

WE DON'T JUST BELIVE IN REINVENTING THE WHEEL.

WE WANT TO IMPROVE IT.

Dear reader,

Turbulent times like these sometimes require extraordinary measures. Against this background, our current newsletter deals with subjects such as the financing alternatives for small and medium enterprises and the subject of restructuring in the property and real estate sector. To use the finance and economic crisis as an opportunity, it is important to take the necessary action. Especially in the two subjects outlined above, our newsletter aims to give an impression of the options that should be considered to enable a business enterprise to face the present challenges in the best possible way.

Then we explore whether corporate governance is worthwhile and how corporate governance can actually strengthen the economic success of a company.

We give an overview of the current developments in relation to off-shore wind farms, deal with new legal provisions in property and real estate law and report on the clarification of the long-disputed question of whether a partnership under civil law (GbR) can be entered into the land register.

In this newsletter you will find current developments in turnover tax law, reports on current judgements in relation to building work and investment fund sales and, in the Commercial & IP section, an analysis of the obligation under German law to provide publication details in an "Impressum" on the Internet.

We hope that you will enjoy reading this current newsletter and that it will offer you a number of interesting suggestions and options for your decision-making processes.

Yours sincerely,
Andreas Kloyer

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CORPORATE & FINANCE

Finance for small and medium enterprises in times of financial crisis

Since the collapse of Lehman Brothers in September 2008, the global financial crisis has intensified dramatically and grown to become a world-wide economic crisis. The conventional finance and banking system has imploded and is experiencing a “melt-down”, and it is uncertain how it is going to end.

Sources of external finance for manufacturing companies – at least for new investments – have almost dried up as a result. On the capital side, the private equity sector is also going through an erosion which is having an effect on almost all holding companies. Follow-on finance – if it is available at all – is only provided on significantly worse terms and with strict requirements for the equity position, the provision of security and the borrower’s credit rating.

This finance environment especially affects small and medium-sized enterprises. Whereas large enterprises are often able to negotiate with the few banks that are still open to discussion, small and medium-sized companies are often faced with a wall of lethargy on the part of the formerly cooperative business account “relationship managers” at the established banks. And if business “crumbles” with large companies, which are often the most important customers of small and medium businesses, if whole branches of industry run into a slump, like the motor industry, or if private consumption is hesitant because people are increasingly afraid for their jobs, even the healthiest small and medium enterprises can quickly fall into economic problems and even an existential crisis. The legislation to restrict the possibility to carry losses forward and the limitation of the deduction of interest on debts, i.e. the “interest barrier”, are other factors which significantly hinder the activities of small and medium businesses.

And in an international comparison, German companies have a low average equity ratio of just 16%. Strengthening the equity basis and creating liquidity are therefore of fundamental importance. The two are often inseparably linked with each other. A better equity base normally leads to a direct improvement in the company’s credit rating, and this in turn is a central requirement for promising discussions with financial partners. This latter point applies equally to equity partners, mezzanine lenders or outside lenders. At present, capital investors are only willing to provide fresh liquidity if the company has a good credit rating and a transparent business model with verifiable and lean corporate structures. And liquidity is essential, because after the “softening” of the insolvency law concept of over-indebtedness by the Financial Market Stabilisation Act, lack of liquidity will become increasingly importance as a cause of insolvency in the coming weeks and months.

Strengthening internal finance is therefore highly advisable for small and medium companies. Operational processes must be optimised, assets which are not absolutely necessary for operations and which may even provide hidden reserves must be “outsourced” in the interest of equity and the company’s financial structure must be thoroughly reviewed. Often, considerable potential for improvement can be identified.

Examples of structural adjustments could include instruments which are actually old and well-known but have been long neglected because loans were so cheap, such as sale-and-lease-back (sale of investment assets, which are then leased back and still used for operational purposes, but releasing hidden reserves), leasing in general, factoring and forfaiting (sale of receivables). To strengthen liquidity directly, silent investments and companies and atypical silent investments and companies should be considered (the latter in the form of equity under commercial law and outside capital under tax law, with the corresponding deduction of debt interest as business expenditure). In both cases, there is no change in the company law majority situation, the entrepreneur is still the “boss”. Loans with profit participation, i.e. with profit-based interest rates, could also provide short-term relief for difficult liquidity situations, or issuing participation rights which give the lender a right to participate in the success of the company, e.g. to receive a share of the future revenue, the future equity ratio or the future profit of a division of the company. The possible conditions for such participation rights are very flexible and can be used creatively. If they are set up in the right way, participation rates can be treated like atypical silent investments, i.e. as equity under commercial law but as outside capital which reduces the profit under tax law.

If finance partners are not (yet) willing to enter into a business relationship with the company, the shareholder will often find himself in a situation in which he is the last “partner” of the company on whom “self-funded” finance can be based. Depending on the specific situation, measures to strengthen the equity basis by the shareholders can include the conversion of outside capital in the form of shareholder loans into equity or a direct contribution of liquidity to the capital reserves or by way of a capital increase.

