PKF

Newsletter

Key Issue:
Highlights of the Trade and Cooperation Agreement between the EU and the UK

01|21

Dear Readers,

We hope that 2021 has started well for you. Shortly before Christmas, something that no longer seemed to be possible then became a reality. The **EU** and the **United Kingdom** reached a compromise – virtually at the last minute – on a **trade and cooperation agreement**. In the Key Issue for this edition of the PKF newsletter we have a report on the highlights of this agreement. The specific form of the agreement and the many outstanding issues are certain to accompany us all throughout the year.

In the first contribution in our Tax section, the topic is, once again, the **2020 Annual Tax Act**. While, in our December issue, the spotlight had been on important changes to German income tax law, this time, after a report on other changes related to income tax and payroll tax, we have turned our attention to **other types of tax**. Moreover, the aspects concerned with criminal law for tax offences should not be overlooked. The next topic of Administrative Principles, initially, may not sound very exciting. However, in terms of the contents, this is not about more or less work for the administration department but, instead, about (even) more **obligations of cooperation for taxpayers in respect of cross-border transactions**. There you can read about how extensively future transactions will have to be prepared. The third article likewise deals with the obligations of taxpayers, although in this case those with limited tax liability. Where there is a **transfer of rights** that have been recorded in a register in Germany the fiscal authority effectively recognises a permanent establishment and also puts the onus on the users of these rights in Germany.

In the Legal section, subsequent to the aforementioned Key Issue report, we have compiled for you some important aspects of the **German Business Stabilisation and Restructuring Act**, which came into force on 1.1.2021. Our second report, contrary to what the name of the legislation might suggest, is primarily about the additional **duties of management in a crisis** and thus, ultimately, about an increase in the liability risk. Next up in the Legal section you will find information on something that, under coronavirus conditions, is currently a particularly relevant labour court problem, namely that **short-time working** is generally only possible when certain criteria are met; we are pleased to report that in this case the court considered **dismissals with the option of altered employment** to be an effective method for employers and employees.

Following on from two articles in our ‘Latest Reports’ section you will also find the social insurance values and tax dates for 2021.

With our best wishes for a healthy and prosperous year during which, hopefully, more in-person meetings will soon be permitted.

Your Team at PKF

Key Issue

Highlights of the Trade and Cooperation Agreement between the EU and the UK

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TAX

StBin [German tax consultant] Sabine Rössler

The 2020 Annual Tax Act – Important changes trelating to various types of tax and the tightening of criminal law for tax offences

On 18.12.2020, the Bundesrat (upper house of the German parliament) approved the 2020 Annual Tax Act. Its aim is to continue to alleviate the burdens due to coronavirus by using tax measures. Following our report in the previous issue, 12/2020, of our PKF newsletter, in the subsequent sections we discuss further details relating to income tax and payroll tax, important changes to other types of tax as well as the significant tightening of criminal law for tax offences..

1. Income tax and payroll tax

1.1 Home office blanket deduction

Tax breaks for working from a so-called home office (HO) are completely new. Section 4(5) sentence 1 no. 6b sentence 4 of the Income Tax Act (Einkommenssteuergesetz, EStG) grants an HO blanket deduction of € 5 per calendar day on which work was carried out solely at home. However, the blanket deduction is limited to 120 days in the HO or a maximum of € 600 for a financial or calendar year and will initially apply to 2020 and 2021.

On closer examination, the HO blanket deduction reveals more style than substance. First of all, the HO blanket deduction has to be included in the general work-related costs deduction of € 1,000 and does not augment it. Therefore, the HO blanket deduction will only actually have an effect if and to the extent that the work-related costs together with other itemised expenses come to more than € 1,000. Secondly, you should bear in mind that you will not be able to claim the so-called commuters' tax allowance (Pendlerpauschale) – for journeys between the home and the place of work (30 cents for each kilometre of distance; in 2021 increased to 35 cents as of the 21st km) – for the days that your work was carried out in an HO. Starting from a simple distance of 17km between the home and the place of work the HO deduction would be less than the km effect.

Please note: In the course of setting up an HO, if expenses were incurred for an office chair or desk, monitor, keyboard, mouse, printer and paper then these can also be deducted as work-related costs on the basis of itemisation like the commuters' tax allowance for days spent in the office and the HO blanket deduction for days worked in the home office. Moreover, despite the HO blanket deduction it should still be possible to claim 20% of the telephone and internet costs (max. € 240 p.a.) in addition.

