PKF

Newsletter

Key Issue:
New option model for partnerships

09|21

Dear Readers,

In the Key Issue section of this edition of the PKF newsletter, you will find a report on the **option model** according to which members of **partnerships** will be able to elect to have their companies **taxed as corporations** from the beginning of 2022. In the current newsletter and in subsequent editions, you can read our detailed presentation on the change in the system of taxation where we examine selected aspects that have hitherto often tended to get neglected in discussions between professionals. The focus in the current newsletter is the transition from the transparency principle to the separation principle and the associated consequences for the taxation of the partners. In the second contribution in the 'Tax' section, we have used a recently published Federal Ministry of Finance circular as an opportunity to provide an overview of the tax treatment of the **private usage of electric and hybrid vehicles**.

Next up, in the Accounting and Finance section, we discuss the box of instruments that has been created in the **Stabilisation and Restructuring Framework for Enterprises** legislation (abbreviated in German to StaRUG) that companies can use to **restructure their enterprises without** having to undergo **insolvency proceedings.**

It has already been almost four years since companies have had to identify their beneficial owners in accordance with the provisions of the German Anti-Money Laundering Act and, up to now, under certain circumstances, even notify the transparency registry of them. The **Transparency Register and Financial Information Act** (abbreviated in German to **TraFinG**) will now usher in far-reaching changes and, moreover, those privileges that previously reduced the number of actions that companies had to take will cease to apply. In the first report in the Legal section, we explain how, on account of these changes, around 1.9m legal entities throughout Germany will consider themselves obliged to notify the transparency registry for the first time. Subsequently, you will find an overview of the draft legislation to "Supplement and Amend the Regulations for the Equal Participation of Women in Leadership Positions in both the Private and Public Sectors" (abbreviated in German to **FuPoG II**). Besides the introduction of **quotas for men and women in the management** of large companies, the draft of this legislation also contains one or two curiosities. Here, questions about liability can arise if **executives pull themselves out of their management roles**, effectively on their own initiative, for a certain period of time **on account of maternity leave, sickness, parental leave or care leave**.

We continue our journey around the PKF locations in Germany through the illustrations that break up the reports from our experts; this time we visit Duisburg and the surrounding area.

With our best wishes for an interesting read.

Your Team at PKF

Front cover photo: Tiger and Turtle, a walkable sculpture, is a new Duisburg landmark

Key Issue

New option model for partnerships

Contents

TAX

WP/StB [German public auditor/ tax consultant] Tanja Schmitz / Benedikt Helling

New option model for partnerships – Part I: System change upon exercising this option

The Act on the Modernisation of Corporation Tax Law *(Gesetz zur Modernisierung der Körperschaftsteuer, KöMoG)* is likely to become applicable as of 1.1.2022. An overview of the main features of the new statutory provisions on the option model was included in the PKF newsletter 04/2021; in this edition, we start a short series of reports with detailed explanations. The current report - Part I - includes a comparison of the different systems of taxation for partnerships and corporations and provides an initial insight into the basic tax consequences of the option model.

1. The background to the option model

Since 2000, in the course of the reform efforts aimed at harmonising business taxation, there has been an extensive convergence in the overall tax burden of corporations and their shareholders, on the one hand, as well as partnership organisations and their partner members, on the other hand. Nevertheless, there are still considerable differences in the taxation schemes and systems. The aim of the option model for partnerships is, in particular, to strengthen the competitiveness of small and medium-sized family enterprises with the legal form of the Kommanditgesellschaft (KG) [limited partnership] or the offene Handelsgesellschaft (OHG) [ordinary partnership]. As a result of the KöMoG (at present, not yet published in the BGBl *[Bundesgesetzblatt, or the Federal Law Gazette]*; approved by the upper house of parliament [Bundesrat] on 25.6.2021), professional partnerships and partnership organisations will be given the option of using the same tax regulations as corporations.

