Newsletter

Key Issue:
Intra-group loans –
national and international

06|21

Dear Readers,

The current legal situation with respect to **intra-group loans** constitutes the Key Issue in the June edition of our newsletter. Against the background of current case law, in our overview we go into detail about national and cross-border issues. In addition, you will also find information on the forthcoming changes in connection with the OECD requirements to which you will need to turn your attention now already. Our second report in the Tax section is likewise about cross-border situations and the implementation of OECD requirements – the focus here is on draft legislation based on the BEPS project. As of 1.1.2022, there will be a considerable number of regulations in place with the aim of providing a **defence against tax avoidance and unfair tax competition** and, in particular, of draining **tax havens**. The third article deals with the implementation of certified **technical security systems (TSS)** for electronic and computer-based cash register systems. Such checkout systems can be found in more tangible and intangible goods than you might suspect at first so that there is a need for clarification as to how far the requirements go. The fourth contribution on tax will be important for employees who use company cars. Their taxable **usage benefits can be reduced** in consequence of the strong increase in working from home due to the coronavirus – this could result in considerable tax advantages.

In the Accounting & Finance section, you will find an overview of how **dashboards** can be used within the framework of a management information system. These dashboards provide a comfortable option for users to get more details about issues of relevance to their decisions – interactively, with just a few clicks on the positions that are important for them.

In the Legal section we kick off with the latest news on the liability of limited partners in the event of insolvency; we report against the backdrop of two recent Federal Court of Justice rulings in this respect. Subsequently, we provide an overview of the **draft of the Supply Chain Act**. Generally, this Supply Chain Act will only apply to domestic (German) companies that employ at least 3,000 workers worldwide (as of 2024 at least 1,000). However, the legislation is expected to have a ripple effect so that even companies with fewer employees should concern themselves with the rules early on.

With the illustrating photos in this newsletter and in subsequent editions we would like to convey impressions from German cities which would perhaps be suitable for a short break once the hotels and restaurants have opened up again and tourist travel is allowed.

With our best wishes for an interesting read.

Your Team at PKF

Front cover: Victory Column in the Tiergarten

Key Issue

Intra-group loans – national and international

Contents

TAX

StB [German tax consultant] Dr Maximilian Bannes

Intra-group loans – national and international

When setting up subsidiary companies the question that always arises is whether it makes more sense to have funding in the form of equity capital or debt capital. However, among small and medium-sized enterprises, in particular, debt financing is most commonly not fiscally driven but, instead, motivated by economic considerations. The flexibility in the provision and repayment of loans as well as fewer formal requirements are convincing in economic terms. Nevertheless, tax principles have to be taken into account because the uncertain legal situation here could result in double taxation risks. This report provides a brief up-to-date overview of and outlook for the structuring issues with respect to intragroup loans.

1. Basic types of contract arrangements

Contracting parties are generally able to freely draw up their loan contracts how they wish and to agree whatever loan terms they want to include. Yet, tax law will override civil law if there is a risk of abusive structures; in such cases

» either the loan relationship under civil law will then, in principle, be negated and for, tax purposes, equity capital will be assumed instead of debt capital along with all the consequences of this (1st level)
» or the agreements concluded under civil law will then be adjusted for tax purposes and instead of the agreed amount of interest only an appropriate amount of interest will be permitted as a business expense deduction (2nd level).

The notional benchmark here is always the 'arm's length comparison', thus the terms that a 'prudent and diligent managing director' would agree. What is relevant is whether or not the loan amount and loan term as well as the debtor's collateral and creditworthiness are in accordance with what is usual for third parties dealing at arm's length. Although, this will take different forms because a distinction has to be made between

» loan relationships that are entered into on a purely national basis with no international connection (more on this in section 2) and
» cross-border transactions that are usually subject to more far-reaching and stricter requirements (more on this in section 3).

Please note: In the following discussion we do not go into the thin-cap rules (the so-called 'interest barrier' under Section 4h of the Income Tax Act *[Einkommenssteuergesetz, EStG]*) and the tax consequences of loans that are completely interest-free (Section 6(1) No. 3 EStG).

2. National transactions

In the case of (purely) national transactions, the loan relationship has to be judged simply on the basis of the criteria of a hidden capital contribution or a hidden profit distribution.

At the 1st level, the recharacterization of the full amount of a loan that has been granted as the provision of equity capital is indeed restricted to rare cases where repayment is not at all wanted. The Federal Fiscal Court (Bundesfinanzhof, BFH) has largely rejected the recharacterization of a loan, granted by shareholders to a company, as a hidden capital contribution (BFH ruling from 11.7.2017, case reference IX R 36/15). Even those loans granted to, or left in a company during a crisis would not cause the loan relationship to be negated 'downstream' under tax law. At the 2nd level, in the case of such a constellation, there are normally different opinions with respect to the appropriate interest rate. If a corporation is paying its shareholders too much in interest, then this would be deemed to constitute a hidden profit distribution. However, interest payments to shareholders that are too low are not a problem any more than cases where the shareholders pay their subsidiary an inflated interest rate.