1.2 Coronavirus special payments

Up to € 1,500 may be paid out to employees tax-free as financial assistance and support because of the coronavirus crisis. The period previously applicable for this benefit has been extended to 30.6.2021.

1.3 Payments by employers to top-up the short-time working allowance

The remuneration periods during which employers are able to make tax-exempt payments to top-up the short-time working allowance, in accordance with the Coronavirus Tax-Related Assistance Act, have been extended to the end of 2021. These top-up payments and the short-time working allowance together may not exceed 80% of the difference between the usual gross remuneration and the remuneration that is actually paid.

1.4 Advice and guidance for exiting employees

In future, employers will be able to provide outplacement services tax-free to employees who will be given their notice or who will exit. Section 3 no. 19 EStG was amended for the purpose of clarification in this respect.

1.5 Tax exemption limit for benefits in kind

From 2022, the monthly tax exemption limit for benefits in kind will be raised from previously € 44 to € 50.

Please note: For other important changes to German income tax law please see the report in the previous

issue, 12/2020, of our PKF newsletter. The topics covered there were, in particular, investment allowances and special depreciation.

2. Value Added Tax

2.1 VAT digital package

As of 1.7.2021 significant changes will come into force with respect to mail order selling to private individuals. The key elements of the news rules (for detailed explanations cf. issue 11/20 of the PKF newsletter) include:

- central reporting of intra-Community distance sales via the so-called 'One Stop Shop' as well as
- tax liability for marketplace participants (e.g., Amazon) in many cases of goods deliveries from countries outside of the EU.

2.2 Reverse charge mechanism for telecommunication services

The liability of the recipient of a service to pay (value added) tax (the so-called reverse charge mechanism) has been extended to include telecommunication services. Germany has thus followed the example of many EU member states.

The background is that in the area of retailing using voice over IP (VOIP) there are VAT fraud models that lead to losses in VAT revenues. Those involved who appear in the background are predominantly persons not domiciled in Germany and, as a result, they evade the actions of the fiscal and law enforcement authorities. Moreover, the fiscal authority frequently has no access to servers installed in a third country on which call minutes could be tracked. The losses in tax revenues arise when the tax charged for the services described is deducted as input tax but is not paid by the service provider to the tax office. This can be avoided if the recipient of the service is liable to pay the tax.

A requirement for the reversal of the liability for the payment of VAT is that the business receiving the service is a so-called reseller and thus performs telecommunications services as the main activity.

Please note: With immediate effect, the tax office will issue certificates attesting to the reseller status of a business. The validity of the certificate should be limited to no longer than three years.

3. Inheritance tax

3.1 Equalisation claim for a community of accrued gains

Under section 5(1) of the Inheritance Tax Act (Erbschaftsteuergesetz, ErbStG), in the event of the death of a

spouse the surviving spouse is granted tax exemption in the amount of the equalisation claim that s/he would have been able to claim in order to equalise the accrued gains in accordance with Section 1371(2) of the German Civil Code if s/he had not become the legal heir. The current structure of this provision results in an unjustified double concession for the surviving spouse. On the one hand, the value of the estate is calculated using tax exemptions and concessions. On the other hand, the deduction to equalise the accrued gains is made on the basis of market values regardless of the valuation for inheritance tax. In order to rule out this double concession a new clause 6 has been added that reduces the notional equalisation claim that can be deducted. For this purpose, the tax exemptions (T) are deducted from the value of the final assets (F – T) and shown in relation to the value of the final assets (F – T / F).

3.2 Income tax liabilities and refund claims in the case of inheritance tax

According to the case-law of the Federal Fiscal Court (Bundesfinanzhof, BFH), income tax refund claims that relate to the year in which a testator died do not fall under a taxable acquisition under Section 10(1) ErbStG because they only arise after the end of the year in which a testator died (cf. BFH ruling from 16.1.2008, case reference: II R 30/06). For acquisitions, the current rule is that tax refund claims may only be considered if they have arisen legally. This unequal treatment has been redressed via an amended version of Section 10(1) sentence 3 ErbStG. The amended version means that both the tax refund claims that relate to the year in which a testator died have to be applied and the tax liabilities also have to be deducted.

