board including *inter alia* relevant knowledge, skills and experience and to publish this information on the company's website.

With regard to supervisory board transparency, the *DCGK* now also recommends that the chairman of the supervisory board should be prepared, within an appropriate framework, to discuss topics relevant to the supervisory board with investors (*please see in this regard our 2016-Year-End Alert, section 1.2*).

These new 2017 recommendations further highlight the significance of compliance and the role of the supervisory board not only for legislators but also for investors and other stakeholders. As soon as the annual declarations of non-conformity ("comply or explain") are published over the coming weeks and months, it will be possible to assess how well these new recommendations will be received as well as what responses there will be to the planned additional supervisory board transparency (including, in particular, by family-controlled companies with employee co-determination on the supervisory board).

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1.4 Corporate, M&A – Employee Co-Determination: No European Extension

As set out in greater detail in past alerts (*please see in this regard our 2016 Year-End Alert, section 1.3 with further references*), the scope and geographic reach of the German co-determination rules (as set out in the German Co-Determination Act; *Mitbestimmungsgesetz – MitbestG* and in the One-Third-Participation Act*; Drittelbeteiligungsgesetz – DrittelbG*) were the subject of several ongoing court cases. This discussion has been put to rest in 2017 by a decision of the European Court of Justice (*ECJ, C-566/15 – July 18, 2017*) that held that German co-determination rules and their restriction to German-based employees as the numeric basis for the relevant employee thresholds and as populace entitled to vote for such co-determined supervisory boards do not infringe against EU law principles of anti-discrimination and freedom of movement. The judgment has been received positively by both German trade unions and corporate players because it preserves the existing German co-determination regime and its traditional, local values against what many commentators would have perceived to be an undue pan-Europeanization of the thresholds and the right to vote for such bodies. In particular, the judgment averts the risk that many supervisory boards would have had to be re-elected based on a pan-European rather than solely German employee base.

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1.5 Corporate, M&A – Germany Tightens Rules on Foreign Takeovers

On July 18, 2017, the amended provisions on foreign direct investments under the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung – AWV*), expanding and specifying the right of the Federal Ministry for Economic Affairs and Energy ("**Ministry**") to review whether the takeover of domestic companies by investors outside the EU or the European Free Trade Area poses a danger to the public order or security of the Federal Republic of Germany came into force. The amendment has the following five main effects which will have a considerable impact on the M&A practice: (i) (non-exclusive) standard categories of companies and industries which are relevant to the public order or security for cross-sector review are introduced, (ii) the stricter sector-specific rules for industries of essential security interest (such as defense and IT-security) are expanded and specified, (iii) there is a reporting requirement for all takeovers within the relevant categories, (iv) the time periods for the review process are extended, and (v) there are stricter and more specific restrictions to prevent possible circumventions.

Under the new rules, a special review by the German government is possible in cases of foreign takeovers of domestic companies which operate particularly in the following sectors: (i) critical infrastructure amenities, such as the energy, IT and telecommunications, transport, health, water, food and finance/insurance sectors (to the extent they are very important for the functioning of the community), (ii) sector-specific software for the operation of these critical infrastructure amenities, (iii) telecom carriers and surveillance technology and equipment, (iv) cloud computing services and (v) telematics services and components. The stricter sector-specific rules for foreign takeovers within the defense and IT-security industry are also expanded and now also apply to the manufacturers of defense equipment for reconnaissance and support.

Furthermore, the reporting requirement no longer applies only to transactions within the defense and IT-security sectors, but also to all foreign takeovers that fall within the newly introduced cross-sector standard categories described above.

The time periods allowed for the Ministry to intervene have been extended throughout. In particular, if an application for a clearance certificate is filed, the clearance certificate will be deemed granted in the absence of a formal review two months following receipt of the application rather than one month as in the past, and the review periods are suspended if the Ministry conducts negotiations with the parties involved. Further, a review may be commenced until five years after the signing of the purchase agreement, which in practice will likely result in an increase of applications for a clearance certificate in order to obtain more transaction certainty.

Finally, the new rules provide for stricter and more specific restrictions of possible circumventions by, for example, the use of so-called "front companies" domiciled in the EU or the European Free Trade Area and will trigger the Ministry's right to review if there are indications that an improper structuring or evasive transaction was at least partly chosen to circumvent the review by the Ministry.

Although the scope of the German government's ability to intervene in M&A processes has been expanded where critical industries are concerned, it is not clear yet to what extent stronger interference

or more prohibitions or restrictions will actually occur in practice. And even though the new law provides further guidance, there are still areas of legal uncertainty which can have an impact on valuations and third party financing unless a clearance certificate is obtained. Due to the suspension of the review period in the case of negotiations with the Ministry, the review procedure has, at least in theory, no firm time limit. As a result, the M&A advisory practice has to be prepared for a more time-consuming and onerous process for transactions in the critical industries and may thus be forced to allow for more time between signing and closing. In addition, appropriate termination clauses (and possibly break fees) must be considered for purposes of the share purchase agreement in case a prohibition or restriction of the transaction on the basis of the amended *AWV* cannot be excluded.

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2. Tax

2.1 Tax – Unconstitutionality of German Change-of-Control Rules

Tax loss carry forwards are an important asset in every M&A transaction. Over the past ten years the German change-of-control rules, which limit the use of losses and loss carry forwards ("**Losses**") of a German target company, have undergone fundamental legislative changes. The current change-of-control rules may now face another significant revision as – according to the German Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) and the Lower Tax Court of Hamburg – the current tax regime of the change-of-control rules violates the constitution.