Recommendation: In a national transaction, the 'downstream' situation will be treated differently from the 'upstream' situation. That is also interesting in terms of structuring if, for example, for the purposes of making use of loss carry-forwards or withholding tax credits, conditions are agreed that deviate from those usual for third parties dealing at arm's length.

3. Rules in cross-border cases

In cross-border cases the national rules are supplemented by Section 1 of the Foreign Transactions Tax Act(Außensteuergesetz, AStG). Accordingly, all loans that have been


Reichstag dome

granted have to stand up to an arm's length comparison without any distinction being made between 'upstream' or 'downstream'. There is widespread agreement that here, up to now, Section 1 AStG has taken effect only at the 2nd level, i.e., the amount of the interest rate.

Please note: The rule that applies when setting transfer prices is that higher risks are associated with higher interest rates. However, in the case of intra-group loans, where the agreements frequently include subordination, flexible maturities but no collateral, this results in a paradox that has remained unsolved to date, namely, the more closely the structure of the intra-group loan resembles equity, the higher the interest rate should be.

Yet, this problem also illustrates that, in many cases, it will be very difficult to subject the interest rate for an intra-group loan to an arm's length comparison, particularly as intra-group loans are frequently also related to matters under company law. In some cases, external financing is then hardly possible any more on account of the economic situation. The ECJ has recognised this and in the Hornbach case (judgement of 31.8.2018, case reference C-382/16) explicitly acknowledged that, within a group, non-arm's-length agreements should also be permitted for tax purposes if a commercial justification can be provided for this.

Since then, the BFH, in a high-profile ruling from 27.2.2019 (case reference: I R 73/16), has established new principles. In the event of a default, the BFH does not want to allow a profit-reducing deduction; this would be tantamount to an adjustment at the 1st level and thus ultimately, in effect, a recharacterization of the loan relationship as an equity injection. It would then at least be logical, at the 2nd level, not to require interest payments for tax purposes either. However, the BFH has not drawn this conclusion.

The BFH wants the above-mentioned legal consequences to apply to all non-arm's-length loan agreements. In this case, it is focussing particularly on unsecured loans.

Please note: Interestingly, the BFH has scarcely dealt with the issue of whether or not its ruling is compatible with the arguments put forward by the ECJ in the Horn-

bach case; recently, in an unusual step, this was criticised by the Federal Constitutional Court in its ruling from 4.3.2021 (case reference: 2 BvR 1161/19).

4. Planned changes for cross-border cases

By introducing a Section 1a AStG the aim is to do away with these unclear rules in cross-border cases. The new rules are admittedly no longer included in any current governmental draft, however, the implementation will in any case be postponed. According to the intention of the legislator, the new rules here will be based on the OECD requirements (Art. X of the OECD TPG).

Within the framework of such new rules, at the 1st level, to begin with, it would have to be demonstrated that the debtor is generally able to service the debt and that it needs the financing for commercial purposes. Otherwise, already in principle, the interest may not be deducted; for transfer pricing purposes this implies recharacterizing debt capital as equity capital. At the 2nd level, thus when assessing the interest rate, besides other factors (such as, e.g., the purpose of the loan, the regulatory frameworks, maturity, currency risks or the loan volume), the borrower's credit risk has to be taken into account, in particular, since this can significantly affect the interest rate. Here, the creditworthiness of the entire group of companies is generally relevant and not that of an individual company.

Recommendations

Cross-border intra-group loan relationships should stand up to an arm's length comparison. This applies not only to the interest rate level but also to the other constituent parts of the loan agreement, especially with respect to collateral. We would recommend that you determine the interest rates on the basis of the appropriate benchmark comparisons.

Groups with cross-border financing, in particular, should keep a close eye on the planned changes in the legal situation and, if necessary, examine existing agreements now already with a view to a potential need for amendments.

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

Combating tax avoidance through the Defence against Tax Havens Act

The draft of the Act to Combat Tax Avoidance and Unfair Tax Competition, which was presented on 31.3.2021, aims to drain tax havens by imposing tax on companies that do business there. The draft Defence against Tax Havens Act *(Steueroasen-Abwehrgesetz, StAbwG-E)* aims to transpose into German law the EU list of non-cooperative jurisdictions for tax purposes (the so-called 'blacklist') together with the related measures that have been approved since its publication.