2. Transparency principle for partnerships

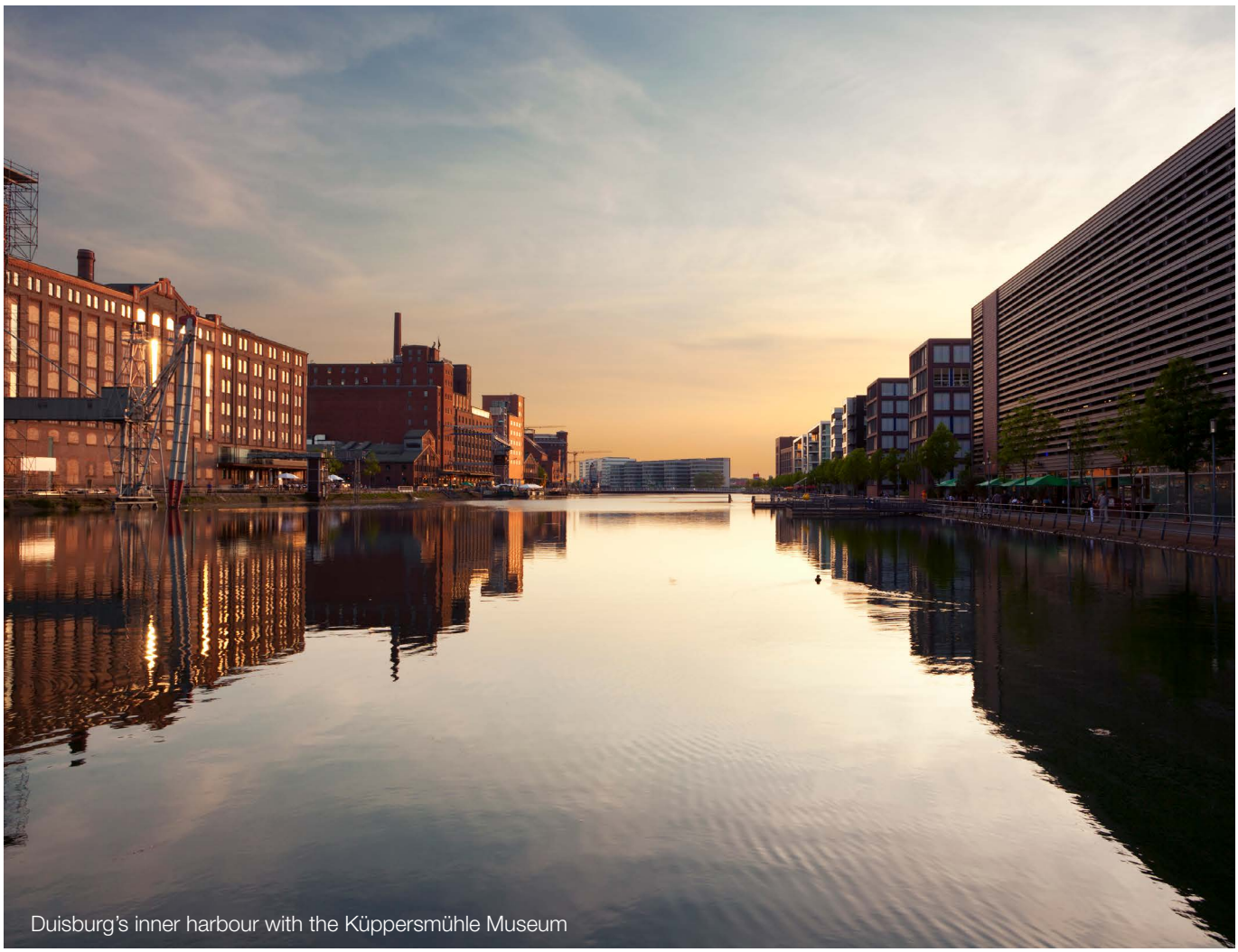
Partnerships are subject to the principle of transparent taxation. Under tax law, they do not constitute autonomous legal entities because you effectively look straight through the companies. Consequently, taxes on the earnings generated by the partnership are not levied at the company level. Instead, for tax purposes, the profits - irrespective of whether they were withdrawn or left in the company - are attributed to the partners and are taxed at the personal rate of income tax of each partner or, in the case of legal persons, of corporation tax. One exception to this is trade tax, which is levied on a business regardless of personal circumstances (a so-called *Objektsteuer*).

The principle that applies is that the supply relationships between the company and the partners are regarded as non-existent for tax purposes. Under German commercial law, remuneration paid to partners (such as, in particular, payments for work that has been performed, rents for assets that have been provided for use, or interest on loans that have been granted to the company) has to be included at the level of the partnership as profit-reducing operating costs. However, to determine the taxable profit, all special payments are then added back once again at the level of the partnership as advance dividend payments. This rule for special payments causes all the income to be recharacterized as the partners' commercial income. Furthermore, for tax purposes, assets that have been provided for use are not deemed to belong to the partners' private assets but, instead, constitute special business assets at the company.

3. Separation principle for corporations

By contrast, corporations are taxed in accordance with the separation principle. In this case, under tax law, the corporation and the shareholders are regarded as two legal entities that are independent of each other. The income of a corporation is first subject to corporation tax as well as trade tax at the level of the corporation. A tax burden only arises for the shareholders when there is a dividend pay-out. Dividend pay-outs are assigned to income from capital assets and generally taxed at a separate withholding tax rate of 25% of the gross dividend if the partial income method for material holdings does not have to be applied.