However, in small and medium businesses all assets of the entrepreneur are often already bound up in the company, so the latter step will normally not be possible to the necessary extent or with a sufficient volume. In this situation, the entrepreneur should not shrink from early consideration of strategic finance and business alliances. In many cases this can ensure the survival of the company, even if it seems at first sight to involve a loss of the entrepreneur’s ability to make decisions. However, this is only at first sight. If the process is intelligently handled and skilfully negotiated, there are generally a number of possible arrangements in which the entrepreneur will continue to have freedom of decision. For example, one possible variant is share repurchase options which can be linked with a staggered schedule and clear terms and requirements.

In any strategic alliances, small and medium-sized businesses should especially also consider joining up with other companies at the same economic stage in the production process so that they can pull more weight in negotiations with large customers and banks and exploit financial effects within the group. It is also worth considering the option of approaching the most important customer, e.g. in heavy industry, to propose an investment in the company. In addition to strategic strengthening, this can also lead to positive side-effects such as access to a corporate cash pooling system which could be of decisive importance in financing the company. Here, again, creativity in the drafting of the contracts is of decisive importance to ensure that the formerly independent company is not completely swallowed up in the anonymity of a large corporation.

Conclusion:

The above measures can only give a very basic impression of the steps which can be taken to solve the specific situation for the affected company in the individual case. In each case, creativity and entrepreneurial courage are crucial. In times of global changes in manufacturing process and the relationships between industrial companies, business entrepreneurs must show initiative to prove their independence. In our daily work, forward-looking and active drafting has proved to be a critical factor for success.

Benefits and costs of Corporate Governance

Corporate Governance is talked about everywhere. But what is behind the concept? Is Corporate Governance worthwhile? For decades, trends have moved through the corporate landscape like waves, brandishing high-sounding names such as lean management, outsourcing/offshoring, financial controlling tools such as the balanced scorecard and SWOT analysis, tax optimisation models and balance sheets geared to the capital market. The main aim to date was increasing profitability. Over the last few years a new theme has reached the management levels: Corporate Governance. This is a systematic consideration of the creation of and adherence to rules of contact and a commitment to responsible business practices. In its implementation, Corporate Governance is both a management task and a joint task for all persons involved in a company, the shareholders, management, employees and their representatives as the internal stakeholders. But Corporate Governance also involves contract partners and the general public – the external stakeholders of a company. The content is often focused on soft factors such as corporate culture and the relationships between the various stakeholders; but Corporate Governance also extends to the “hard” factor of criminal law.

Is Corporate Governance worthwhile?

But what added value does Corporate Governance generate for a company – or does it just cost time and trouble? Can we consider a commitment to responsible business practices and adherence to the law, two ideals which should be taken for

granted, from the point of view of benefits and costs? – Of course we can. But there is still a dilemma here. Whereas many people officially commit themselves to Corporate Governance, behind closed doors they question whether it is possible to be successful in business if they keep all the rules and laws. Here, three examples will be quoted to show the effect that Corporate Governance, or a cavalier treatment of the rules, can have.

Integration of shareholders

Shareholders provide business companies with capital without any securities. It is understandable that they want more information than the legally prescribed minimum. The amount of work that is initially involved in integrating the shareholders and meeting their interests is considerable. In listed companies this applies to investor relations, because investors continually question their investments. Therefore, financial investors require their portfolio companies to provide extensive reporting. Even in small and medium businesses with a smaller number of shareholders it is no less important to inform everyone about the company's strategy and plans. The advantages of this voluntary information are easily apparent: it helps to prevent excessive yield expectations, and conflicts can often be solved more constructively – either by persuasion, by compromise or by the mutually agreed removal of shareholders who do not wish to go along with the way the company is developing. Integrating the shareholders safeguards and extends the company's scope for action. A group of shareholders who are in touch with the goals of the company will be more willing to subordinate their own interests to the interests of the company. But if the information provided and the integration of the shareholders is poor, it is often not possible to keep the shareholders in the long term. This could lead to a decline in the stock market price which would make the company vulnerable and increase the costs of finance. Financial investors may drop their investments, and disputes with shareholders in small and medium businesses cost energy which is better used for the interests of the company.

Corruption

Again and again we read about corruption in the form of bonuses paid to employees or consultants of a customer. In other words, part of the business volume is not used for the contractually agreed goods and services, it goes into someone's pocket instead. This means that the customer pays for something that brings him no direct benefit. A company that uses such practices risks being fined, barred from future contracts or even blacklisted, which means that it would be effectively excluded from the market. Corrupt employees are liable to be prosecuted – and in some countries they may even be sentenced to death. But especially in the case of corruption in sales, it is often argued that such “favours” are normal or are part of the tradition in the region. But corruption can never be regarded as legitimate simply because civil servants or managers act corruptly at the highest levels.

In fact, companies which practice corruption are placing themselves at risk. This will be seen at the latest when the company is to be sold. The purchaser will have no interest in honouring historically developed obligations. If significant volumes of turnover are not achieved legally, this can lead to a breakdown in negotiations or substantial cuts in the purchase price. In other words, the turnover achieved through corruption is not sustainable. And blacklisting can even endanger the company's legal business model, and therefore its very survival.