4. German Fiscal Code – Running of interest in the case of provisional loss carry-backs from 2020

Under an addendum to Section 111 EStG, the general provision in Section 233a(2a) of the Fiscal Code (Abgabenordnung, AO) on adding interest in the case of loss carry-backs has to be applied to the provisional loss carry-back to 2019 that is based on the new regulations that formed part of the coronavirus legislation. If the tax assessment for 2019 was based on taking into consideration a provisional loss carry-back for the first time then the interest on tax arrears and/or tax refunds may only be assessed from the time when the loss is carried back plus a grace period of 15 months. The assumption underpinning this is that a loss deduction could not yet have been taken into consideration in the original tax assessment and, therefore, prior to the occurrence of the loss, neither the taxpayer nor the tax office would have sustained a liquidity advantage/disadvantage that the adding of interest aims to compensate. The rule has to be applied both to the original loss carry-back as well as to subsequent add-backs in the context of the 2020 tax assessment.

5. Criminal Law for Tax Offences

5.1 Extended limitation period for cases of especially serious tax evasion

The limitation period in Section 376(1) AO has been increased for cases of especially serious tax evasion from 10 to 15 years. This applies to all acts that had not yet been barred by the statute of limitations on the date of the entry into force of this legislation.

5.2 Unlimited forfeiture of criminal gains

There will be no limit on the possibility to confiscate the proceeds of crime, e.g., from tax offences, if the entitlement to the restitution of gains has expired merely because of the statute of limitations. This provision is applicable to the proceeds of crime

- from offences as of the date of the entry into force of the legislation (one day after the promulgation of the legislation) and
- from offences prior to the entry into force of the legislation where the confiscation was ordered after the entry into force of the new provision (this, particularly, if it is a case of a tax offence where the offender avoided tax on a large scale or had obtained unjustified tax benefits – cases for Section 370(3) sentence 2 no. 1 AO).

WP/StB [German public auditor/ tax consultant] Daniel Scheffbuch / Luca Gallus

2020 Administrative Principles – Stricter obligations of cooperation for cross-border transactions

Taxpayers are generally obliged to cooperate in enquiries into tax matters. These obligations of cooperation were specified by the fiscal authority, on 3.12.2020, in the context of the publication of the 2020 Administrative Principles. Taxpayers now have to satisfy stricter requirements in the case of cross-border transactions in order to be able to avoid an estimate of the tax bases and the setting of surcharges.

1. Obligations of cooperation for cross-border transactions

Taxpayers' obligations of cooperation exist independently of any official duty of enquiry on the part of the fiscal authority and without being requested to cooperate. In the Federal Ministry of Finance's circular from 3.12.2020 (case reference: IV B5 – S 1341/19/10018 :001) the fiscal authority once again enhanced the obligations of taxpayers in relation to cross-border transactions and, in particular, in transfer pricing cases.

In case of cross-border transactions taxpayers are generally obliged to clarify the facts, provide evidence and take precautionary measures with respect to preparing evidence. This means that a statement about evidence that is located abroad is not sufficient. Instead, evidence also has to be obtained independently by the taxpayer within its possibilities.

This, in turn, specifically means using the cost plus method to present evidence of the costs and using the resale price method for the selling prices. Evidence is understood to mean, e.g., expert opinions on transfer pricing, yet also information via electronic communication media (e-mails, information from messenger services, etc.) if they are of tax-related relevance to the business transaction under review. This duty of presentation likewise includes documents and data from closely related parties as well as accounts, records and commercial documents.

Please note: Precautionary evidence obligations ensure that taxpayers cannot rely on being unable to clarify a respective transaction or to provide evidence. By implication, this means that the taxpayer has to ensure that the possibility of obtaining evidence has already been agreed when contracts are concluded.

2. Requirements for transfer price documentation

With respect to transfer price documentation, the taxpayer is obliged to maintain its records in such a way that the fiscal authority is able to carry out an expert risk assessment and perform a transfer pricing audit. Here, the relevant facts and circumstances on the date when the business relationship was established (transaction imposing an obligation) have to be presented. This includes arm's length comparison data referring to this date for the documentation of the appropriateness of the transfer prices (so-called hypothetical arm's length comparison).

Please note: These documents should be so comprehensive that the fiscal authority has the possibility to validate the data used on an ex-post basis by using current data.

The taxpayer generally only has to prepare records for the methods it has used. If the fiscal authority considers a different method to be more appropriate then the taxpayer would however be called upon to cooperate and should provide the relevant data for this purpose.

Please note: The OECD requirements were implemented for the application of the above-mentioned hypothetical arm's length comparison. The taxpayer is required to produce a sensitivity analysis for modified assumptions and parameters.