1. Objectives

The legislation uses targeted fiscal measures in its endeavour to deter individuals and companies from investing in tax jurisdictions that fail to satisfy internationally recognised standards in the areas of transparency in tax matters, unfair tax competition and for the implementation of the BEPS Minimum Standards. In this way, these tax jurisdictions would likewise be encouraged to comply with international standards, in the future, in the area of taxation. The legislation should apply from 1.1.2022. For tax jurisdictions that were not yet on the 'blacklist' as at 1.1.2021, the legislation shall apply as of 1.1.2023 insofar as these jurisdictions are subsequently added.

2. Content and consequences of the law

The aim is supposed to be achieved through so-called defensive measures when conducting business in or relating to non-cooperative states. The defensive measures can be classified as follows:

(1) Prohibition on the deduction of business expenses and work-related costs – It would no longer be possible to claim a tax deduction for expenses arising from business transactions relating to natural or legal persons, associations of persons or pools of assets resident or based in a non-cooperative tax jurisdiction.

(2) Stricter CFC rules – If a so-called intermediate company is based in a tax haven, then stricter CFC rules would


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apply. Companies would thus no longer be able to avoid tax payments by shifting income to a company in a tax haven because the entire active and passive income of the intermediate company would be subject to CFC rules.

(3) Stricter withholding tax measures – These would apply, for example, to interest costs that are paid to persons who are resident in tax havens. As a result, the limited tax liability of persons based in tax havens would be expanded to include certain types of income (in particular, all income from financing fees) that, moreover, would be subject to withholding tax.

(4) Measures relating to profit distributions and sales of shares – In the case of profit distributions and sales of shares, tax exemptions and provisions in double taxation agreements would be restricted or denied if these payments are made by a corporation based in a tax haven, or if shares are sold in a company based in a tax haven.

(5) Extension of duties of cooperation – It is envisaged that, in particular, it will be necessary to provide a detailed presentation and documentation of the business ties and contractual relationships, the significant assets employed, the selected business strategies, the market and competitive conditions as well as of the natural persons that have direct or indirect shareholdings in a company in the non-cooperative tax jurisdiction.

Please note

A tax jurisdiction would be regarded as being non-cooperative where there is either a lack of sufficient transparency in tax matters, where unfair tax competition prevails or if there is no compliance with the BEPS Minimum Standards. There are 17 countries altogether on the EU 'blacklist', such as, e.g., Bermuda or the United Arab Emirates.

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

TSS for parking ticket machines, charging devices and merchandise management systems

Under Section 146a of the Fiscal Code *(Abgabenordnung, AO)* and Section 1 sentence 1 of the Cash Register Anti-Tampering Ordinance *(Kassensicherungsverordnung, KassenSichVO)*, electronic or computer-based cash register systems have to be fitted with a certified technical security system (TSS). We already reported on this in the August 2020 issue of the PKF newsletter. However, it is unclear which systems, besides electronic or computer-based cash registers, will have to be fitted with a TSS. An amendment to the KassenSichVO should provide simplifications and clarity.

1. TSS for parking ticket machines and charging devices

The aim of the amendment to the KassenSichVO is to add the automatic pay stations and parking ticket machines used in parking space management as well as the charging points for electric or hybrid vehicles to the list of exceptions in Section 1 sentence 2 of the KassenSichVO. The planned amendment would lead to parking ticket machines and charging devices being exempted from the requirement to be fitted with a TSS.

In a circular from 3.5.2021, the Federal Ministry of Finance published transitional rules that will apply until the amendment to the KassenSichVO comes into force. Under these rules, the requirement to upgrade the automatic pay stations and parking ticket machines used in parking space management as well as the charging points for electric or hybrid vehicles is suspended. If these systems have not yet been fitted with a TSS then this does not have to happen during the transitional period until the amended ordinance comes into force.

2. TSS for merchandise management systems

The affected systems also include merchandise management systems if they have a checkout function or a checkout module. According to the application decree for Section 146a AO, such a checkout function is deemed to exist if it can record and process payment transactions that, at least in some cases, are cash based. The relevant criterion for deciding if a merchandise management system has to be fitted with a TSS is thus not the actual use of the checkout module but, instead, the way it works. If the merchandise management system provides for the technical possibility of a checkout function then a TSS has to be implemented even if the checkout function will not actually be used.

Company cars while working from home – Employees are able to reduce their taxable usage benefit

When employees also use company cars for private purposes, normally, they have to pay tax every month on a lump sum of 1% of the gross list price of the motor vehicle. If the car is used for journeys between the home and the primary workplace then for each kilometre of the distance between the home and the primary workplace another 0.03% of the list price is added to the taxable amount. The coronavirus crisis has now opened up possible paths to a reduction.