Tax-saving models

Business companies develop tax-efficient business models. But experience shows that the hope of tax savings often clouds the company's sense of what is the feasible. As a result, tax arrears payments can jeopardise the existence of the company because they are often not allowed for in balance sheet reserves. And such companies are often prosecuted for tax fraud. As part of its Good Corporate Governance, a business company should regard such models critically from the outset and ask themselves what is realistic.

Corporate Governance as a driving force for innovation

So Corporate Governance can certainly stand up to a cost-to-benefit analysis. But the increasing complexity of the economy makes it more and more difficult to be a "Good Corporate Citizen" – the legal and cultural differences require different conduct in different countries, whereas codes of conduct even in international companies require simple and consistent rules in many areas in order to be accepted by their employees. And Corporate Governance is not something that can be taken for granted. Corporate Governance must be permanently maintained as an internal monitoring and control process, just like the company's products. If the expectations of the stakeholders are not fulfilled or laws are broken, this can jeopardise the existence of the company. Therefore any business company is well advised to identify problem areas all the time so that risks can be identified and remedied as early as possible. This means that Corporate Governance protects the existing company – and a critical consideration may also provide new impetus for the development of the company and thus become a sustainable driving force for innovation.

The first off-shore wind farm projects in Germany

The first German off-shore wind farm on the high seas is currently being built in the North Sea. The pilot project is situated 45 kilometres north of the island of Borkum and called "alpha ventus", and when completed it will consist of twelve wind turbines and one transformer station and will generate electricity for up to 50,000 households. The "alpha ventus" project is the world's first off-shore wind farm to be built in such deep water and so far from the coast. In addition, the project aims to explore the technical and operational possibilities of off-shore wind energy generation.

The project is being implemented as a cooperative venture between E.ON Climate & Renewables, EWE and Vattenfall Europe New Energy. The syndicate is purchasing the wind turbines from the manufacturers, leasing the location in the test zone and agreeing maintenance and other service contracts with the manufacturers. And the Federal Ministry of the Environment is participating in the project with a research grant.

The special off-shore wind turbines for the wind farm "alpha ventus" are being supplied by Multibrid and REpower. The six Multibrid turbines were originally due to be assembled and erected in the summer of 2008. The other six REpower turbines were scheduled to complete the wind farm in the summer of 2009.

Because of the persistence of poor weather conditions in the North Sea, however, the foundations for the Multibrid turbines (tripods) have not yet been constructed, so the scheduled erection of the first turbines was not possible in 2008. According to the press release on the subject, about four days with a calm sea are necessary in order to position and anchor the foundations on the sea bed. These weather conditions have not existed since the middle of 2008. This means that the construction of the first wind turbines will be later than the summer of 2008, and the syndicate is now planning to erect all turbines in 2009.

Locations

The open sea is predestined as a location for wind turbines because of the significantly higher wind speeds and the constant wind conditions. For several reasons, the German waters of the North Sea and Baltic Sea will therefore play a decisive role in the selection of the best locations for off-shore projects. First of all, the use of wind energy on land is comparatively far advanced in the north of Germany, so particularly suitable and attractive new locations for the construction of wind turbines are now hard to find. The proximity to major population centres increases the competitiveness of wind farms. And it should not be forgotten that the North Sea and Baltic Sea locations offer enormous additional development potential for the harbours.

In the selection of specific sites, areas close to the coast with a water depth of 30 metres are ideal for the construction of wind turbines. But such locations are not often found even in the open sea, partly because other factors also play a role in addition to these requirements. Issues which must be considered when choosing a location include nature conservation areas, shipping routes, restricted military areas and communication cable routes. The rarity of locations with ideal conditions has led developers to submit permit applications even for areas far from the coast in order to "block" parts of the sea for other applicants. These applications were often submitted without knowing whether the projects applied for are technically feasible.

This practice has now been limited by a change in the German Nature Conservation Act, which now allows several applications to be dealt with parallel to each other until one of the projects is ready for a permit.

Revision of the Renewable Energy Act

The amendment that has already been passed for the German Renewable Energy Act (EEG) as from 1 January 2009 brings further significant changes, especially in the provisions about remuneration levels and bonuses. In the area of wind energy, the initial remuneration for wind turbines on land was increased from 7.95 ct/kWh to 9.20 ct/kWh. The increase in the basic remuneration rate for off-shore wind turbines is even higher. The rate for off-shore turbines is now 13.00 ct/kWh compared with the previous value of 8.74 ct/kWh. As an extra incentive for fast implementation of the wind turbines that are being planned or are under construction, an "early starter bonus" of a further 2.00 ct/kWh has been created.

The minimum remuneration is paid for a period of 20 calendar years plus the year of commissioning from the time when the turbine is commissioned. In February 2001, the European Court of Justice provided greater planning and legal certainty at the European level by finding that this is not to be classified as state aid.

REAL ESTATE

Notarisation of site development contracts

Site development contracts must be notarised if they either themselves contain an obligation to transfer a plot of land or if they are legally linked with a land purchase contract in such a way that the land purchase contract is at least dependent on the site development contract.

If a site development contract specifies that the local community will take over the traffic infrastructure after its completion and the acceptance of the construction work, this then constitutes a contract in relation to land properties, so all terms of the contract which are necessary to specify the plots of land to be transferred are subject to compulsory notarisation. This question was clarified in a ruling by the Federal Court of Justice (BGH) of 5 May 1972; nothing has changed in the legal position since then, and this has recently been confirmed again in two new court rulings.