In this respect, supply relationships governed by the law of obligations (such as agreements between the company and the shareholders with respect to employment, loans or rent) are recognised for tax purposes. The amounts in these agreements have to be appropriate in order not



Duisburg's inner harbour with the Küppersmühle Museum

to be deemed to be hidden profit distributions. As long as the payments resulting from these agreements do not constitute hidden profit distributions then, at the level of the corporation, they have to be classified as operating costs - just like comparable payments to third parties - and they will also reduce taxable profit.

Practical effects: For the shareholder, the salary paid within the scope of an employment relationship constitutes income from employment (Section 19 of the German Income Tax Act [Einkommenssteuergesetz, EStG]) and is subject to payroll tax. Loan interest received is classed as a capital gain (Section 20 EStG) and is subject to withholding tax, and rental payments received are classed as income from letting and leasing (Section 21 EStG) and are taxable at the personal rate of income tax.

4. Far-reaching consequences of exercising the option

Exercising the option would result in a change in the system of taxation - from one according to the transparency principle to taxation according to the separation principle. Far-reaching consequences would ensue from this, notably, the complex concept of special business assets would cease to apply along with the accounting particularities via special partner balance sheets and supplementary partner tax accounts. There would be continuing recognition for tax purposes of the supply relationships between the partners and the partnership that has exercised the option. The expenses resulting from these would then also constitute operating costs for tax purposes at the level of the company and this would lead to a reduction in taxable profit. At the level of the partners, this income would no longer be recharacterized for tax purposes as income from commercial operations.

5. Application to exercise the option

According to the new provision in the Corporation Tax Act *[Körperschaftsteuergesetz, KStG]* (Section 1a(1) KStG, as amended), it is possible to file an application to exercise the option to be treated as a corporation for tax purposes. However, the application to exercise the option can only be made for the partnership as a whole. It would affect all the partners. A hybrid structure where

partnership taxation would continue for some of the partners would not be possible.

The approval of all the partners would be required for the application. If majority voting has been stipulated in a partnership agreement, then a 3/4 majority would be sufficient. Companies whose partnership agreements contain a majority clause applicable to resolutions on this matter would be exempt from this principle. The irrevocable application, using an officially prescribed set of data, would have to be filed with the tax office that is responsible for the partnership. The application would have to be filed, at the very latest, one month prior to the start of the financial year when taxation in accordance with the KStG option is supposed to be activated for the first time and this filing will directly bring about the change to the taxation regime from the start of the following financial year. Nevertheless, the company will have an opportunity to return to transparent taxation.

Please note: There is no legal minimum term for the option model so that, after the end of one single financial year, it would already be possible to revert back again to being taxed as a partnership via a return option. For the option where book values are rolled over, you should however be mindful of the blocking periods under the Reorganisation Tax Act.

Conclusion

The aim of the option model is to enhance the competitiveness of the partnerships that exercise the option. This will be realised through the new possibilities that will arise for retaining profits for the long-term in a tax optimised way and the fact that the overall profit will not be directly attributed to the partners. The liquidity that will thus be gained can then be used for making investments. Under civil law, the partnership will still continue to be treated as such.

StB [German tax consultant] Dennis Brügge

Private usage of electric and hybrid vehicles

Propulsion technology is getting better and traditional concepts in this respect are being left behind and so, currently, the tax treatment of motor vehicle expenses is subject to extensive adjustments. Various changes were thus implemented in Germany's Second Act Implementing the Tax-Related Measures to Help Overcome the Coronavirus Crisis, of 29.6.2020. As a result of this there have been changes to the tax incentives for electrically powered vehicles that apply retroactively to 1.1.2020. These concern, in particular, concessions in the area of the private use of company cars. Furthermore, the Federal Ministry of Finance published a draft, on 17.5.2021, with the aim of summarising the previous decrees. In the following section is a summary of the most important aspects of the current legal situation with respect to the tax treatment of the private use of electrically powered vehicles.

1. Recording private usage according to the lump sum method

The private use of a vehicle that is mostly used for business purposes is recognised, for each calendar month, at a lump sum of 1% of the domestic (German) list price at the time of the initial registration plus the costs for special equipment and including VAT. Alternatively, it is also permissible to determine the proportion of private usage on an individual basis by means of a driver's log book.