1. Use of company car for journeys between the home/workplace

In times of the coronavirus pandemic, in particular, for a number of employees there has been a severe reduction in company car use for professional reasons due to having frequently worked from home. The flat-rate taxation of journeys between the home and the workplace could be disadvantageous on account of there having been fewer journeys to the primary workplace. There is thus the possibility of retroactively reducing the usage benefit because the flat-rate 0.03% benefit is based on the assumption that the journeys to the primary workplace take place on 180 days in a year.

2. Providing proof

If an employee provides the local tax office with documen-

tary evidence that s/he had made fewer journeys then s/he could obtain a more favourable individual assessment for the journeys; this would be based on 0.02% of the list price for each kilometre of distance so that the excess payroll taxes that have been withheld would be reimbursed via the income tax assessment notice. The documentary evidence that should be maintained in order to obtain a reduction in the usage benefit should show the days on which the employee had actually used the company car for journeys to the primary workplace (e.g., by submitting appointment schedules or working time records). Furthermore, the employee has to credibly demonstrate how the employer had taxed the benefit to date by providing a salary statement or a certifying statement from the employer.

3. Example of how to calculate the tax reduction

The employee drives his company car (gross list price of € 50,000) to his primary workplace(distance: 48 kilometres) on 64 days in the year. This gives rise to the following usage benefit:

- According to the 0.03% method:
  0.03% x 50,000 € x 48 km x 12 months = € 8,640
- According to the 0.02% method:
  0.002% x 50,000 € x 48 km x 64 journeys = € 3,072
- Reduction in the benefit:
  € 8,640 – € 3,072 = € 5,568.00

If a marginal tax rate of 30% is assumed this therefore results in a tax reduction of € 1,670.40.

Recommendation

Those who provide a record of a reduced number of journeys to the company for the taxation of usage would, however, also have to use this as a basis for the distance-related tax allowance so that the deduction of work-related costs would decrease.

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ACCOUNTING & FINANCE

Florian Buschbacher

Dashboards as cockpits for gaining a quick overview of the interrelationships within a business

It is not just the corona crisis but also technological developments that are adding to the desire of investors, banks and shareholders or family offices to be better and more quickly informed about the situation of a business. While, in the case of banks, new loan applications are what matter in this respect, for shareholders and investors the interactive graphics lend themselves to providing a much simplified and concise information basis. In the following paragraphs we discuss what modern dashboards are capable of and how the introduction process should be organised.

1. Using dashboards

1.1 Definition and the rise of dashboards

A dashboard refers to a graphical user interface for the visualisation of data. The word dashboard has mostly been associated with cars and in that context it denotes a panel with gauges and controls. As is generally known, this type of dashboard displays not only the speed but also warnings from the engine compartment and early warning indicators from driver assistance systems. The use of such powerful dashboards has now become standard practice in many companies and departments. However, studies have shown that businesses with up to 1,000 employees still have an enormous need to catch up in this respect.

1.2 The benefit – Added value can be realised

The added value of dashboards is that they make it possible to visualise numbers in very many different ways. This visualisation means that the report recipients are provided with a completely new approach to the data and its interrelationships. The causes and effects of various metrics and developments can thus be intuitively understood and experienced.

Besides the well-known visualisation options such as line charts and bar charts, there are, in particular, so-called heat maps or map sections where the data can be shown on the basis of the regional distribution (e.g., of customers or products).

Here the graphics can be designed to be interactive. By clicking on the graphics it is possible to pull up details; for example, by clicking on the sales revenues it would thus be possible to display the allocation between the product categories. By continuing to click you could get information on margins and customer groups.

1.3 Advantages of using dashboards

The potential applications of dashboards have increased considerably in recent years and we have an overview of these below (cf. also the sample graphics on p. 11).