A popular model which is frequently encountered is for the site development contract to include only the provisions which do not require notarisation in the view of the parties to the contract, and to agree the provisions of a land transfer contract separately, for example in an urban development contract. Here, extreme caution is necessary: If a legal transaction about the sale or purchase of land is connected with another legal transaction, the notarisation obligation also applies to the other legal transaction if the two legal transactions are

intended to form a coherent unit in the intention of the parties to the contract. The Federal Court of Justice (BGH) assumes that such a coherent unit exists if the two contracts are connected with each other in such a way that they are designed to "stand and fall together".

A site development contract which is subject to compulsory notarisation according to the above provisions but is not notarised is null and void. However, the lack of the notarisation can be remedied retrospectively by conveyance and entry in the land register. It is also conceivable that the situation could be remedied by enclosing a site development contract which has been agreed without formal validity as an appendix that has also been read together with the notarised land purchase contract.

But it may sometimes be difficult to identify exactly which contract provisions are important for the handover of the land, so it is advisable to notarise the whole of the site development contract including its appendices. In this connection it is also recommended that any changes agreed in the construction phase should also be notarised to ensure that they are included in the contract in the correct form.

A partnership under civil law (GbR, Gesellschaft bürgerlichen Rechts) is eligible for entry in the land register

In a ruling of 4 December 2008 the Federal Court of Justice (BGH) finally eliminated an uncertainty that had existed since the memorable ruling of the Federal Court of Justice (BGH) on the "partial legal capacity" of partnerships under civil law (GbR):

"A partnership under civil law (GbR) can be entered in the land register under the designation which its shareholders have stipulated for it in the articles of partnership."

Up to this ruling, there was a gap between the effects of the partial legal capacity of the partnership under civil law (GbR) which had been granted to it especially with regard to legal proceedings – the company can sue and be sued as a legal entity – and the practice of land registry offices: even after the partial legal capacity ruling of the Federal Court of Justice (BGH), the Highest Regional Court of Bavaria had issued a clarification ruling stating that a partnership under civil law (GbR) was not eligible for entry in the land register because it was not capable of registration, so in the absence of proof of the shareholders each shareholder had to be entered into the land register.

This was a strange result, as was shown by the case which the Federal Court of Justice (BGH) had to decide: Here, a partnership under civil law (GbR) had obtained an enforceable ruling in its name against the landowner, but it failed with its application to the Schöneberg land registry to enter a claim-securing mortgage for this ruling. The appeal court wanted to find in favour of the partnership under civil law (GbR) but saw itself barred from doing so by contrary case law rulings such as that by the Highest Regional Court of Bavaria and therefore referred the matter to

the Federal Court of Justice (BGH).

The Federal Court of Justice (BGH) now makes it unmistakably clear: the material legal position is that the owner of the right is the partnership under civil law (GbR), not the individual shareholder jointly with the other shareholders. The “procedural law” at the land registry must adapt to this even if the relevant statutory provisions are still missing or no longer suitable.

What does this mean in practice?

1. The land register entry should no longer list the individual shareholders with the remark “in a partnership under civil law (GbR)”, instead, the partnership under civil law (GbR) should be entered under its own name (the names of the shareholders are now only listed if there is no such name).
2. In individual cases there will probably be disputes with the land registry offices on how to prove the name of the company and the authorisation of the representatives of the partnership under civil law (GbR) who deal with the land registry (and probably the notary too!). Does this mean that the articles of partnership must be notarised? Should there be an agreement in the articles of partnership that changes in the articles of partnership and powers of representation must always be notarised? Does the notary now more or less become a public authenticating replacement for a public register?

The Federal Court of Justice (BGH) has already “hinted” to the land registry offices that they should base their approach on the regulations for other legally capable and private companies which are capable of registration.

Considerable time will probably pass before this dilemma is solved by the legislators who should really settle the matter, so until then, as much as possible should be documented with authentication to simplify the proceedings with the land registry.

Eventually, the problem will probably be solved in a different way: by a separate register for partnerships under civil law (GbR).

By the way: this almost answers the question of whether the participation ratios in the partnership under civil law (GbR) must be registered to prevent abuse and concealment of the true economic circumstances within the partnership under civil law (GbR): the present situation, i.e. no registration of these details, is likely to remain unchanged if the partnership under civil law (GbR) is registered as such. This means that the discussion about how a creditor is to know who holds what share of a company (and how secure the value is) will probably flare up again if the shares can be quietly and secretly transferred back and forth without any obligation of notarisation. But this problem could probably also be solved with a register of partnerships under civil law (GbR).

Real estate restructuring – a necessity in a time of crisis

On 16 January 2009 the Frankfurter Allgemeine Zeitung printed the headline “Waiting for the first emergency sales” in its property market section. This year, emergency sales will be a dominant factor in the transaction market. This is consistent with the assessment of the economic research institutions, which expect the largest post-war recession. The background to this is a lack of an important commodity: “loans”. The topic of real estate restructuring, which includes emergency sales as just one of its aspects, will be one of the predominant subjects in the property business this year.