3. Estimates in the event of violations of the duty to cooperate

A taxpayer would breach its duty to cooperate if it did not disclose facts and circumstances of which it was or ought to have been aware to the fiscal authority. In such cases the fiscal authority would have the right to make an estimate. However, this would not constitute a punitive estimate. The aim would be an estimate that comes as close as possible to the true facts by being coherent, economically feasible and reasonable.

Please note: In the case of infringements of the rules on transfer pricing documentation (failure to submit, late submission or the submission of records that are essentially unusable) a penalty surcharge may also be determined in addition.

StBin [German tax consultant] Elena Müller

Limited tax liability and tax deduction where rights have been transferred

Limited tax liability can already arise if the income in Germany is generated solely from rights that have been recorded in a register in Germany. A recent Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) circular includes detailed explanations that are used to differentiate between permanent and temporary transfers of rights.

1. Limited tax liability

Natural persons who are neither domiciled nor ordinarily resident in Germany have limited tax liability there in respect of income flows in Germany that are listed exhaustively in Section 49 of the Income Tax Act (Einkommenssteuergesetz, EStG). The same applies to corporate bodies, associations of persons and pools of assets if,

among other things, neither their management nor registered offices are based in Germany.

Domestic income flows also include those derived from the renting out and leasing of rights (Section 49(1) no. 2f and no. 6 EStG). The respective income flows, such as royalties, will trigger a limited tax liability in Germany if they have a connection to Germany. The BMF, in its circular from 6.11.2020 (case reference: IV C 5 -S 2300/19/10016 :006) clarified that in the case of temporary or permanent transfers of rights the connection to Germany already exists as a result of the record in a German register (e.g., in the German trademark register).

2. Temporary transfer of rights

Temporarily transferring those rights that have been recorded in a German register is one of the elements for the existence of income flows listed in Section 49 EStG that are subject to limited taxation; such a temporary transfer of rights will thus result in a tax liability for a foreign patent owner. It is incumbent on the payment (royalty) obligor

- to withhold tax (Section 50a(1) no. 3 EStG),
- to pay the tax to the Federal Central Tax Office (Bundeszentralamt für Steuern, BZSt) and
- to send a tax return to the BZSt.

Please note: In some cases, it may be possible to apply for a certificate of exemption.

3. Permanent transfer of rights as the sale of rights

A permanent transfer of rights constitutes a sale of the rights. This would likewise trigger a limited tax liability since this is included in the catalogue of income flows in Section 49 EStG. In such a case, however, it is the recipient of the payment that has to take action and submit a tax declaration to the competent tax office since the sale of rights is not subject to withholding tax under Section 50a(1) no. 3 EStG.

Please note

Admittedly, under the law, for a limited tax liability to arise it is not necessary to exploit the rights, which have been recorded in a German register, in a permanent establishment based in Germany or to have cash flow in Germany. It is only upon such exploitation however that income flows are actually generated in Germany that can then be taxed.

LEGAL

RA [German lawyer/tax consultant] Sebastian Thiel

Highlights of the Trade and Cooperation Agreement between the EU and the UK

On 24.12.2020, it finally happened – after seemingly endless negotiations between the EU Commission and the British government a compromise was reached on a Trade and Cooperation Agreement between the EU and the UK ("Agreement") in respect of future relations. Our report gives an initial overview of the key elements of the Agreement and the legal certainty that businesses have gained as a consequence.

1. Background and coming into force

With the end of the one-year transition phase on 31.12.2020 – the United Kingdom (UK) having already exited from the EU on 1.2.2020 – the UK has to be treated as a third country in the EU Single Market. Without the agreement there would have been a hard cliff-edge exit probably with a chaotic aftermath. One consequence of this would have been, for example, that tariffs would have had to have been charged for the trade in goods.

However, for now, things have turned out differently. The Agreement was ratified by the British side on 30.12.2020. By contrast, the coming into force of the long-awaited Agreement on 1.1.2021 was merely provisional. On the EU side, the formal ratification by the European Parliament is still outstanding.

This final step towards ratification is expected by 28.2.2021, although according to initial reports the European Parliament has already called for more time to

examine the Agreement. Furthermore, more and more voices on both sides are calling for adjustments to the Agreement.

The contents of the Agreement are as follows.

2. Key elements of the Agreement

2.1 Tariffs

The UK – with the exception of Northern Ireland – left the EU Single Market as of 1.1.2021. From now on, "zero tariffs and zero quotas" will basically apply to trade on both sides. This means that, initially, there will be no tariffs or quantitative restrictions via quotas for specific goods. This will however only apply on the condition that the so-called rules of origin are complied with. The aim of this is to ensure that no products from third countries can be passed through tariff-free.