Under the current change-of-control rules, Losses of a German corporation will be forfeited on a pro rata basis if within a period of five years more than 25% but not more than 50% of the shares in the German loss-making corporation are transferred (directly or indirectly) to a new shareholder or group of shareholders with aligned interests. If more than 50% are transferred, Losses will be forfeited in total. There are exceptions to this rule for certain intragroup restructurings, built-in gains and – since 2016 – for business continuations, especially in the venture capital industry.

On March 29, 2017, the German Federal Constitutional Court ruled that the pro rata forfeiture of Losses (share transfer of more than 25% but not more than 50%) is not in line with the constitution. The *BVerfG* held that the provision leads to unequal treatment of companies. The aim of avoiding legal but undesired tax optimizations does not justify the broad and general scope of the provision. The *BVerfG* has asked the German legislator to amend the change-of-control rules retroactively for the period from January 1, 2008 until December 31, 2015 and bring them in line with the constitution. The legislative changes need to be finalized by December 31, 2018.

Furthermore, in another case on August 29, 2017, the Lower Tax Court of Hamburg held that the change-of-control rules, which result in a full forfeiture of Losses after a transfer of more than 50% of the shares in a German corporation, are also incompatible with the constitution. The ruling is based on the 2008 wording of the change-of-control rules but the wording of these rules is similar to that of the current forfeiture rules. In view of the March 2017 ruling of the Federal Constitutional Court on the pro-rata forfeiture, the Lower Tax Court referred this case also to the Federal Constitutional Court to rule on this issue as well. If the Federal Constitutional Court decides in favor of the taxpayer the German tax

legislator may completely revise the current tax loss limitation regime and limit its scope to, for example, abusive cases. A decision by the Federal Constitutional Court is expected in the course of 2018.

Affected market participants are therefore well advised to closely monitor further developments and consider the impact of potential changes on past and future M&A deals with German entities. Appeals against tax assessments should be filed and stays of proceedings applied for by reference to the case before the Federal Constitutional Court in order to benefit from a potential retroactive amendment of the change-of-control rules.

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2.2 Tax - New German Tax Disclosure Rules for Tax Planning Schemes

In light of the *Panama* and *Paradise* leaks, the respective Finance Ministers of the German federal states (*Bundesländer)* created a working group in November 2017 to establish how the new EU Disclosure Rules for advisers and taxpayers as published by the European Commission ("**Commission**") on July 25, 2017 can be implemented into German law. Within the member states of the EU, mandatory tax disclosure rules for tax planning schemes already exist in the UK, Ireland and Portugal.

Under the new EU disclosure rules certain tax planners and advisers (intermediaries) or certain tax payers themselves must disclose potentially aggressive cross-border tax planning arrangements to the tax authorities in their jurisdiction. This new requirement is a result of the disclosure rules as proposed by the OECD in its Base Erosion and Profit Shifting (BEPS) Action 12 report, among others. The proposal requires tax authorities in the EU to automatically exchange reported information with other tax authorities in the EU.

Pursuant to the Commission's proposal, an "intermediary" is the party responsible for designing, marketing, organizing or managing the implementation of a tax payer´s reportable cross border arrangement, while also providing that taxpayer with tax related services. If there is no intermediary, the proposal requires the taxpayer to report the arrangement directly. This is, for example, the case if the taxpayer designs and implements an arrangement in-house, if the intermediary in question does not have a presence within the EU or in case the intermediary cannot disclose the information because of legal professional privilege.

The proposal does not define what "arrangement" or "aggressive" tax planning means but lists characteristics (so-called "hallmarks") of cross-border tax planning schemes that would strongly indicate whether tax avoidance or abuse occurred. These hallmarks can either be generic or specific. Generic hallmarks include arrangements where the tax payer has complied with a confidentiality provision not to disclose how the arrangement could secure a tax advantage or where the intermediary is entitled to receive a fee with reference to the amount of the tax advantage derived from the arrangement. Specific hallmarks include arrangements that create hybrid mismatches or involve deductible cross border payments between related parties with a preferential tax regime in the recipient's tax resident jurisdiction. The information to be exchanged includes the identities of the tax payer and the intermediary, details about the hallmarks, the date of the arrangement, the value of the transactions and the EU member states involved.

The implementation of such mandatory disclosure rules on tax planning schemes are heavily discussed in Germany especially among the respective bar associations. Elements of the Commission's proposal are regarded as a disproportionate burden for intermediaries and taxpayers in relation to the objective. Further clarity is needed to align the proposal with the general principle of legal certainty. Certain elements of the proposal may contravene EU law or even the German constitution. And the interaction with the duty of professional secrecy for lawyers and tax advisors is also still unclear. Major efforts are therefore needed for the German legislator to make such a disclosure regime workable both for taxpayers/intermediaries and the tax administrations. It remains to be seen how the Commission proposal will be implemented into German law in 2018 and how tax structuring will be affected.

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2.3 Tax - Voluntary Self-Disclosure to German Tax Authorities Becomes More Challenging

German tax law allows voluntary self-disclosure to correct or supplement an incorrect or incomplete tax return. Valid self-disclosure precludes criminal liability for tax evasion. Such exemption from criminal prosecution, however, does not apply if the tax evasion has already been "detected" at the time of the self-disclosure and this is at least foreseeable for the tax payer.