Smaller lump sums have been applicable since 2019 already for specific electric vehicles and off-vehicle charging hybrid electric vehicles. For hybrid vehicles, 0.5% of the list price is recognised and for purely electrically powered vehicles this is just 0.25%. A corresponding distinction is also made when determining costs in accordance with the driver's log book method.

However, not every electrically powered vehicle will meet the criteria to be able to benefit from the tax concessions; in the following section we first make a distinction according to the type of vehicle.

2. Tax-privileged electric vehicles

2.1 Pure electric vehicles

In Section 6(1) no. 4 sentences 2 and 3 of the Income Tax Act (Einkommenssteuergesetz, EStG) such vehicles are defined as ones that are propelled exclusively by an electrical motor. This covers, in particular, battery electric vehicles and fuel cell vehicles. As of 2020, the non-cash benefit for


A symbol of the freedom of the city in medieval times - the Roland statue by Duisburg's town hall

purely electrically powered vehicles without CO2 emissions has been recognised at one quarter of the assessment base. However, the gross list price may not exceed € 60,000. If it is more than € 60,000 then the benefit goes down to 0.5%.

2.2 Off-vehicle charging hybrid electric vehicles

For hybrid electric vehicles purchased, for the first time, in the period from 1.1.2019 to 31.12.2030, just half the list price has to be recognised. This covers vehicles with at least two different types of energy converters. One of these has to have an off-vehicle charging energy storage device (plug-in hybrids). In addition, under the German Electric Mobility Act, hybrid electric vehicles have to meet further criteria. These are either a maximum level of carbon dioxide emissions, or alternatively a minimum electric only range. A special number plate on the vehicle with the letter 'E' at the end normally provides proof that these criteria have been met.

3. Compensation of disadvantages

For vehicles purchased prior to 1.1.2023 and not accorded tax privileges as pure electric vehicles (section 2.1) or hybrid electric vehicles (section 2.2), as an alternative, it is possible to obtain compensation for these disadvantages [referred to in German as Nachteilsausgleich]. In this case, the list price is reduced by a blanket amount that corresponds to the costs of the battery system that is contained in the vehicle. The amount that can be deducted will depend on the battery capacity and the year of purchase; the maximum overall amount is € 10,000.

4. Overview of the criteria for tax concessions

The relevant criteria for electric vehicles are essentially the cost of the vehicle and when it was purchased. Placing an order is on its own not sufficient, the vehicle has to have actually been delivered. Tax will have to be paid on the use of electric vehicles purchased in the period from 1.1.2019 to 31.12.2030 on the basis of

- 0.25% of the list price if this is not more than € 60,000, or
- 0.5% if the price is more than € 60,000.

For off-vehicle charging hybrid electric vehicles, with effect from 2020, in the context of the lump sum method, tax has been charged on 0.5% of the list price if the following conditions are present:

- maximum carbon dioxide emissions of 50g/km, or a minimum range of 40km when purchased in the period between 1.1.2019 and 31.12.2021;
- maximum carbon dioxide emissions of 50g/km, or a minimum range of 60km when purchased in the period between 1.1.2022 and 31.12.2024;
- maximum carbon dioxide emissions of 50g/km, or a minimum range of 80km when purchased in the period between 1.1.2025 and 31.12.2030.

Please note: The above-mentioned criteria apply in equal measure if a used vehicle is purchased.

5. Providing electric vehicles to employees for their use

In the context of providing company vehicles to employees for their use, in terms of the payroll tax treatment the above-mentioned concessions will apply accordingly if the vehicle has been or will be made available by the employer for private usage for the first time after the 31.12.2018 and prior to 1.1.2031. Although, in these cases, it is not the date on which the employer purchased, produced or leased the vehicle that is relevant. Solely the date on which the vehicle was made available to an employee for their use is what matters.

ACCOUNTING & FINANCE

WP/StB [German public auditor/ tax consultant] Daniel Scheffbuch/ WP/eidg. WP [German public auditor/ Swiss public auditor] André Simmack