Who is involved?

First of all we must consider the classic relationship between the owner and the user – in many cases this is one of the main areas where problems arise. If the user is in economic difficulties, this can lead to a loss of rental income for the owner. Equally, the owner itself may have fallen into economic problems. The situation also involves the providers of finance, i.e. banks and mezzanine lenders. Here, the need for action may arise on the owner’s side if it is no longer to pay the interest and the capital repayments. But the reasons may also arise on the side of the bank, for example if refinancing problems arise or if there is pressure to act for internal reasons, such as an adjustment of the loan portfolio.

Whereas the relationship between the owner and the user is normally defined by a contract which governs the usage (rent or lease agreement), the relationship with the lender is defined by the loan agreement. A mezzanine agreement defines the relationship between the “junior lender” and the owner. Typically, the relationship between the bank and the mezzanine lender is defined by an “inter-creditor agreement”.

What options for action are there?

If the cause of the (impending) precarious situation of the property lies within the owner’s direct sphere of responsibility, intelligent asset management is necessary. Communication between the owner and the user is important, with the aim of avoiding a total loss of the rent payments and finding flexible solutions. An agreed reduction of the rent is infinitely preferable to a total loss. Potential costs savings in the property and facility management must also be sought on the expenditure side. And finally, a restructuring of the rental mixture in the portfolio must be considered.

Classical problems in the relationship with the lender involve violations of the financial covenants, especially the interest cover ratio (“ICR”) and the agreed loan-to-value ratio (“LTV”). Persistent violations of these financial covenants, if they are not redressed by the borrower, lead to a right of termination by the lender. Here, a solution may lie in an adjustment of the values by negotiation, as long as the interest and the redemption payments can still be covered by the income.

The situation becomes much more difficult if the owner is no longer able to make the agreed redemption payments. Short-term problems in the ability to repay the capital can be solved without serious consequences by agreeing a temporary suspension of redemption payments. But if there is a long-term inability to make redemption payments, or if the owner is not even able to earn enough to pay the interest, the lender is faced with the question of how to end its involvement with the least possible loss. Scenarios such as "friendly repossession" in which the lender takes over the ownership of the property and offsets the purchase price against its receivables under the loan are a possible way to avoid any further loss for either party. The bank must then find solutions which enable it to pass on the asset in a sensible way.

If the loan agreement is terminated, realisation scenarios such as compulsory administration and execution proceedings must be expected. All parties normally lose out in such scenarios, appropriate solutions to the problems in the loan agreement should be adopted to ensure that they are not necessary.

The situation of mezzanine lenders is completely different. Such lenders usually have little or no security. Here, the lender is directly faced with the need to assume the role of ownership in order to avoid a total loss. In many cases a "debt-equity swap", which involves taking over the property and the whole of the financing arrangements, and often requires additional payments, is the only way to limit the risk. But even after that, activities to sell the property are essential.

Earnings

If there is a danger of a property or portfolio failing, all parties involved should prepare themselves for the possible courses of action and take the necessary preliminary steps. The situation requires cooperative and intelligent solutions. Here, emergency sales and execution proceedings can and must remain an exception.

Act to Secure Contractor Claims and Improve the Enforcement of Payment Claims (FoSiG)

In its 847th session 19 September 2008, the Federal Council approved the Act to Secure Contractor Claims and Improve the Enforcement of Payment Claims (abbreviated as FoSiG). The Act was announced in the Federal Law Gazette on 23 October 2008 and came into force 1 January 2009. It applies to all contracts for work agreed after 31 December 2008.

In addition to strengthening the protection of consumers, the Act aims to remedy the losses suffered by contractors on trade receivables as a result of insolvency of clients or late payments. The same purpose was also the background to the Late Payment of Commercial Debts Act, which was introduced in 2000. In practice, however, this Act proved to be inadequate, and the Act to Secure Contractor Claims and Improve the Enforcement of Payment Claims (FoSiG) is an attempt to remedy this.

The Act proposes a number of amendments in different laws. In our client newsletter in September 2008 we informed you about the most important amendments to the German Civil Code (BGB) in relation to contracts for work. You will find our client newsletter on our website under News/Recent Legislation.

Energy Saving Ordinance (EnEV) 2007

In our newsletter 2/2008 we informed you about the new provisions which are coming into force this year as a result of the Energy Saving Ordinance (EnEV) 2009. We would like to supplement this by again pointing out the new provisions for 2009 which result from the Energy Saving Ordinance (EnEV) 2007, which came into force on 1 October 2007. The Energy Saving Ordinance (EnEV) 2007 creates an obligation to implement various measures to improve and increase the efficient use of energy, especially in existing buildings. The first effects of the Energy Saving Ordinance (EnEV) 2007 came into play in 2008. Further effects will now apply as from 1 January and 1 July 2009. The major elements that result from the Energy Saving Ordinance (EnEV) 2007 are the obligations to retrofit certain technical components in existing buildings and the introduction of the obligation to present energy certificates in any sale, renting, letting or lease of existing buildings. Previously it was only compulsory to provide energy certificates for new buildings, but now they are also compulsory in any sale or new letting of existing buildings.