On May 5, 2017 the German Federal Supreme Court (*Bundesgerichtshof – BGH*) further specified the criteria for voluntary self-disclosure to secure an exemption from criminal prosecution (*BGH, 1 StR 265/16 – May 9, 2017*). The *BGH* ruled that exemption from criminal liability might not apply if a foreign authority had already discovered the non- or underreported tax amounts prior to such self-disclosure.

Underlying the decision of the *BGH* was the case of a German employee of a German defense company, who had received payments from a Greek business partner, but declared neither the received payments nor the resulting income in his tax declaration. The payment was a reward for his contribution in selling weapons to the Greek government.

The Greek authorities learned of the payment to the German employee early in 2004 in the course of an anti-bribery investigation and obtained account statements proving the payment through intermediary companies and foreign banks.

On January 6, 2014, the German employee filed a voluntary self-disclosure to the German tax authorities declaring the previously omitted payments. The respective German tax authority found that this self-disclosure was not submitted in time to exempt the employee from criminal liability.

The issue in this case was *by whom* and at *what moment in time* the tax evasion needed to be detected in order to render self-disclosure invalid. The *BGH* ruled that the voluntary self-disclosure by the German employee was futile due to the fact that the payment at issue had already been detected by the Greek authorities at the time of the self-disclosure.

In this context, the *BGH* emphasized that it was not necessary for the competent tax authorities to have detected the tax evasion, but it was sufficient if any other authority was aware of the tax evasion. The *BGH* made clear that this included foreign authorities. Thus, a prior detection is relevant if on the basis of a preliminary assessment of the facts a conviction is ultimately likely to occur.

This requirement is for example met if it can be expected that the foreign authority that detected the incorrect, incomplete or omitted fact will forward this information to the German tax authorities as in the case before the *BGH*. In particular, there was an international assistance procedure in place between German and Greek tax authorities and the way the payments were made by using intermediaries and foreign banks made it obvious to the Greek authorities that the relevant amounts had not been declared in Germany. Due to the media coverage of the case, this was also at least foreseeable for the German employee.

This case is yet another cautionary tale for tax payers not to underestimate the effects of increased international cooperation of tax authorities.

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3. Financing and Restructuring

3.1 Financing and Restructuring – Upfront Banking Fees Held Void by German Federal Supreme Court

On July 4, 2017, the German Federal Supreme Court (*Bundesgerichtshof – BGH*) handed down two important rulings on the permissibility of upfront banking fees in German law governed loan agreements. According to the *BGH*, boilerplate clauses imposing handling, processing or arrangement fees on borrowers are void if included in standard terms and conditions (*Allgemeine Geschäftsbedingungen*).

With this case, the court extended its prior rulings on consumer loans to commercial loans. The *BGH* argued that clauses imposing a bank's upfront fee on a borrower fundamentally contradict the German statutory law concept that the consideration for granting a loan is the payment of interest. If ancillary pricing arrangements (*Preisnebenabreden*) pass further costs and expenses on to the borrower, the borrower is unreasonably disadvantaged by the user (*Verwender*) of standard business terms, unless the additional consideration is agreed for specific services that go beyond the mere granting of the loan and the handling, processing or arrangement thereof. In the cases at hand, the borrowers were thus awarded repayment of the relevant fee.

The implications of these rulings for the German loan market are far-reaching.

The rulings affect all types of upfront fees for a lender's services which are routinely passed on to borrowers even though they would otherwise be owed by the lender pursuant to statutory law, a regulatory regime or under a contract or which are conducted in the lender's own interest. Consequently, this covers fees imposed on the borrower for the risk assessment (*Bonitätsprüfung*), the valuation of collateral, expenses for the collection of information on the assessment of a borrower's financing

requirements and the like. At this stage, it is not yet certain if, for example, agency fees or syndication fees could also be covered by the decision. There are, however, good arguments to reason that services rendered in connection with a syndication are not otherwise legally or contractually owed by a lender.

Upfront fees paid in the past, i.e. in 2015 or later, can be reclaimed by borrowers. The *BGH* applied the general statutory three year limitation period and argued that the limitation period commenced at the end of 2011 after Higher District Courts (*Oberlandesgerichte*) had held upfront banking fees void in deviation from previous rulings. As of such time, borrowers should have been aware that a repayment claim of such fees was possible and could have filed a court action even though the enforcement of the repayment was not risk-free.

Going forward, it can be expected that lenders will need to modify their approach as a result of the rulings: Choosing a foreign (i.e. non-German) law for a separate fee agreement could be an option for lenders, at least, if either the lender or the borrower is domiciled in the relevant jurisdiction or if there is a certain other connection to the jurisdiction of the chosen law. If the loan is granted by a German lender to a German borrower, the choice of foreign law would also be generally recognized, but under EU conflict of law provisions mandatory domestic law (such as the German law on standard terms) would likely still continue to apply.

In response to the ruling, lenders are also currently considering alternative fee structures: Firstly, the relevant costs and expenses underlying such fees are being factored into the calculation of the interest and the borrower is then given the option to choose an upfront fee or a (higher) margin. This may, however, not always turn out to be practical, in particular given that a loan may be refinanced prior to generating the equivalent interest income. Secondly, a fee could be agreed in a separate fee letter which specifically sets out services which go beyond the typical services a bank renders in its own interest. It may, however be difficult to determine services which actually justify a fee. Finally, a lender might charge typical upfront fees following genuine individual negotiations. This requires that the lender not only shows that it was willing to negotiate the amount of the relevant fee, but also that it was generally willing to forego the typical upfront fee entirely. However, if the borrower rejects the upfront fee, the lender still needs to rely on alternative fee arrangements.