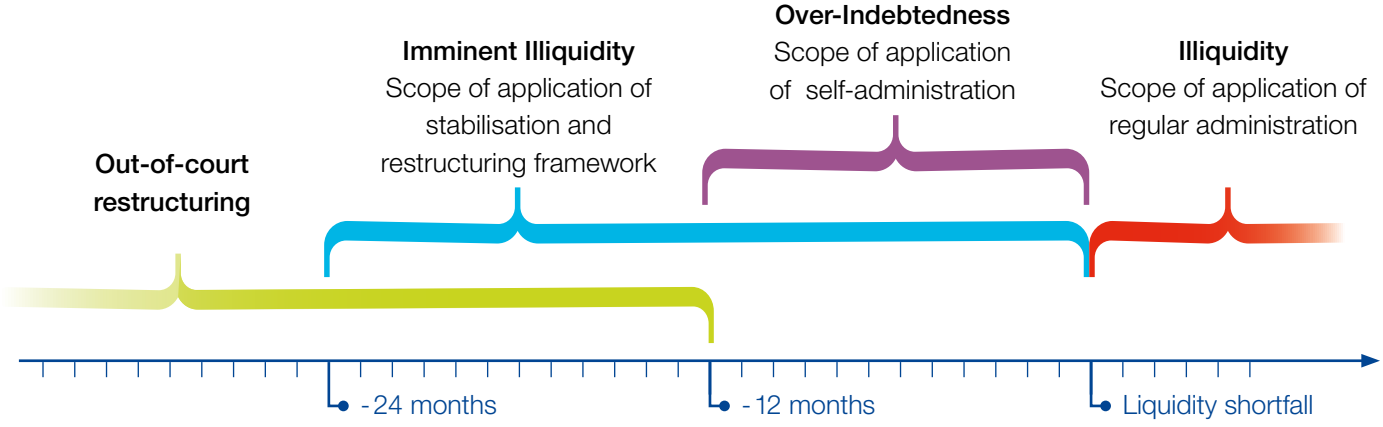
Out-of-court restructuring facilitated by the Business Stabilisation and Restructuring Act

The Act on the Stabilisation and Restructuring Framework for Enterprises *(Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen, StaRUG)* created a framework that business owners have been able to use, since 1.1.2021, in order to restructure their enterprises without having to go through the conventional insolvency proceedings.

1. Implementation of the 'Preventive Restructuring Framework'

In March 2019, the EU Parliament adopted the Directive on "Preventative Restructuring Frameworks', which required Member States to create pre-insolvency restructuring proceedings. The aim of this is to give companies the option of reaching an agreement about restructuring measures with the parties involved under protected conditions and in a uniform way and then to implement these measures. The Act for the Development of Restructuring and Insolvency Law *(Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts, SanInsFoG)* was published in the Federal Law Gazette on 29.12.2020. An important part of this Act was the StaRUG, which mainly came into force on 1.1.2021.

Please note: The newly created Stabilisation and Restructuring Framework can also have implications for the mandatory filing for insolvency. In this respect, it should be noted that, in the context of the coronavirus pandemic, the legislator has amended the provisions on mandatory filing for insolvency several times. The Institute of Public Auditors in Germany *(Institut der Wirtschaftsprüfer, IDW)* makes reference to the StaRUG in the current revised draft version of its standard 11 (IDW S 11) on 'Assessing the existence of reasons for opening insolvency proceedings' (Beurteilung des Vorliegens von Insolvenzeröffnungsgründen); moreover, the StaRUG was also the subject of a separate report in the PKF newsletter 7-8/2021 (starting on page 9 in that issue).