While no tariffs have to be paid, nevertheless, for the businesses concerned this will represent a cost factor that should not be underestimated. This is because, in the future, various customs formalities will have to be complied with. Besides the extra expenses for export and import declarations, issuing proof of origin documents will give rise to yet more additional costs. The requirements for the respective proof of origin documents, in some cases, are based on special rules for specific product categories (e.g., batteries and electric vehicles).

Recommendation: The businesses concerned are advised to carefully review and adjust their costing.

2.2 Level playing field – fair conditions of competition

In return for granting Britain tariff-free access to the EU Single Market the EU requires fair conditions of competition, the so-called level playing field. Uniform environmental, social and subsidy standards are supposed to counteract changes in competition standards and thus a distortion of conditions.

Please note: Special arbitration panels will carry out reviews.

2.3 Services

When Britain exited the EU the freedom to provide services was removed. This will result in, among other things, considerable obstacles if cross-border services are supposed to be provided. The financial services sector is moreover especially affected. A separate framework agreement is however expected for this sector by March 2021. For businesses whose employees are seconded on a regular basis the Agreement initially provides for new rules. From now on, applications will have to be made for the recognition of professional qualifications and, in individual cases, this might sometimes be complicated; the earlier automatic recognition is now a thing of the past.

2.4 Transport and logistics

Following the exit, the single European sky and the common transport market for road traffic no longer exist. Transporting goods and passengers within the EU will be restricted for providers from the UK. The agreement provides for special conditions in this respect.

2.5 Fishing

The EU and UK have initially agreed – the adjustment period is limited to five and a half years – on a new framework for the joint management of the fisheries stocks. The fishing rights for EU fishermen will be initially reduced

by 25%. As of June 2026, the catch shares will then be negotiated annually with the UK in multilateral bodies.

2.6 Free movement of people

Britain's exit from the EU saw the end of the free movement of people on 1.1.2021. It is naturally still possible to travel in both directions. Visa applications generally only have to be submitted for stays of more than 90 days.

Please note: EU citizens living in the UK have to apply free of charge to the 'EU Settlement Scheme', by 30.6.2021, for so-called settled status to have their right of residence confirmed in this way.

2.7 Data Protection

The Agreement does not provide for the definitive settlement of the issue of data protection. Instead, the Agreement allows for an initial four-month transition period for data transfer to the UK. An extension to 30.6.2021 would be possible. Key regulatory content from the GDPR has been transferred to the new British Data Protection Act (UK GDPR). The British government now aims to achieve recognition of this via a so-called adequacy decision to be issued by the EU Commission in accordance with Art. 45 GDPR. The UK would then be officially classified as a 'secure third country' in terms of its data protection legislation so that, for example, EU companies could refer to this when making data transfers to the UK. The advantage of this for businesses would be that they would not have to put in place any further costly protection measures themselves.

Recommendation: The businesses concerned must be advised to follow further developments and in the event that the adequacy decision is not forthcoming to take appropriate measures.

3. Area-specific regulations

Beyond the above regulations, the Agreement includes a great number of specific rules from various areas, such as, for example:

- regulatory practice,
- social security,
- state aid,
- the energy industry,
- tax transparency,
- criminal prosecution,
- dispute resolution.

Conclusion

The Agreement leaves many questions unanswered. In several areas important decisions have been merely postponed – the end point is still open. Disputes will inevitably result from this. Nevertheless, this Agreement is an important signal and a crucial step for the realignment of relations between the EU and UK.

RA [German lawyer] Andy Weichler

Extended obligation to detect crises at an early stage

The Business Stabilisation and Restructuring Act *(Unternehmensstabilisierungs- und -restrukturierungsgesetz, StaRUG)* came into force on 1.1.2021. With this the German legislator has created a new instrument for companies that get into payment difficulties and the use of which can prevent insolvency proceedings and, instead, makes it possible to reorganise or restructure a business earlier on.

1. New responsibilities for the management

The content of this Act, however, includes not just rules on reorganising and restructuring. In particular, in Section 1 of the StaRUG, management responsibilities with respect to continuously monitoring the development of the business have been standardised. According to this, the bodies authorised to represent the company are required to continuously inform themselves about the development of their own business in order to be able to detect possible crises at an early stage.