Further elaboration by the courts and market practice should be closely monitored by lenders and borrowers alike.

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3.2 Financing and Restructuring – Lingering Uncertainty about Tax Relief for Restructuring Profits

Ever since the German Federal Ministry of Finance issued an administrative order in 2003 ("**Restructuring Order**") the restructuring of distressed companies has benefited from tax relief for income tax on "restructuring profits". In Germany, restructuring profits arise as a consequence of debt to equity swaps or debt waivers with regard to the portion of such debt that is unsustainable. Debtors and creditors typically ensured the application of the Restructuring Order by way of a binding advance

tax ruling by the tax authorities thus providing for legal certainty in distressed debt scenarios for the parties involved.

However, in November 2016, the German Federal Tax Court (*Bundesfinanzhof – BFH*) put an end to such preferential treatment of restructuring profits. The *BFH* held the Restructuring Order to be void arguing that the Federal Ministry of Finance had lacked the authority to issue the Restructuring Order. It held that such a measure would need to be adopted by the German legislator instead. The Ministry of Finance and the German restructuring market reacted with concern. As an immediate response to the ruling the Ministry of Finance issued a further order on April 27, 2017 ("**Continuation Order"**) to the effect that the Restructuring Order continued to apply in all cases in which creditors finally and with binding effect waived claims on or before February 8, 2017 (the date on which the ruling of the Federal Tax Court was published). But the battle continued. In August 2017, the Federal Tax Court also set aside this order for lack of authority by the Federal Ministry of Finance. In the meantime, the German *Bundestag* and the *Bundesrat* have passed legislation on tax relief for restructuring profits, but the German tax relief legislation will only enter into force once the European Commission issues a certificate of non-objection confirming the new German statutory tax relief's compliance with EU restrictions on state aid.

This leaves uncertainty as to whether the new law will enter into force in its current wording and when. Also, the new legislation will only cover debt waivers/restructuring profits arising after February 8, 2017 but at this stage does not provide for the treatment of cases before such time. In the absence of the 2003 Restructuring Order and the 2017 Continuation Order, tax relief would only be possible on the basis of equitable relief in exceptional circumstances. It appears obvious that no reliable restructuring concept can be based on potential equitable relief. Thus, it is advisable to look out for alternative structuring options in the interim:

- Subordination of debt: while this may eliminate an insolvency filing requirement for illiquidity or over indebtedness, the debt continues to exist. This may make it difficult for the debtor to obtain financing in the future.

- In certain circumstances, a carve-out of the assets together with a sustainable portion of the debt into a new vehicle while leaving behind and subordinating the remainder of the unsustainable portion of the debt, could be a feasible option. As the debt subsists, a silent liquidation of the debtor may not be possible considering the lingering tax burden on restructuring profits. Also, any such carve-out measures by which the debtor is stripped of assets may be challenged in case of a later insolvency of the debtor.

- A debt hive up without recourse may be a possible option, but a shareholder or its affiliates are not always willing to assume the debt. Also, as tax authorities have not issued any guidelines on the tax treatment of debt hive ups, a binding advance tax ruling from the tax authorities should be obtained before the debt hive up is executed. Still, a debt hive up could be an option if the replacement debtor is domiciled in a jurisdiction which does not impose detrimental tax consequences on the waiver of unsustainable debt.

- Converting the debt into a hybrid instrument which constitutes debt for German tax purposes and equity from a German GAAP perspective is no longer feasible. Pursuant to a tax decree from May 2016, the tax authorities argue that the creation of a hybrid instrument amounts to a taxable waiver of debt on the basis that tax accounting follows commercial accounting.

It follows that irrespective of potential alternative structures which may suit a specific set of facts and circumstances, restructuring transactions in Germany continue to be challenging pending the entry into force of the new tax relief legislation.

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4. Labor and Employment

4.1 Labor and Employment – Defined Contribution Schemes Now Allowed

In an effort to promote company pension schemes and to allow more flexible investments, the German Company Pension Act (*Betriebsrentengesetz – BetrAVG*) was amended considerably with effect as of January 1, 2018. The most salient novelty is the introduction of a purely defined contribution pension scheme, which had not been permitted in the past. Until now, the employer would always be ultimately liable for any kind of company pension scheme irrespective of the vehicle it was administered through. This is no longer the case with the newly introduced defined contribution scheme. The defined contribution scheme also entails considerable other easements for employers, e.g. pension adjustment obligations or the requirement of insolvency insurance no longer apply. As a consequence, a company offering a defined contribution pension scheme does not have to deal with the intricacies of providing a suitable investment to fulfil its pension promise, but will have met its duty in relation to the pension simply by paying the promised contribution ("pay and forget").

However, the introduction of such defined contribution schemes requires a legal basis either in a collective bargaining agreement (with a trade union) or in a works council agreement, if the union agreement so allows. If these requirements are met though, the new legal situation brings relief not only for employers offering company pension schemes but also for potential investors into German businesses for whom the German-specific defined benefit schemes have always been a great burden.