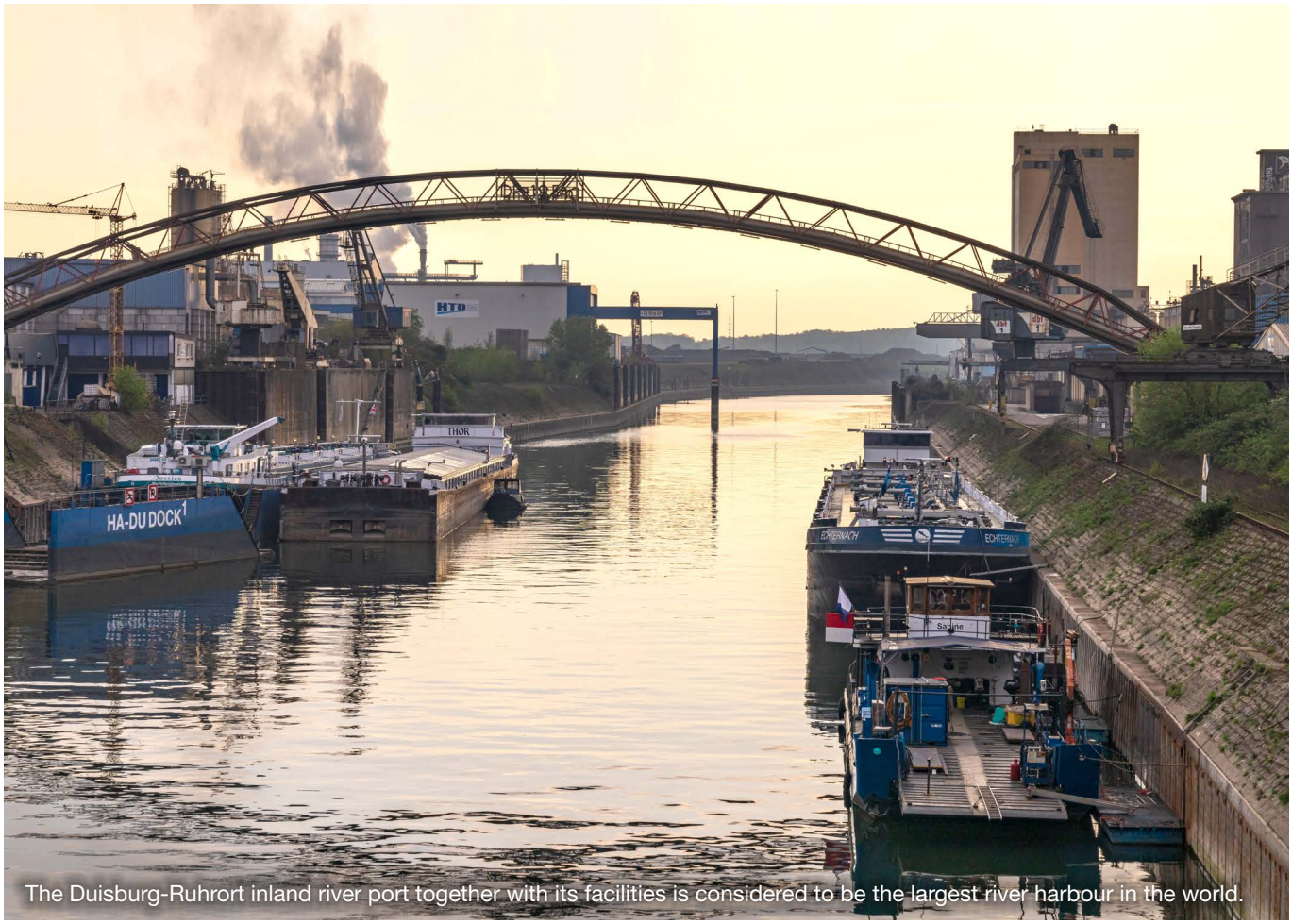
2. Objectives

With effect from 1.1.2021, the StaRUG should provide help to business owners so that they are able to restructure their enterprises without having to undergo judicial insolvency proceedings. Any enterprise that is facing the threat of insolvency is able to invoke such restructuring proceedings if there is a chance that the restructuring could be successful. A situation of imminent illiquidity would be assumed if an enterprise was still solvent but was projected to become insolvent within 24 months. There may be many reasons for a situation of imminent illiquidity however, in times of the coronavirus pandemic, it is particularly worth mentioning a lack of orders and revenue slumps. Up to now, in such cases it was common to restructure the enterprise through insolvency proceedings after having filed for insolvency. Instead of this, in the future, it will be possible to file a separate application for restructuring proceedings with the competent Restructuring Court (generally the local court [Amtsgericht]). However, if the illiquidity situation is already too far advanced then insolvency proceedings could, at least, still provide a solution via an insolvency plan but, in that case, the StaRUG would generally not be available as an option.

Please note: When compared with insolvency plan proceedings, the advantage of the StaRUG is that the restructuring proceedings are not conducted in public and, thus, the enterprise does not have to fear any potential collateral damage from the resulting extensive reporting. Therefore, this means that adequate liquidity management will become an even stronger foundation for diligent business management practices because the choice of applicable restructuring instruments will be made on the basis of proper liquidity planning. Once illiquidity has occurred this normally results in the termination of the restructuring proceedings and the filing of an application for the opening of insolvency proceedings.

3. Content of the new proceedings

The StaRUG can be basically divided up into different chapters such as, e.g., the early detection of crises, the restructuring plan or restructuring moderation. However, the structure of the legislation is not prescribed analogously to conventional patterns of civil procedure rules but, instead, reflects the chronological sequence in practice - starting with the general obligations in the run up to restructuring, subsequently, the Act first of all



The Duisburg-Ruhrort inland river port together with its facilities is considered to be the largest river harbour in the world.

regulates the contents of the restructuring plan. In the sections below we discuss, besides this restructuring plan, the judicial stabilisation and restructuring framework, the 'restructuring officer' and restructuring moderation.

Please note: The extended obligations that arise for executives from the SanInsFoG with regard to detecting crises at an early stage and initiating countermeasures were the subject of a report by Andy Weichler, a German lawyer, in the PKF newsletter 1/2021.