As from 1 July 2008 all vendors, landlords and lessors of existing residential buildings which were built before 1965 must make an energy certificate "available" to their potential purchasers, tenants or lessees on demand. As from 1 January 2009 this obligation also applies to all vendors, landlords and lessors of residential properties built from 1965 onwards. For non-residential buildings (Section 16 (3) of the Energy Saving Ordinance EnEV) this obligation applies from 1 July 2009. The same obligations apply to owners of other separate units and to residential or partial owners. Whether mixed-use buildings are classed as residential or non-residential properties depends on the main use.

The intention of the legislators is to persuade the parties to any purchase or rental contract to be guided by the energy efficiency of the buildings and thus to place indirect pressure on the owners of a building to comply with the requirements of the Energy Saving Ordinance (EnEV) 2007 and to adopt measures to increase energy efficiency on their own initiative. The energy certificate has a direct influence on the value of a property and the yield situation. It will become a mark of quality for the building. Existing properties with poor energy performance certificates will experience a considerable decrease in their purchase prices or rents. The obligation to present an energy certificate will need to be taken into account whenever properties are sold or let. This will not only affect the drafting of purchase and rental contracts, it will also affect the drafting of community regulations.

The necessity of contractual risk management system in case of an insolvency of the nursing home operator

In this day and age, more and more people spend their final years in a nursing home rather than at home. In 2020 it is expected that there will be a million places in nursing homes. In view of this development, nursing home buildings are still an attractive property category in the market in spite of the financial crisis.

In drafting a contract for a nursing home transaction it is especially important – in addition to compliance with the provisions of social and nursing home law and the numerous other legal requirements – to take the specific conditions of nursing homes into account in the rental contract between the landlord/owner and the operator.

In this connection, minimising the risks associated with an insolvency of the operator is one of the central topics that must be considered when purchasing a nursing home and concluding a rental contract with the operator. The goal must be to create a contract structure which especially allows the smooth transfer of the operation to the landlord or a new operator.

It is true that the landlord is entitled to terminate the rental contract without notice if the operator becomes bankrupt. But the resulting entitlement to clear the property does not enable the landlord to continue to operate the business.

When the landlord has obtained a clearance order, this only removes the operator's occupancy of the premises because the operator is obliged to hand back the building. But the operator is not obliged to pass on to the landlord the business documents which are necessary to continue the business or to cooperate in a transfer of the contracts which it has concluded with the nursing and care personnel and the residents of the home. The landlord, in turn, has no direct entitlement to take over the operation of the home or the necessary contracts.

To enable the operation of the home and the associated contracts to be transferred if the rental contract is terminated, extensive risk management is essential in the drafting of the rental contract with the operator. Special attention must be paid to ensuring that the operator is obliged, in the event of a termination of the rental contract, to transfer the contracts for the home and grant the lessor the right to take over the operation.

If the business is operated through a property company which only operates the property that is to be purchased or rented, it may also be worth considering an agreement of a call option in favour of the investor.

TAX

Place of performance for catalogue goods and services for the non-entrepreneurial operations of a business entrepreneur

Fundamentally, the "registered-place-of-business principle" applies to turnover tax, i.e. the place of performance for any goods and services is fundamentally the place of business of the entrepreneur providing them. Any goods or services provided by an entrepreneur based in Germany are therefore always liable for turnover tax in Germany. However, certain catalogue goods and services are subject to the place of receipt principle if the recipient of the services is a business entrepreneur. For example, if a German entrepreneur transfers a trademark to a French entrepreneur, this service is taxable in France, not in Germany.

The European Court of Justice, in its ruling TRR of 6 November 2008, strengthened the place-of-receipt principle. The applies to catalogue goods and services provided to a recipient which carries out both entrepreneurial and non-entrepreneurial activities (public authorities, holding companies, non-profit associations) even if the recipient uses the goods or services (exclusively) for its non-entrepreneurial purposes.

The ruling, which can be described as spectacular, is diametrically opposed to the predominant opinion and administrative practice in Germany. Under Section 38 (5) sentence 2 of the German Turnover Tax Act (UStG), the entrepreneur would need to receive the goods or services for its entrepreneurial purposes in order for the place-of-receipt principle to apply.

The place-of-receipt principle implements the EU single market more strongly than the registered-place-of-business principle. The aim is for the recipient of the goods or services to select the supplier solely on economic factors and not because of the turnover tax (i.e. the applicable tax rate). For this reason, the value-added tax reform at the European level (the "VAT package"), and the German Annual Tax Act 2009 which implements it, have significantly extended the place-of-receipt principle. They stipulate that from 2010, the turnover tax on services rendered in trade between business enterprises will always be payable in the destination country, not the country of origin. In sales to private customers, this change will be made in 2015. But it is not yet possible to give a final verdict on whether the reform will go as far as the TRR ruling of the European Court of Justice.

Liable for turnover tax for the sale of shares in investment funds

The Federal Court of Finance (BFH), in a ruling of 30 October 2008, decided on the turnover tax treatment of services in connection with the sale of investment fund shares. In a departure from the previous view of the tax authorities and the treatment of such sales in practice, the Federal Court of Finance significantly restricted the applicability of tax exemptions. This decision is particularly significant in cases in which the work

of selling such shares is divided between different parties.