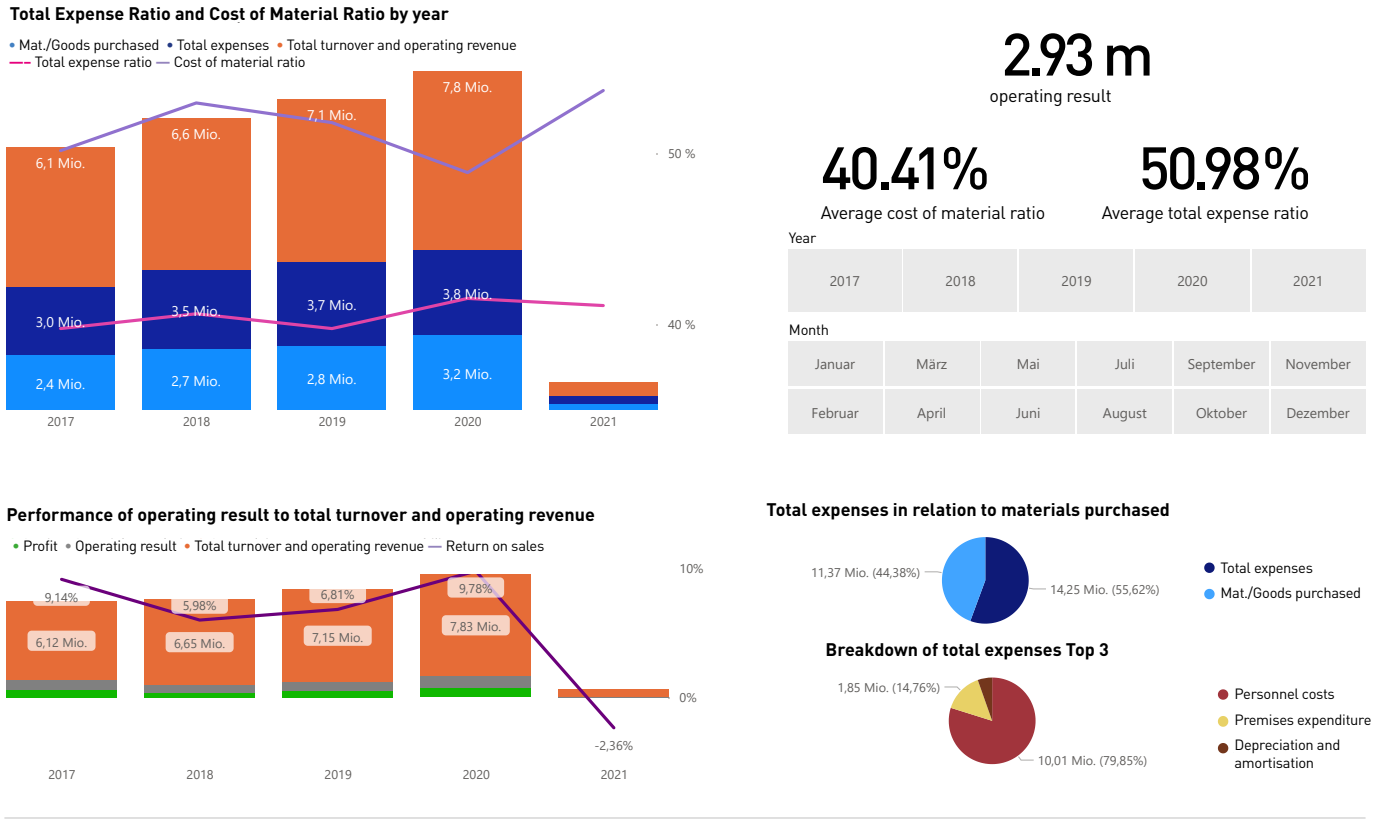
- All the graphics can be customised and called up on tablet computers or mobile phones;
- a data connection to the ERP system is possible;
- the graphics can be designed to be interactive and you can get a feel for the details simply by clicking;
- the integration of artificial intelligence makes it possible to incorporate algorithms to forecast metrics related to sales and costs;
- scenario programming allows answers to be provided to an array of questions, e.g.: What is the outlook for the development of the situation of the business for the coming months if the borrowing rates go up by x% and/or the purchase prices by y% or if sales deteriorate by z%?

2. Project sequence for the introduction of dashboards

2.1. Definition of project goals

At the start of the project, you need an answer to the question of where the dashboards should be deployed. We would recommend that you start with one department so that you are able to transfer the experiences and benefits more quickly to other departments. Dashboards are particularly suited for use in the following departments:

- finance and accounting,
- controlling (at the central and departmental levels),
- logistics,



» personnel department,
» production planning and control,
» sales.

Besides the selection of the department where the dashboard should be deployed, the information needs of the report recipients are also particularly important. These are normally based on the previous reporting and include the following data:

» historic developments,
» metrics,
» forecasts,
» measurement and comparison of developments over time,
» comparisons between geographically different courses of development,
» price differences.

Besides the question of 'what', asking 'how' is also particularly crucial. And this is where the data scientists are deployed. The visualisation should indeed be optically appealing, however, the actual benefit only arises if the graphic contributes to the informative value and the interpretation of the data. A bar chart with postcodes for the analysis of the structure of the customer base could be good; however, it would be better to underpin the analysis by displaying a map and using this to visually represent the regional distribution of customers.