4. Restructuring plan

The restructuring plan is the starting point for the restructuring proceedings and, therefore, of paramount significance. The overarching objective of the restructuring plan is to avert insolvency or (imminent) illiquidity in order to ensure the continued existence of the business. However, it is the debtor company that has to propose as well as draw up the restructuring plan. Similarly, as in insolvency plan proceedings, here too, the parties that will be affected by the restructuring plan have to be divided into groups for the purpose of voting on it. The groups are set up in due consideration of the legal status of the different parties and on the basis of their economic interests (e.g., secured creditors, unsubordinated unsecured creditors, subordinated creditors). Moreover, holders of share and membership rights will make up a separate group. For the adoption of the plan, it is necessary to have a qualified majority of 75% of the voting rights in each group.

Please note: This majority rule means that it is possible to reach agreement faster and it is less likely that individual creditors will engage in obstructive behaviour. Moreover, upon notification of StaRUG proceedings the obligations to file for insolvency will be suspended.

5. Restructuring moderation and the judicial stabilisation and restructuring framework

Instead of a restructuring plan it is also possible to conclude a mutual settlement agreement (restructuring settlement agreement) mediated by a court-appointed, independent and experienced restructuring moderator. If this restructuring settlement agreement is confirmed by the court, then the benefit to the company would be, in particular, that the right to contest the respective agreements would be limited in any subsequent insolvency proceedings. The term 'restructuring moderation' is understood to mean a 'formalised mediation process' that stands fully alongside StaRUG proceedings.

In the context of restructuring by means of a restructuring plan, it will however frequently be necessary to obtain support for the negotiations through judicial measures. The instruments available here under the judicial stabilisation and restructuring framework include:

- confirmation of the plan by the court,
- preliminary review of issues,
- injunction against enforcement and asset recovery as well as
- confirmation of the restructuring plan.

In order to make use of one of these instruments the competent restructuring court needs to be notified of the restructuring proposal. The company has to add documentation that includes, in particular, a draft of a restructuring plan or at least a restructuring concept.

6. 'Restructuring officer'

Companies are able to autonomously make use of the StaRUG instruments. However, if it is foreseeable that the requisite majority approval for the plan will not be achieved in all the groups then it would be mandatory for a so-called restructuring officer to be appointed by the court in order to supervise the proceedings. In doing so, the restructuring officer will act impartially by monitoring and supervising the negotiations in order to protect the interests of the creditors in the process. The restructuring officer will thus also provide support, above all, for small and medium-sized enterprises as well as owners of micro-enterprises or consumers when determining their claims in the restructuring plan.

Conclusion

With the StaRUG the legislator has created a good possibility for companies to restructure without having to resort to a court. A restructuring plan makes it possible to reach agreement more swiftly and less likely that individual creditors will engage in obstructive behaviour. Moreover, the obligations to file for insolvency will be suspended via the notification of StaRUG proceedings. For executives there is now no conflict between the obligation to preserve assets and the obligation to pay tax, both of which come with the risk of personal liability. In the legislative procedure, priority has now been given to the obligation to preserve assets and personal liability for the payment of tax has been suspended.

The former Thyssen steelworks in the North Duisburg Landscape Park

RA/StB [German lawyer/tax consultant] Sebastian Thiel

New notification obligations – The transparency register has become a comprehensive register

The Transparency Register and Financial Information Act *(Transparenz- und Informationsgesetz, TraFinG)*, which was passed at the end June, came into force on 1.8.2021. As a result of this the transparency register has been transformed into a comprehensive register. A report on the legislative procedure was included already in the March issue of our PKF newsletter. In view of the highly significant practical implications and the need to promptly set up a process for fulfilling the notification obligations we have addressed this issue once again by providing a general overview and, in particular, describing the current need for action.

1. Please take note - The presumption of notification *(Mitteilungsfiktion)* has been abolished without any substitution

Previously, the so-called 'presumption of notification' meant that companies did not have to notify the transparency registry if all the requisite disclosures were already contained in electronically accessible public registers (e.g., the Commercial Register). From now on, the presumption of notification will cease to apply without any substitution. It is now no longer relevant whether or not there is information about the beneficial owners in other public registers.

In future, this will lead to the transparency register standing alongside the existing public registers. So, to put it clearly, this means that in the future all German companies will be obliged to continually notify the transparency registry of their beneficial owners.

Please note: On account of these changes, around 1.9m legal entities throughout Germany will consider themselves obliged to notify the transparency registry for the first time. This will also apply to companies that do not actually have a beneficial owner and where a legal fiction is created according to which the legal representatives are simply considered to be the notional beneficial owners. A notional beneficial owner would be, for example,

the managing director of a GmbH (private limited company) where no natural person, directly or indirectly, held an equity interest of more than 25%.