Should a potential crisis be detected then the management is required to take appropriate measures. Furthermore, the management is required to notify the supervisory body, if there is one, without undue delay.

In order to comply with these requirements, the developments, opportunities and risks will inevitably have to be analysed and written down at regular intervals.

Please note: If a crisis or the potential for a crisis is identified then appropriate measures will have to be taken in

order to avert or resolve such a crisis. This should likewise be explicitly written down.

2. Extended management liability

If the management does not adequately comply with the obligation to detect crises at an early stage and to manage crises then it can expect to be held liable. In this connection, the German legislator makes reference to the already existing liability rules under Section 43(1) of the German Limited Liability Companies Act and Section 93(2) of the German Stock Corporation Act. Here, managing directors or board members are held liable if they have not exercised the due care of a prudent business person or manager. According to the intention of the legislator this can now be deemed to be so if no early detection of crises was carried out or if there was no crisis management.

Please note: In such a case, it would then frequently be assumed that the right to claim damages will be asserted against the representative body if there is a causal connection between the lack of an early crisis detection system and the losses that have arisen.

3. Payments in the ordinary course of business after factual insolvency

Besides tightening the requirements with respect to the early detection of crises and crisis management, the German legislator also opted to reduce the liability of the management with the newly introduced Section 15b of the German Insolvency Code. Here, the German legislator has now clarified that if payments were made in the ordinary course of business for the purpose of maintaining business operations then this will not result in managing directors being held personally liable. This will apply at most to the period that the management needs to prepare for insolvency proceedings or for measures that are conducive to the long-term elimination of factual insolvency. In the case of illiquidity, the maximum applicable period here is still three weeks and in the case of over-indebtedness a period of up to six weeks.

Recommendations

The new legal situation means that the management is obliged to detect potential crises at an early stage and to take appropriate measures. In order to avoid personal liability here it is vital to carefully document all the measures.

RA [German lawyer] Jan-Erik Twehues

Unilateral imposition of short-time working in an individual employment relationship

Even if the pre-conditions for entitlement to the short-time working allowance have been satisfied it is only possible to unilaterally impose short-time working with respect to employees where there is a legal basis. However, in a recent ruling, the Stuttgart labour court decided that dismissal with the option of altered employment conditions (Änderungskündigung) with the aim of enabling short-time working can be justified.

1. Issue – Coronavirus-induced short-time working

The legal action was brought by an employee (A) who had been working in the social services and care division for an operator (B). Following the temporary closure of the kindergartens and day nurseries, in mid-March 2020, B notified the Federal Employment Agency of the worker inactivity at her enterprise. The Federal Employment Agency authorised the short-time working allowance retroactively to 1.4.2020. However, A withheld permission for the introduction of short-time working. On 22.4.2020, B terminated employment without notice and with the alternative of ordinary dismissal with the option of altered employment conditions as of 31.7.2020. The aim was for B to be entitled to impose short-time working for the period from 18.5.2020 until probably 31.12.2020 provided that there was considerable worker inactivity and all the other pre-conditions for entitlement to the short-time working allowance being granted – in accordance with Section 95 ff. of Volume III of the German Social Security Code (Sozialgesetzbuch, SGB) – had been satisfied.

2. Pre-conditions for and processing of the imposition of short-time working

If neither the employment contracts nor the current works agreements or collective agreements – that are applicable to the employment relationship – put on record that

short-time working is possible and may be imposed by the employer then the employees' contractual permission is required in addition. If employees do not consent to short-time working then the employer is basically obliged to continue paying the employees the (full) amount of their contractually agreed remuneration for their work.

An alternative to the requisite consent is the dismissal with the option of altered employment conditions according to which continued employment under new and altered conditions is offered at the same time as the previous employment relationship is terminated. This gives the employee the option of leaving the enterprise entirely or, alternatively, continuing to work under altered conditions. In view of the notice periods that have to be observed – which in some cases can be several months -, for the introduction of short-time working ordinary dismissal with the option of altered employment makes little practical sense however. Dismissal without notice but with the option of altered employment conditions would provide a remedy in such circumstances; however, the previous much more stringent requirements would also have to be satisfied.