2.2 Conceptual phase

Once the goal has been defined, the next step involves clarifying whether or not the required data are available in the ERP system or in previous/feeder systems and whether or not these systems can be accessed via an interface (API). It is likewise important to clarify how frequently the report will be called up and how up-to-date the report needs to be. A distinction thus has to be made in terms of whether it should be a data model where the visualisation would be on the basis of daily updates, if possible, (up to 'near real time'), or whether weekly or monthly reports would be sufficient.

2.3 Implementation

Once the specific informative value for the report recipients has been defined, the data model and its granularity have to be reviewed. It is frequently ascertained that either even more details would be possible or new data sources need to be opened up. However, caution is required for this step because dashboards are not databases. The more complex the data model and the calculations, the slower the performance becomes. That is why larger datasets should be mapped directly via a database interface, or large-scale calculations via software such as Python.

3. Conclusion

Existing reports and reviews in all departments are predestined to be switched to modern dashboards. Using visualisation and an interactive presentation is a considerably better way to reach target readers and, in turn, they will be able to derive decisions with a focused perspective. Good preparation and a positive introduction in all the departments will allow markedly faster decision-making while, nevertheless, maintaining accuracy. Data scientists can provide support when designing complex applications.

Please note

More information at: www.PowerBWA.de

LEGAL

RA/StB [German lawyer/tax consultant] Frank Moormann

Latest news on the liability of limited partners in the event of insolvency

Two recent rulings by the Federal Court of Justice *(Bundesgerichtshof, BGH)* have significantly weakened the position under liability law of limited partners in the event of their company becoming insolvent. In both cases, the insolvency administrator for a ship fund management company was ultimately successful in holding the limited partners liable for trade tax liabilities.

1. Starting situation – Repayment of capital contribution

The liability of limited partners of a KG [German limited partnership] or a GmbH & Co. KG [German limited partnership with a limited liability company as a general partner] vis à vis the company's creditors is restricted to the amount of their limited partnership contribution or liability capital contribution as recorded in the commercial register. Once this amount has been paid then, generally, further liability can no longer be considered. However, this would not apply if the capital contribution has been repaid to the limited partners. In this respect, the liability to third parties is then restored once more. This is also frequently the situation in the case of investments in ship funds where distributions are regularly paid out to an investor although the profits that have actually been generated are insufficient to cover these. In this sense, this would then be deemed to constitute the repayment of a capital contribution that would result in liability being restored.

2. The extent of liability in the event of insolvency

In the cases in question,(BGH from 15.12.2020, case reference: II ZR 108/19, and from 28.1.2021, case reference: IX ZR 54/20), insolvency proceedings pertaining to the assets of the fund management company were opened each time and, in the course of these, the ships were sold. Switching to the so-called tonnage tax method of determining taxable income, prior to the crisis already, had ultimately resulted in a trade tax liability for the company (add-back of the hidden reserves determined during the switch to this method of determining taxable income). In each case, the insolvency administrator held the limited liability partners liable for the tax payment.

The BGH judges ultimately accepted that the limited partners could be held liable and essentially based their decision on the fact that the tax liability was established prior to the opening of insolvency proceedings. The basis for the trade tax liability was created, prior to the insolvency, by switching the method of determining taxable income so that the trade tax, which was triggered as a consequence, was covered by the partners' liability.

3. Practical advice

Even though these new rulings will be of little comfort to limited partners who are affected, nevertheless, they do at least provide considerably more legal certainty in the area of the liability of limited partners in the event of insolvency. From now on, the exclusion of liability can only be considered for those obligations that arise as genuine preferential liabilities incurred as a result of legal acts by the insolvency administrator. By contrast, if the liability was already established prior to the insolvency – which is frequently the case not only for tax liabilities but also, e.g., in the case of continuous obligations – then the limited partner would not be able to claim any limitation of liability.

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

Corporate due diligence requirements pursuant to the Supply Chain Act

Part I – Scope of application and catalogue of requirements

On 3.3.2021, the German Federal Cabinet adopted the draft bill for the Supply Chain Act, which is supposed to enter into force on 1.1.2023. Many questions have already arisen for German companies regarding the requirements that will result from this in the future, the preparations that will have to be made as well as the measures that will need to be taken.