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4.2 Labor and Employment – Federal Labor Court Facilitates Compliance Investigations

In a decision much acclaimed by the business community, the German Federal Labor Court (*Bundesarbeitsgericht – BAG*) held that intrusive investigative measures by companies against their employees do not necessarily require a suspicion of a *criminal* act by an employee; rather, less severe forms of misconduct can also trigger compliance investigations against employees (*BAG, 2 AZR 597/16 – June 29, 2017*).

In the case at hand, an employee had taken sick leave, but during his sick leave proceeded to work for the company owned by his sons who happened to be competing against his current employer. After

customers had dropped corresponding hints, the company assigned a detective to ascertain the employee's violation of his contractual duties and subsequently fired the employee based on the detective's findings. In the dismissal protection trial, the employee argued that German law only allowed such intrusive investigation measures if criminal acts were suspected. This restriction was, however, rejected by the *BAG*. This judgment ends a heated debate about the permissibility of internal investigation measures in the case of compliance violations. However, employers should always adhere to a last-resort principle when investigating possible violations. For instance, employees must not be seamlessly monitored at their workplace by way of a so-called "key logger" as the Federal Labor Court held in a different decision (*BAG, 2 AZR 681/16 – July 27, 2017*). Also, employers should keep in mind a recent ruling of the European Court of Human Rights of September 5, 2017 (*ECHR, 61496/08*). Accordingly, the workforce should be informed in advance that and how their email correspondence at the workplace can be monitored.

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5. Real Estate

Real Estate – Invalidity of Written Form Remediation Clauses for Long-term Lease Agreements

On September 27, 2017, the German Federal Supreme Court (*Bundesgerichtshof – BGH*) ruled that so-called "written form remediation clauses" (*Schriftformheilungsklauseln*) in lease agreements are invalid because they are incompatible with the mandatory provisions of section 550 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB; BGH, XII ZR 114/16 – September 27, 2017*).

The written form for lease agreements requires that all material agreements concerning the lease, in particular the lease term, identification of the leased premises and the rent amount, must be made in writing. If a lease agreement entered into for a period of more than one year does not comply with this written form requirement, mandatory German law allows either lease party to terminate the lease agreement with the statutory notice period irrespective of whether or not a fixed lease term was agreed upon. The statutory notice period for commercial lease agreements is six months (less three business days) to the end of any calendar quarter.

To avoid the risk of termination for non-compliance with the written form requirement, German commercial lease agreements regularly contain a general written form remediation clause. Pursuant to such clause, the parties of the lease agreement undertake to remediate any defect in the written form upon request of one of the parties.

While such general written form remediation clauses were upheld in several decisions by various Higher District Courts (*Oberlandesgerichte*) in the past, the *BGH* had already rejected the validity of such clauses vis-à-vis the purchasers of real property in 2014. With this new decision, the *BGH* has gone one step further and denied the validity of general written form remediation clauses altogether. Only in exceptional circumstances, the lease parties are not entitled to invoke the non-compliance with the written form requirement on account of a breach of the good faith principle. Such exceptional circumstances may exist, for example, if the other party faced insolvency if the lease were terminated

early as a result of the non-compliance or if the lease parties had agreed in the lease agreement to remediate such specific written form defect.

This new decision of the *BGH* forces the parties to long-term commercial lease agreements to put even greater emphasis on ensuring that their lease agreements comply with the written form requirement at all times because remediation clauses as potential second lines of defense no longer apply. Likewise, the due diligence process of German real estate transactions will have to focus even more on the compliance of lease agreements with the written form requirement.

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6. Data Protection

Data Protection – Employee Data Protection Under New EU Regulation

After a two-year transition period, the EU General Data Protection Regulation ("**GDPR**") will enter into force on May 25, 2018. The GDPR has several implications for data protection law covering German employees, which is already very strictly regulated. For example, under the GDPR any handling of personnel data by the employer requires a legal basis. In addition to statutory laws or collective agreements, another possible legal basis is the employee's explicit written consent. The transfer of personnel data to a country outside of the European Union ("**EU**") will have to comply with the requirements prescribed by the GDPR. If the target country has not been regarded as having an adequate data protection level by the EU Commission, additional safeguards will be required to protect the personnel data upon transfer outside of the EU. Otherwise, a data transfer is generally not permitted.

The most threatening consequence of the GDPR is the introduction of a new sanctions regime. It now allows fines against companies of up to 4% of the entire group's revenue worldwide.

Consequently, these new features, especially the drastic new sanction regime, call for assessments of, and adequate changes to, existing compliance management systems with regard to data protection issues.

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7. Compliance

7.1 Compliance – Misalignment of International Sanction Regimes Requires Enhanced Attention to the EU Blocking Regulation and the German Anti-Boycott Provisions

The Trump administration has been very active in broadening the scope and reach of the U.S. sanctions regime, most recently with the implementation of "Countering America's Adversaries Through Sanctions Act (H.R. 3364) ('**CAATSA**')" on August 2, 2017 and the guidance documents that followed. CAATSA includes significant new law codifying and expanding U.S. sanctions on Russia, North Korea, and Iran.

The European Union ("**EU**") has not followed suit. More so, the EU and European leaders openly stated their frustration about both a perceived lack of consultation during the process and the substance of the new U.S. sanctions.

Specifically, the EU and European leaders are concerned about the fact that CAATSA authorizes secondary sanctions on any person supporting a range of activities. Among these are the development of Russian energy export pipeline projects, certain transactions with the Russian intelligence or defense sectors or investing in or otherwise facilitating privatizations of Russia's state-owned assets that unjustly benefits Russian officials or their close associates or family members.