3. The decision of the Stuttgart labour court

The Stuttgart labour court, in its ruling from 22.10.2020 (case reference: 11 Ca 2950/20), expressly accepted, for the first time, the justification for dismissal without notice but with the option of altered employment conditions with the introduction of short-time working. The justification for dismissal without notice but with the option of altered employment requires:

- a notice period to be observed for the start of short-time working (here: three weeks was adequate);
- a proper selection based on social criteria from among the employees who could be considered (i.e., the conditions for a short-time working allowance being granted in accordance with the SGB III are also present in each case in the person of the employee);
- a limit on the duration of the short-time working;
- the absence of milder methods (in particular, proof is necessary that an attempt was made prior to the dismissal to achieve an individual agreement with the employees).

Please note:

It should be borne in mind that this labour court decision is not yet legally binding and we will have to wait and see if the competent state labour court, as the appellate court and, potentially, the Federal Labour Court will affirm the ruling.

LATEST REPORTS

Commercial trading in property when constructing an extension building

Extensive building and extension measures that a taxpayer carries out on a property that has been privately let for many years when the sale of the property is imminent could result in the property being assigned to commercial business assets.

The limits of non-taxable asset management are normally exceeded when more than three properties are sold again within a period of approximately five years following their purchase or construction. Even though, at first sight, the basic requirement for commercial trading in property – the sale of more than three properties within five years – has not been fulfilled, nevertheless, under certain circumstances, commercial trading in property may exist.

With respect to this issue, the Federal Fiscal Court, in its ruling from 15.1.2020 (case reference: X R 18, 19/18) decided that commercial trading in property can exist in the case of properties that have been privately let if, in view of a sale, the taxpayer carries out construction measures that are so extensive that the existing building is not merely extended or considerably enhanced beyond its previous condition but, instead, a new asset is produced – a building. In such a case, it would not be relevant if the measures gave rise to a standalone building beside the existing one, a standalone part of the building or a single new building.

Please note: The very important consequence is that, in such a case, there will be not just one property that is included in the sale but, instead, (at least) two properties will be sold and these would have to be factored into the 3-property limit.

RAin/StBin [German lawyer/tax consultant] Antje Ahlert

Obligation to register in the core energy market data register

The Federal Network Agency's (Bundesnetzagentur) core energy market data register has been the central register for all energy generation systems since 31.1.2019. Operators of photovoltaic systems, block-type thermal power stations, battery storage systems, CHP plants, wind energy converters or emergency power generators are legally obliged to register themselves and their systems in the register. All systems that are running have to be registered irrespective of when they were commissioned.

This likewise applies to systems that had already been registered in earlier registers as well as to systems that do not receive remuneration. To avoid losing the payments under the Renewable Energy Sources Act (Erneuerbare-Energien-Gesetz, EEG) you will have to comply with the time limits prescribed by the German lawmaker.

- If the system came on stream before 31.1.2019 then the applicable time limit for registration will be two years (31.1.2021).
- If the system came on stream after 31.1.2019 then registration will have to take place one month after the commissioning of the system.

Please note: If the reporting obligations are nor fulfilled then fines can be imposed.

RAin [German lawyer] Maha Steinfeld

Social security – Thresholds for 2021

Parity financing of health insurance contributions was reintroduced in 2019 and will likewise continue for 2021. Accordingly, employees and employers each pay half towards the contribution to the statutory health insurance providers. In the case of trainees who receive remuneration of up to € 325 monthly, the employer solely pays the contributions. If this limit is exceeded through a one-off payment such as, e.g., a Christmas bonus or a holiday bonus then this relief ceases to apply. Employees and employers then, as usual, share the payment of the contributions equally.

The average supplementary rate of contribution to the statutory health insurance providers for 2021 has gone up to 1.3%. For the current social security values please refer to the overview that follows.

Furthermore, it should be noted that the minimum wage was increased as of 1.1.2021 from € 9.35 to € 9.50; as of 1.7.2021 it will go up to € 9.60. As a result, until 31.6.2021, the monthly maximum working hours for mini jobbers will be reduced to 47 hours/monthly.

In the course of year end reporting activities in personnel departments other contributions have to be taken into account. The allocation to social security contributions for artists has remained at 4.2%. We would like to remind you that the report on the fees paid in 2020 that are liable to social security contributions has to be submitted by 31.3.2021. This report forms the basis of the contribution assessment that, once it has been issued, results in a payment obligation that will be in addition to any prepayments that have possibly been determined.

Likewise, information relating to and the payment of the countervailing charge for not employing severely handicapped people in 2020 have to be submitted by 31.3.2021. The salary and wages verification statement for the statutory trade association for health and safety at work and employer liability insurance (Berufsgenossenschaft) has to be submitted electronically to the competent Berufsgenossenschaft by 16.02.2021. The contributions have to be paid once the contribution assessment has been issued. All the values are shown in the following table:

Key Social Insurance Values and Tax Dates for 2021

All data in EUR and monthly, except where otherwise specified.