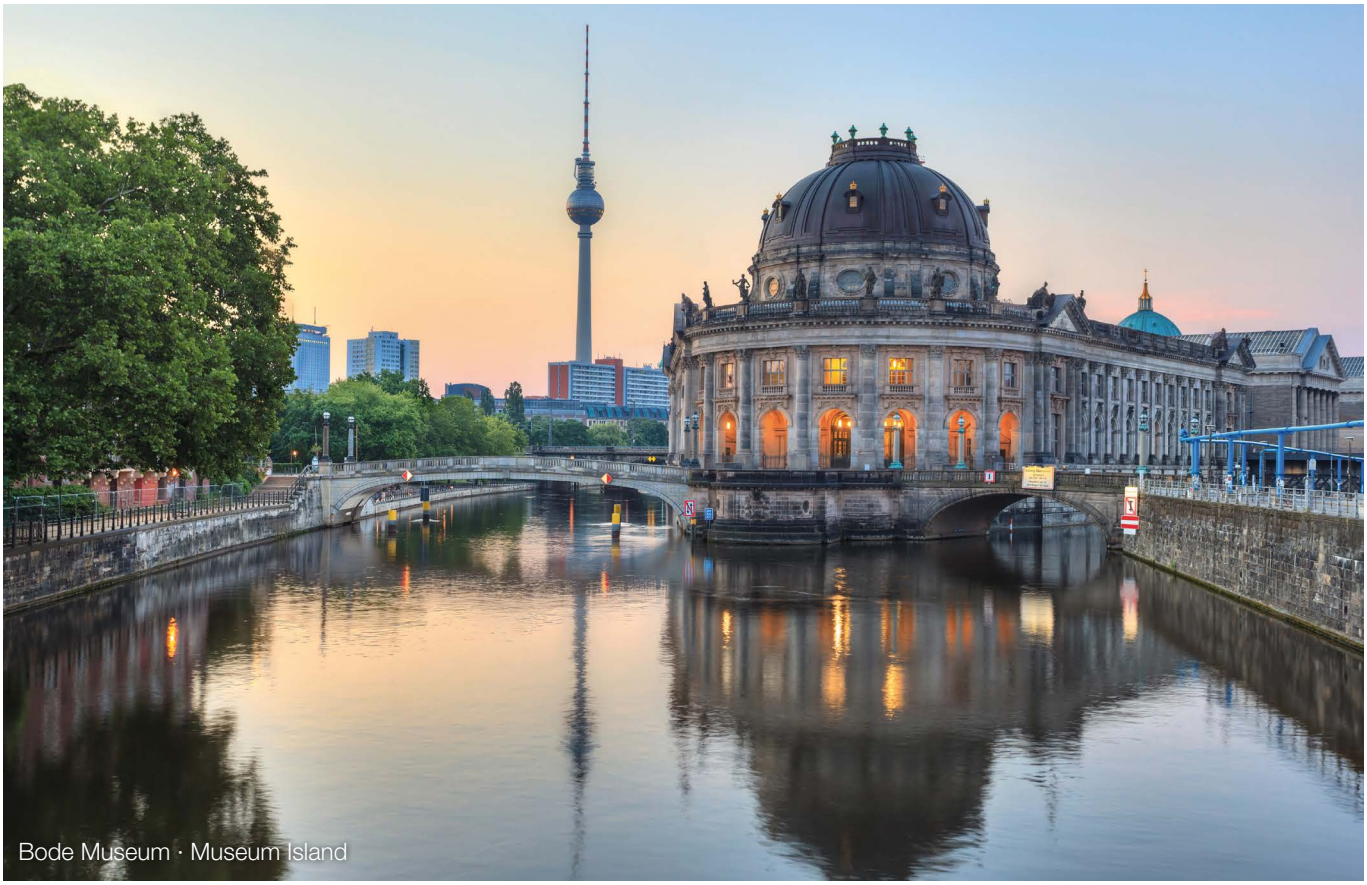
1. The aim of the Act and its scope of application

Basic human rights violations are being repeatedly committed within global supply chains; these can involve child labour, exploitation, discrimination as well as inadequate workers' rights and also include environmental destruction. Germany is the third largest importer and so German companies benefit particularly from foreign production and trading operations. The Supply Chain Act aims to require companies to meet their global responsibility in relation to protecting people and the environment.

The Supply Chain Act will apply to domestic (German) companies that ordinarily employ at least 3,000 workers worldwide (as of 2024 at least 1,000 workers). The Supply Chain Act will not be directly applicable to companies with fewer employees. Nonetheless, for internal company reasons or, e.g., because of the expectations of customers and/or other reference groups an analogous application could come about.

2. Which human rights does the Supply Chain Act relate to?

The due diligence requirements are linked particularly to human rights risks. The international treaties that have been ratified by Germany constitute an initial reference point for the human rights that are covered by the Act. The draft legislation supplements these with a catalogue of prohibitions pertaining to human rights and environmental obligations. The following areas, among others, are covered:



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- freedom from child labour, forced labour, slavery and torture,
- freedom of association,
- prohibition of breaching current occupational health and safety obligations that are applicable under national law,
- integrity of life and health,
- prohibition of unequal treatment,
- prohibition of refusing to pay a decent wage and upholding the minimum wage,
- environmental protection and environment-related obligations,
- prohibition of unlawful deprivation of land, forests and waters.