1. The factual situation considered by the Federal Court of Finance (BFH)

In the case which the Federal Court of Finance (BFH) had to decide, an entrepreneur had assigned the (sub-)agency services for the funds of an issuer to a commercial agent. Under the agreement, the entrepreneur had to visit his assigned sales partners (deal procurement agents) regularly and keep them informed and trained in relation to the development of the fund products on the basis of product information. The commercial agent's commission for the investments resulting from his work was to be based on the volume of the investment fund shares acquired by each investor.

2. The decision of the Federal Court of Finance (BFH)

The Federal Court of Finance (BFH) ruled that there was no exemption from turnover tax under Section 4 (8) lit. f of the German Turnover Tax Act (UStG). According to this provision, the procurement of the turnover shares in business companies is exempt from turnover tax. But this procurement assumes that the agent does what is necessary to enable two parties to conclude a contract, and that the agent does not have any interest in the content of this contract. The agency services which are necessary for an exemption from turnover tax could consist of showing one party the opportunity to conclude a contract, then making contact with the other party or negotiating the details of the mutual performance.

In the opinion of the Federal Court of Finance (BFH), however, an activity which is directed towards recruiting, training and instructing the agents or providing supervision, support, monitoring, coordination and organisation for the agents does not fall under the concept of "agency services". These activities do not represent a direct contribution to the conclusion of a purchase of shares in the fund.

3. Conclusion

All this means that the content of the relevant (sub-)agency contract is of decisive importance. At each level of the sales chain it must be exactly defined what is the main emphasis of the services provided. If an activity is undertaken in which support, training and supervision play a significant and dominant role, this activity will not be granted exemption from turnover tax. Sub-dividing distribution activities between different service providers can therefore be problematical. In any case, existing contracts must be reviewed, and adapted if necessary.

Land transfer tax on future building work is not contrary to European law

Under the case law rulings of German fiscal courts and in the opinion of the tax authorities, under certain circumstances when land that has not been built on is purchased, the purchase price of the land plus the remuneration for the future building

work can be applied as the basis of calculation for the land transfer tax. This is ruled to apply always if the purchase applies to the land together with buildings that are yet to be built (as a single subject of the performance). These conditions are always assumed to apply under the "Bauherrenmodell" (tax-beneficial scheme for building residential properties), and also in cases in which the purchaser is no longer free to decide "whether" and "how" to build the building because of one or more contracts with the vendor.

The Financial Court of Lower Saxony feared that such an extension of the basis of calculation could violate European law. In view of the fact that the building work is thus subject to land transfer tax, and at the same time subject to turnover tax, it suggested that this practice went against the prohibition of a multiple levy of turnover tax under European law. Economically, it suggested that the German land transfer tax had a similar effect to turnover tax. For this reason, in a ruling of 2 April 2008 the court appealed to the European Court of Justice.

In a ruling of 27 November 2008, (Monika Vollkommer ./ Hannover-Land I tax office) the European Court of Justice now decided that charging land transfer tax on future building work is compatible with European law. Because the land transfer tax does not have the character of turnover tax, the value-added tax system directive does not give any grounds to reject it. This means that the double burden of land transfer tax and turnover tax continues to apply.

Obation of proof fr deliveries within the Community

In a statement of 6 January 2009, the Federal Ministry of Finance (BMF) stated its position on exemption from turnover tax for deliveries within the Community. This again underlines the great care that the sales department of a company must take in any deliveries within the Community.

1. Problem: Turnover tax trap

Deliveries within the Community are exempt from turnover tax under Section 6a (1) of the German Turnover Tax Act (UStG). If an entrepreneur (supplier) sells goods to a Spanish company from Madrid, for example, and if the customer causes the goods to be collected by a representative, there is a risk of a turnover tax trap for the supplier. If the supplier treated the delivery as exempt from tax, and if the tax authorities then assume a retrospective tax liability because not all conditions for tax exemption are fulfilled (e.g. customer's identity as a business enterprise, use of the supplied goods for its business purposes or physical movement of the goods to another member state), the supplier is then liable for the unpaid turnover tax. The liability risks is generally higher than the profit margin for the affected transaction.

2. Acting in good faith

In future, the Federal Ministry of Finance (BMF) wishes to offer protection of confidence for a supplier acting in good faith. But the decisive factor for protection as being of good

faith, in the view of the Federal Ministry of Finance (BMF), is that the accounting records and receipts must clearly and conclusively indicate a delivery within the Community and that the proof provided by the business enterprise complies with the prudence of a competent businessman and was in good faith (cf. No. 50 in the letter of the Ministry of Finance). Here, high formal demands are placed on the accounting and receipt evidence provided (cf. below, No. 3).

In our view, these high demands placed on protection as being in good faith differ from the requirements of case law. In a ruling of 6 December 2007, for example, the Federal Court of Finance (BFH) stated that tax exemption must be granted in spite of any failure to fulfil the formal obligations of proof if the objective evidence proves that a delivery within the Community has actually taken place. In a such case, the court ruled that tax exemption must be granted even if the entrepreneur has not provided the necessary proof.