Type of Contribution	Old Federal States	New Federal States
Income threshold for compulsory insurance in the statutory health insurance scheme		
A) General, annual*	64,350.00	64,350.00
B) For those with private health insurance on 31.12.2002 due to breaching the 2002 threshold **	58,050.00	58,050.00
Contribution assessment ceiling *(Beitragsbemessungsgrenze)*		
Statutory Pension Insurance and Unemployment Insurance monthly	7,100.00	6,700.00
annual	85,200.00	80,400.00
Health Insurance and Long-term care Insurance monthly	4,837.50	4,837.50
annual	58,050.00	58,050.00
Contribution Rates		
Statutory Pension Insurance (of which employer and employee pay ½ each)	18.6 %	18.6 %
Unemployment Insurance (of which employer and employee pay ½ each)	2.4 %	2.4 %
Health Insurance + supplementary contribution set by individual health insurers (of which employer and employee pay ½ each)	14.6 %	14.6 %
Average supplementary contribution	1.3 %	1.3 %
Long-term Care Insurance for people with children (of which employer and employee pay ½ each)***	3.05 %	3.05 %
for childless people	3.30 %	3.30 %
Max. employer-paid subsidy voluntary statutory health insurance	353.14 + half of the individual supplementary contribution	353.14 + half of the individual supplementary contribution
Max. employer-paid subsidy for private health insurance**	384.58	384.58
Max. employer-paid subsidy long-term care insurance (apart from Saxony)	73.77	73.77
long-term care insurance (only Saxony)		49,58
Reference values for statutory pension insurance/ unemployment insurance monthly	3,290.00	3,115.00
annual	39,480.00	37,380.00

* Section 6(6) of Volume V of the German Social Security Code
** Section 6(7) of Volume V of the German Social Security Code
*** For employees, in addition, there could potentially be a surcharge on the contribution for those who are childless (0.25%) that they would have to bear alone and for which they would receive no subsidy. In Saxony the contribution costs are borne differently: employer 1.025 % and employee 2.025 % (potentially plus 0.25 % surcharge on the contribution for the childless).
**** the average supplementary contribution of 1.3 % is included in this contribution

Mini Jobs

Type of Contribution	Amount
Contributions for low-wage employees (mini jobs) Employer's flat-rate contribution	
Health insurance	13 %
Statutory pension insurance	15 %
Flat-rate tax (including church tax and the solidarity surcharge)	2 %
Remuneration threshold for marginal jobs (Mini Jobs)	450.00
Minimum basis for assessment of statutory pension insurance for marginal employees	175.00
Minimum contribution/month (175 € x 18,6 %)	32.55
Sliding scale (until 06.2019)	450.01 bis 850.00
Transition range (from 01.07.2019)	450.01 bis 1,300.00
Low earners threshold for trainees (social security contributions are borne by employers alone)	325.00
Maximum contribution for direct insurance schemes annually 8 % of the tax-exempt contribution assessment ceiling for pension insurance thereof max. exempt from social security charge	6,816.00 3,408.00
Minimum payment amount for the obligation to make contributions for pension benefits in health insurance and long-term care insurance schemes	164.50
Allocation to statutory insolvency insurance	0.06 %
Allocation to social security contributions for artists	4.2 %

Reference values for benefits in kind in 2021

Meal allowance in EUR

Employees and adult family members

	Breakfast	Lunch	Dinner	Meals overall
monthly	55.00	104.00	104.00	263.00
daily	**1.83**	**3.47**	**3.47**	**8.77**

Accommodation allowance in EUR

(monthly)	237.00
per calendar day	**7.90**

Due Dates for Social Security

Month	Filing date for the contribution statement	Payment due date
January 2021	25.01.2021	27.01.2021
February 2021	22.02.2021	24.02.2021
March 2021	26.03.2021	29.03.2021

AND FINALLY...

"All the earlier proposals are in the new treaty, but hidden and disguised in some way."

Valéry Giscard d'Estaing, 2.2.1926 – 2.12.2020, French politician, from 1974 – 1981, President of France and, from 1962 – 1966 and 1969 – 1974, Minister of Economy and Finance. His greatest political achievement is considered to be the vision of the global responsibility of the big European nations that he shared with the then German Federal Chancellor Helmut Schmidt

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