The U.S. sanctions regime differentiates between primary sanctions that apply to U.S. persons (U.S. citizens, permanent U.S. residents and companies under U.S. jurisdiction) and U.S. origin goods, and secondary sanctions that expand the reach of U.S. sanctions by penalizing non-U.S. persons for their involvement in certain targeted activities. Secondary sanctions can take many forms but generally operate by restricting or threatening to restrict non-U.S. person access to the U.S. market, including its global financial institutions.

European, especially export-heavy and internationally operating German companies are thus facing a dilemma. While they have to fear possible U.S. secondary sanctions for not complying with U.S. regulations, potential penalties also loom from European member state authorities when doing so.

These problems are grounded in European and German legislation aimed at protecting from and counteracting financial and economic sanctions issued by countries outside of the EU and Germany, unless such sanctions are themselves authorized under relevant UN, European, and German sanctions legislation.

On the European level, Council Regulation (EC) No 2271/96 of November, 22 1996 as amended ("**EU Blocking Regulation**") is aimed at protecting European persons against the effects of the extra-territorial application of laws, such as certain U.S. sanctions directed at Cuba, Iran and Libya. Furthermore, it also aims to counteract the effects of the extra-territorial application of such sanctions by prohibiting European persons from complying with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from such U.S. sanctions.

For companies subject to German jurisdiction, section 7 of the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung – AWV*), states that "*[t]he issuing of a declaration in foreign trade and payments transactions whereby a resident participates in a boycott against another country (boycott declaration) shall be prohibited*" to the extent such a declaration would be contradictory to UN, EU and German policy.

With the sanctions regime on the one hand and the blocking legislation at EU and German level on the other hand, committing to full compliance with U.S. sanctions whilst falling within German jurisdiction, could be deemed a violation of the *AWV*. Violating the *AWV* can lead to fines by the German authorities and, under German civil law, might render a relevant contractual provision invalid.

For companies conducting business transactions on a global scale, the developing non-alignment of U.S. and European / German sanctions requires special attention. Specifically, covenants with respect to compliance with U.S. or other non-EU sanctions should be reviewed and carefully drafted in light of the diverging developments of U.S. and other non-EU sanctions on the one hand and European / German sanctions on the other hand.

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7.2 Compliance – Restated (Anti-) Money Laundering Act – Significant New Requirements for the Non-Financial Sector and Good Traders

On June 26, 2017, the restated German Money Laundering Act (*Geldwäschegesetz – GWG*), which transposes the 4th European Anti-Money Laundering Directive (Directive (EU 2015/849 of the European Parliament and of the Council) into German law, became effective. While the scope of businesses that are required to conduct anti-money laundering procedures remains generally unchanged, the *GWG* introduced a number of new requirements, in particular for non-financial businesses, and significantly increases the sanctions for non-compliance with these obligations.

The *GWG* now extends anti money laundering ("**AML**") risk management concepts previously known from the financial sector also to non-financial businesses including good traders. As a matter of principle, all obliged businesses are now required to undertake a written risk analysis for their business and have in place internal risk management procedures proportionate to the type and scope of the business and the risks involved in order to effectively mitigate and manage the risks of money laundering and terrorist financing. In case the obliged business is the parent company of a group, a group-wide risk analysis and group-wide risk management procedures are required covering subsidiaries worldwide who also engage in relevant businesses. The risk analysis must be reviewed regularly, updated if required and submitted to the supervisory authority upon request. Internal risk management procedures include, in particular, client due diligence ("know-your customer"), which requires the identification and verification of customers, persons acting on behalf of customers as well as of beneficial owners of the customer (see also section 1.1 above on the Transparency Register). In addition, staff must be monitored for their reliability and trained regularly on methods and types of money laundering and terrorist financing and the applicable legal obligations under the *GWG* as well as data protection law, and whistle-blowing systems must be implemented. Furthermore, businesses of the financial and insurance sector as well as providers of gambling services must appoint a money laundering officer ("**MLO**") at senior management level as well as a deputy, who are responsible for ensuring compliance with AML rules. Other businesses may also be ordered by their supervisory authority to appoint a MLO and a deputy.

Good traders including conventional industrial companies are subject to the AML requirements under the *GWG*, irrespective of the type of goods they are trading in. However, some of the requirements either do not apply or are significantly eased. Good traders must only conduct a risk analysis and have in place internal AML risk management procedures if they accept or make (!) cash payments of EUR 10,000 or more. Furthermore, client due diligence is only required with respect to transactions in which they make or accept cash payments of EUR 10,000 or more, or in case there is a suspicion of money

laundering or terrorist financing. Suspicious transactions must be reported to the Financial Intelligence Unit ("**FIU**") without undue delay. As a result, also low cash or cash free good traders are well advised to train their staff to enable them to detect suspicious transactions and to have in place appropriate documentation and reporting lines to make sure that suspicious transactions are filed with the FIU.

Non-compliance with the *GWG* obligations can be punished with administrative fines of up to EUR 100,000. Serious, repeated or systematic breaches may even trigger sanctions up to the higher fine threshold of EUR 1 million or twice the economic benefit of the breach. For the financial sector, even higher fines of up to the higher of EUR 5 million or 10% of the total annual turnover are possible. Furthermore, offenders will be published with their names by relevant supervisory authorities ("naming and shaming").