3. Obligation of proof

Nevertheless, in view of the unambiguous statement by the Ministry, it is urgently recommended that accounting and receipt evidence should be maintained as demanded by the Ministry. Specifically, for example, the following documentation is advisable in the event of any transport of goods:

- Duplicate of the invoice
- Normal commercial receipt showing the exact destination (e.g. delivery note)
- Extract from the register of companies for the customer
- Copy of the personal identity document of the customer or its manager
- Signed collection authority of the customer for the collector (or chain of authorisations) with a reference to the specific delivery, in German
- Copy of the personal identity card of the collector
- Signed confirmation of receipt of the collector, dated
- Signed and dated assurance of the collector that he will transport the object of delivery to another country within the Community, in German
- Verified request for confirmation of the VAT ID No. in the first business contact with the customer
- Simple request for confirmation of the VAT ID No. on collection

The organisation within the company must be structured to ensure that the sales department complies with these requirements, not only the accounting department. Generally it will be difficult or even impossible to obtain proper proof for the date of the delivery after the event. Compliance with the requirements should be ensured by the appropriate check lists.

COMMERCIAL & IP

The obligation to provide proper publication details (an "Impressum") on the Internet

Under Section 5 of the German Telemedia Act (TMG), "service providers" offering "telemedia on a commercial basis, generally offered for gain" must provide certain information in a way that is "easily identifiable, directly accessible and constantly available". This obligation to identify the service provider especially aims to protect consumers, but it is also in the interest of business enterprises which are thus able to obtain information about other participants in the market, e.g. in order to enforce fair competitive practices.

Who is subject to this obligation?

"Service providers" who are subject to the obligations under Section 5 of the Telemedia Act are defined as "any natural person or legal entity which holds its own telemedia or those of third parties available for use, or provides access for such use". Here, the concept of "telemedia" is defined very broadly and includes all information and communication services which are not radio transmission or telecommunications in the narrow sense. This means that practically every on-line presentation is a "telemedium". The concept of offering services "on a commercial basis" must also be interpreted broadly. This means that the obligation to provide publication details in an "Impressum" under German law must be fulfilled by practically everyone who offers an on-line presentation unless it is used exclusively for private or family purposes and has absolutely no effect on the market. If there is any doubt, it should therefore always be assumed that the mandatory details must be given.

What details must be given?

The basic details which must be given depend in the first place on whether the obliged party is a natural person or a legal entity.

The basic details for natural persons are the surname and first name, the complete address as required for a summons (not just a post box!) and a valid phone number and e-mail address as additional contact information.

For legal entities, the complete company name and the complete address as required for a summons must be given (here, too, a post box is not enough, and if there are several branches the main branch must be stated to avoid any doubt), a valid phone number and e-mail address and the authorised representative (and if this in turn is a legal entity, the representative of this entity must be named, and so on until a natural person can be named). If (voluntary!) details of the company's share capital are given, the nominal capital must be stated, and also the total amount of the outstanding contributions if not all cash contributions have been paid up.

For some groups of service providers, additional mandatory details must also be given, i.e.:

If the service is offered or rendered within the framework of an activity which requires the approval of any public authorities, details of the responsible supervisory authority

The register of companies, register of associations, register of partnerships or register of cooperatives in which the service provider is registered, together with the registration number,

If the service provider is in a regulated profession: details of the chamber which the service provider belongs to, the legal designation of the profession, the state in which the professional title was granted and details of the professional codes of conduct and access to such codes of conduct,

If the service provider has a VAT ID No. under Section 27a of the Turnover Tax Act or a business identification number under Section 139c of the Fiscal Code (AO), the details of this Number, and

If the service provider is a German public limited company (AG), a limited partnership with shares (KGaA) or private limited company (GmbH) which is in the process of winding up or liquidation, the relevant details.

This means that there are a large number of compulsory details depending on the circumstances of the service provider.

It must also be taken into account that – depending on the type of on-line presentation - further information obligations may exist under other legal provisions in individual cases, e.g. under the Broadcasting Agreement of the Federal States for websites with a journalistic or editorial character.

What happens if the obligation to provide publication details is violated?

Anyone who violates the obligation to provide proper publication details under Section 5 of the German Telemedia Act (TMG) commits a regulatory offence and can be fined up to 50,000.00 Euros. In addition, it is a violation of competition which can justify claims for injunctive relief, and competitors can enforce this by a cease-and-desist letter with a demand for a penalty payment. On the whole it is therefore urgently advised that you should not go on-line with a website which is subject to the German "Impressum" requirements without providing the publication details which are compulsory in the individual case.

LATEST NEWS

More than 200 participants at the HAUBROK seminar "Capital Market Law Update 2009" with SIBETH

Together with the main seminar service provider Haubrok Corporate Events GmbH, in January of this year SIBETH held what is now the sixth practical "Capital Market Law Update" seminar in Berlin, Düsseldorf, Hamburg, Frankfurt am Main and Munich. The content of the practical seminar was focused on numerous current subjects in share and capital market law. As in the previous years, there was a special focus on current judgments from the past annual general meeting season and changes in legislation, for example the government draft for a law to implement the European directive on shareholders' rights in German law. More than 200 decision-makers from listed joint-stock companies participated in the practical seminar in the five venues.

IMPRESSUM

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