3. Catalogue of requirements for German companies

The applicable human rights due diligence requirements for companies constitute the main subject matter of the Supply Chain Act. These include, in particular:

- setting up a risk management system
- risk analysis
- adoption of a policy statement
- preventative measures
- remedial measures
- setting up a complaints procedure
- documentation and reporting

The due diligence requirements basically span the entire supply chain. The requirements for the companies are graduated here, in particular, according to the degree of influence that they are able to exert. Utmost diligence is prescribed for a company's own field of business. In the case of **direct suppliers** there are minimal exemptions to the requirements. In the case of **indirect suppliers**, the due diligence requirements would apply for a company once it has received substantiated reports of potential human rights violations at that level.

Please note: In cases of violations, appropriate **fines and penalty payments** can be imposed by the Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA), which is responsible for this. Furthermore, a violation could result in exclusion from public procurement procedures and civil lawsuits.

Outlook

Once the legislation has been passed, at the very latest, companies should give some detailed consideration to carrying out a risk analysis for their own field of business as well as for their direct suppliers. To this end, in Part II, in the next issue of the PKF newsletter, the respective implementation of a risk management system will be specified and we will take a closer look at the consequences in the case of violations.

James Simon Galeriy · Museum Island

Crediting foreign withholding tax on capital gains against domestic (German) trade tax

The German Trade Tax Act does not have any separate provisions relating to the crediting of foreign withholding tax on capital gains. However, crediting against German trade tax could ensue from the respective double taxation agreement (DTA) with a foreign country. Recently, this was the conclusion of the Hesse tax court *(Finanzgericht Hessen, FG)*.

In its ruling from 26.8.2020 (case reference: 8 K 1860/16), the FG affirmed that Canadian withholding tax on capital gains could be credited against domestic (German) trade tax. Deducting Canadian withholding tax would result in double taxation because Germany and Canada levy a similar type of tax on the same taxpayer for the same taxable income and period. It was the view of the FG that the DTA with Canada provides for the crediting of tax paid in Canada and does not differentiate here between crediting against, firstly, corporation tax and income tax, and, secondly, trade tax. Neither is the crediting hampered by the fact that, unlike the German Income Tax Act/German Corporation Tax Act, the German Trade Tax Act does not contain any provisions on the crediting of foreign tax. Therefore, whether or not foreign withholding tax can be credited against domestic (German) trade tax depends on the terms of the DTA.

Please note: An appeal has been lodged against the FG's decision with the Federal Fiscal Court (case reference: I R 8/21)and that is why comparable cases can be kept open through objections that make reference to the pending court case.

No contractor status for supervisory board members – Tax court implements ECJ ruling

Supervisory board members are generally considered to be contractors who have to register for VAT and their remuneration is subject to VAT. However, the European Court of Justice (ECJ) has stipulated additional preconditions for a VAT assessment. This has now been reaffirmed by the Cologne tax court *(Finanzgericht Köln, FG)*.

In the recently published ruling of the Cologne FG from 26.11.2020 (case reference: 8 K 2333/18), the judges decided that the remuneration that a supervisory board member at a sports club received for his work was not subject to VAT. An annual budget had been made available to the supervisory board member at the sports club and he was able to use this to buy season tickets and day tickets, reimburse travel costs and purchase fan merchandise. The local tax office viewed this budget as remuneration for his supervisory board work and assessed the amount of VAT that was payable.

The legal action against the VAT assessment was successful because the FG followed the ECJ ruling from 13.6.2019 (case reference: C-420/18). According to that, supervisory board members do not perform their supervisory board work on a freelance basis and, therefore, are not contractors within the meaning of the German VAT Act. Supervisory board members can only act as contractors if they perform their activities in their own names and for their own accounts and if they bear the economic risks associated with performing these activities. In the case in question, these preconditions had not been satisfied. The value added tax assessment that had been issued thus had to be revoked.

Please note: The German fiscal authority's general approach, to date, of classifying supervisory board members as contractors is likely to become increasingly obsolete in the course of the further implementation of the above-mentioned ECJ ruling and the Federal Fiscal Court's decision from 27.11.2019 (case reference: V R 23/19).

AND FINALLY...

„Anyone can replicate a product. There are lots of brilliant minds out there that know how to code, but there's unique DNA to a brand. You cannot have a brand without people. That is the most important asset you will ever have."

Whitney Wolfe Herd, born 1.7.1989 in Salt Lake City, US American entrepreneur and the youngest self-made female billionaire in the world. She is a cofounder of Tinder as well as the founder and CEO of Bumble.

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