Relevant non-financial businesses are thus well advised to review their existing AML compliance system in order to ensure that the new requirements are covered. For good traders prohibiting cash transactions of EUR 10,000 or more and implementing appropriate safeguards to ensure that the threshold is not circumvented by splitting a transaction into various smaller sums, is a first and vital step. Furthermore, holding companies businesses who mainly acquire and hold participations (e.g. certain private equity companies), must keep in mind that enterprises qualifying as "finance enterprise" within the meaning of section 1 (3) of the German Banking Act (*Kreditwesengesetz - KWG*) are subject to the *GWG* with no exemptions.

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7.3 Compliance – Protection of the Attorney Client Privilege in Germany Remains Unusual

The constitutional complaint (*Verfassungsbeschwerde*) brought by Volkswagen AG's external legal counsel requesting the return of work product prepared during the internal investigation for Volkswagen AG remains pending before the German Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*). The Munich public prosecutors had seized these documents in a dawn raid of the law firm's offices. While the *BVerfG* has granted injunctive relief (*BVerfG, 2 BvR 1287/17, 2 BvR 1583/17 – July 25, 2017*) and ordered the authorities, pending a decision on the merits of the case, to refrain from reviewing the seized material, this case is a timely reminder that the concept of the attorney client privilege in Germany is very different to that in common law jurisdictions. In a nutshell:

- In-house lawyers do not enjoy legal privilege.
- Material that would otherwise be privileged can be seized on the client's premises – with the exception of correspondence with and work product from / for criminal defense counsel.

The German courts are divided on the question of whether corporate clients can already appoint criminal defense counsel as soon as they are concerned that they may be the target of a future criminal investigation, or only when they have been formally made the subject of such an investigation. Searches and seizures at a law firm, however, are a different matter. A couple of years ago, the German legislator changed the German Code of Criminal Procedure (*Strafprozessordnung – StPO*) to give attorneys in general, not only criminal defense counsel, more protection against investigative measures (section 160a

StPO). Despite this legislation, the first and second instance judges involved in the matter decided in favor of the prosecutors. As noted above, the German Federal Constitutional Court has put an end to this, at least for now. According to the court, the complaints of the external legal counsel and its clients were not "obviously without any merits" and, therefore, needed to be considered in the proceedings on the merits of the case. In order not to moot these proceedings, the court ordered the prosecutors to desist from a review of the seized material, and put it under seal until a full decision on the merits is available. In the interim period, the interest of the external legal counsel and its clients to protect the privilege outweighed the public interest in a speedy criminal investigation. At this stage, it is unclear when and how the court will decide on the merits.

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7.4 Compliance – The European Public Prosecutor's Office Will Be Established – Eventually

After approximately four years of discussions, 20 out of the 28 EU member states agreed in June 2017 on the creation of a European Public Prosecutor's Office ("**EPPO**"). In October, the relevant member states adopted the corresponding regulation (Regulation (EU) 2017/1939 – "**Regulation**"). The EPPO will be in charge of investigating, prosecuting and bringing to justice the perpetrators of offences against the EU's financial interests. The EPPO is intended to be a decentralized authority, which operates via and on the basis of European Delegated Prosecutors located in each member state. The central office in Luxembourg will have a European Chief Prosecutor supported by 20 European Prosecutors, as well as technical and investigatory staff.

While EU officials praise this Regulation as an "*important step in European justice cooperation*", it remains to be seen whether this really is a measure which ensures that "*criminals [who] act across borders […] are brought to justice and […] taxpayers' money is recovered*" (U. Reinsalu, Estonian Minister of Justice). It will take at least until 2020 until the EPPO is established, and criminals will certainly not restrict their activities to the territories of those 20 countries which will cooperate under the new authority (being: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Germany, Greece, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovenia, Slovakia and Spain).

In addition, as the national sovereignty of the EU member states in judicial matters remains completely intact, the EPPO will not truly investigate "on the ground", but mainly assume a coordinating role.

Last but not least, its jurisdiction will be limited to "offences against the EU's financial interests", in particular criminal VAT evasion, subsidy fraud and corruption involving EU officials. A strong enforcement, at least prima facie, looks different.

To end on a positive note, however: the new body is certainly an improvement on the status quo in which the local prosecutors from 28 member states often lack coordination and team spirit.

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7.5 Compliance – Court Allows for Reduced Fines in Compliance Defense Case

The German Federal Supreme Court (*Bundesgerichtshof – BGH*) handed down a decision recognizing for the first time that a company's implementation of a compliance management system ("**CMS**") constitutes a mitigating factor for the assessment of fines imposed on such company where violations committed by its employees are imputed to the company (*BGH 1 StR 265/16 – May 9, 2017*).

According to the *BGH*, not only the implementation of a compliance management system at the time of the detection of the offense should be considered, but the court may also take into account subsequent efforts of a company to enhance its respective internal processes that were found deficient. The *BGH* held that such remediation measures can be considered as a mitigating factor when assessing the amount of fines if they are deemed suitable to "*substantially prevent an equivalent violation in the future*."

The *BGH's* ruling has finally clarified the highest German court's views on a long-lasting discussion about whether establishing and maintaining a CMS may limit a company's liability for legal infringements. The recognition of a company's efforts to establish, maintain and improve an effective CMS should encourage companies to continue working on their compliance culture, processes and systems.

Similarly, management's efforts to establish, maintain and enhance a CMS, and conduct timely remediation measures, upon becoming aware of deficiencies in the CMS, may become relevant factors when assessing potential civil liability exposure of corporate executives pursuant to section. 43 German Limited Liability Companies Act (*Gesetz betreffend Gesellschaften mit beschränkter Haftung - GmbHG*) and section 93 (German Stock Companies Act (*Aktiengesetz - AktG*). Consequently, the implications of this landmark decision are important both for corporations and their senior executives.

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8. Antitrust and Merger Control

In 2017, the German Federal Cartel Office (*Bundeskartellamt – BKartA*) examined about 1,300 merger filings, imposed fines in the amount of approximately EUR 60 million on companies for cartel agreements and conducted several infringement proceedings.

On June 9, 2017, the ninth amendment to the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*) came into force. The most important changes concern the implementation of the European Damages Directive (Directive 2014/104/EU of the European Parliament and of the Council of November, 26 2014), but a new merger control threshold was also introduced into law.

Implementation of the European Damages Directive

The amendment introduced various procedural facilitations for claimants in civil cartel damage proceedings.

There is now a refutable presumption in favor of cartel victims that a cartel caused damage. However, the claimant still has the burden of proof regarding the often difficult to argue fact, if it was actually affected by the cartel and the amount of damages attributable to the infringement.

The implemented passing-on defense allows indirect customer claimants to prove that they suffered damages from the cartel – even if not direct customers of the cartel members – because the intermediary was presumably able to pass on the cartel overcharge to his own customers (the claimants). The underlying refutable presumption that overcharges were passed on is not available in the relationship between the cartel member and its direct customer because the passing-on defense must not benefit the cartel members.

In deviation from general principles of German civil procedural law, according to which each party has to produce the relevant evidence for the facts it relies on, the *GWB* amendment has significantly broadened the scope for requesting disclosure of documents. The right to request disclosure from the opposing party now to a certain degree resembles discovery proceedings in Anglo-American jurisdictions and has therefore also been referred to as "discovery light". However, the documents still need to be identified as precisely as possible and the request must be reasonable, *i.e.*, not place an undue burden on the opposing party. Documents can also be requested from third parties. Leniency applications and settlement documents are not captured by the disclosure provisions.

Furthermore, certain exceptions to the principle of joint and several liability of cartelists for damage claims in relation to (i) internal regress against small and medium-sized enterprises, (ii) leniency applicants, and (iii) settlements between cartelists and claimants were implemented. In the latter case, non-settling cartelists may not recover contribution for the remaining claim from settling cartelists.

Finally, the regular limitation period for antitrust damages claims has been extended from three to five years.

Cartel Enforcement and Corporate Liability

Parent companies can now also be held liable for their subsidiary's anti-competitive conduct under the *GWB* even if they were not party to the infringement themselves. The crucial factor – comparable to existing European practice – is the exercise of decisive control. Furthermore, legal universal successors and economic successors of the infringer can also be held liable for cartel fines. This prevents companies from escaping cartel fines by restructuring their business.

Publicity

The *Bundeskartellamt* has further been assigned the duty to inform the public about decisions on cartel fines by publishing details about such decisions on its webpage. Taking into account recent efforts to establish a competition register for public procurement procedures, companies will face increased public attention for competition law infringements, which may result in infringers being barred from public or private contracting.

Whistleblower Hotline

Following the example of the *Bundeskartellamt* and other antitrust authorities, the European Commission ("**Commission**") has implemented a whistleblowing mailbox. The IT-based system operated by an external service provider allows anonymous hints to or bilateral exchanges with the Commission – in particular to strengthen its cartel enforcement activities. The hope is that the whistleblower hotline will add to the Commission's enforcement strengths and will balance out potentially decreasing leniency applications due to companies applying for leniency increasingly facing the risk of private cartel damage litigation once the cartel has been disclosed.

Merger Control Thresholds

To provide for control over transactions that do not meet the current thresholds but may nevertheless have significant impact on the domestic market (in particular in the digital economy), a "size of transaction test" was implemented; mergers with a purchase price or other consideration in excess of EUR 400 million now require approval by the *Bundeskartellamt* if at least two parties to the transaction achieve at least EUR 25 million and EUR 5 million in domestic turnover, respectively.

Likewise, in Austria a similar threshold was established (EUR 200 million consideration plus a domestic turnover of at least EUR 15 million).

The concept of ministerial approval (*Ministererlaubnis*), *i.e.*, an extra-judicial instrument for the Minister of Economic Affairs to exceptionally approve mergers prohibited by the *Bundeskartellamt*, has been reformed by accelerating and substantiating the process.

In May 2017, the *Bundeskartellamt* published guidance on remedies in merger control making the assessment of commitments more transparent. Remedies such as the acceptance of conditions (*Bedingungen*) and obligations (*Auflagen*) can facilitate clearance of a merger even if the merger actually fulfils the requirements for a prohibition. The English version of the guidance is available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20on%20Remedies%20in%20Merger%20Control.html; jsessionid=5EA81D6D85D9FD8891765A5EA9C26E68.1_cid378?nn=3600108.

Case Law

Finally on January 26, 2017, there has been a noteworthy decision by the Higher District Court of Düsseldorf (*OLG Düsseldorf, Az. V-4 Kart 4/15 OWI – January 26, 2017*; not yet final): The court confirmed a decision of the *Bundeskartellamt* that had imposed fines on several sweets manufacturers for exchanging competitively sensitive information and even increased the fines. This case demonstrates the different approach taken by courts in calculating cartel fines based on the group turnover instead of revenues achieved in the German market.

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