2. Additional information about the beneficial owners

In the future, with respect to beneficial owners, it will be necessary to ensure that all their nationalities are disclosed. The previous right to choose to disclose merely one of several nationalities has ceased to exist.

There is no requirement to notify the registry additionally merely of the nationalities that have not yet been recorded. Additionally notifying the registry of any other nationalities will only be necessary if information about the beneficial owners is being updated for some other reason.

Please note: Trust representatives, trustors and comparable legal constructions for foundations (particularly foundations without legal capacity) will moreover, in specific cases, see themselves exposed to an expansion of the group of beneficial owners.

3. Transitional periods

The Act provides for transitional periods, specific to legal forms, for those legal entities that had been exempted from the notification obligation up to now because of the 'presumption of notification'. Specifically:

- AG [public limited company] and KGaA [a partnership limited by shares] until 31.3.2022,
- GmbH [private limited company], cooperative, European cooperative and partnerships until 30.6.2022,
- all other entities until 31.12.2022.

Please note: Those who were however in any case obliged to file a disclosure because, for example, in their specific cases they did not meet the criteria to be able to benefit from the presumption of notification, have to notify the registry without undue delay.

4. Expansion of the notification obligations for foreign companies

The notification obligations for foreign organisations when they purchase property located in Germany have likewise been extended. Up to now, foreign organisations only had to notify the German transparency registry of their beneficial owners in the case of direct acquisitions of domestic property. From now on, foreign organisations will be obliged to notify the registry if they intend to acquire shares in a corporation that owns property in Germany as part of a share deal.

Please note: Failure to comply with the notification obligation would result in a prohibition on the share deal being officially recorded by a German notary.

5. Special rules for registered associations

It is encouraging that the new version of the Anti-Money Laundering Act *(Geldwäschegesetz, GWG)* provides for registered associations to be automatically entered into the transparency register. Consequently, a notification obligation will generally cease to apply for registered associations. However, automatic registration will not happen until 1.1.2023. Moreover, in the event of automatic registration, registered associations will be exempt by law from paying any fees.

Please note: However, the names of the beneficial owners will not be automatically taken from the register of associations and recorded in the transparency register, in particular, in those cases where a registered association has already arranged for the transparency registry to be actively notified of the beneficial owners. In such cases, the obligation to notify the registry without undue delay will continue to apply for registered associations.

6. Sanctions and penalties

Fines of up to € 100,000 have been provided for administrative offences that result from a frivolous breach of the notification obligation; if the breach is intentional then this amount goes up to € 150,000. For serious, repeated or systematic breaches the ceiling for fines goes up to one million € or up to twice the financial benefit derived from the breach. The financial benefit in this case will include profits generated and losses avoided and may be estimated by the Federal Office of Administration *(Bundesverwaltungsamt, BVA)*. In addition, the BVA will publish breaches on its website as part of its naming and shaming scheme.

Recommendation

Against the backdrop of far-reaching new regulations, it is not only the current need for action that should be determined. Over and above that, we would recommend setting up an ongoing process to ensure that, in future, all the data that are subject to disclosure are provided within the stipulated period and that they are complete. Furthermore, compliance to-date with notification obligations should be critically analysed and the need to make any corrected notifications should be determined.

RA [German lawyer] Prof. Heiko Hellwege

‘Leave to stay’ or baby leave, sick leave and care leave for business executives (m/f/x)

Draft legislation to “Supplement and Amend the Regulations for the Equal Participation of Women in Leadership Positions in both the Private and Public Sectors” *(Ergänzung und Änderung der Regelungen für die gleichberechtigte Teilhabe von Frauen an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst, FuPoG II)* was passed by the lower house of the German parliament *(Bundestag)* on 11.6.2021. New rules in the case of baby leave, sick leave and care leave were effectively tabled in addition, too.

1. Introduction of quotas for men and women in management and executive boards

If the management or the executive board of a GmbH [a German limited company], Aktiengesellschaft or SE [German or European stock corporations] consists of more than three people then at least one woman and at least one man have to be appointed to the representative body. Failure to achieve this quota will render the appointments null and void. However, this mandatory quota will only be applicable to companies that are either stock listed or subject to parity co-determination rules in accordance the German Co-determination Act.

2. Other reforms in respect of maternity leave, parental leave or care leave

However, in the wake of the quota described above, another amendment was introduced - via a quick resolution recommendation with a large majority - whose implications are no less spectacular - a business executive’s mandatory right to maternity leave, parental leave or care leave and, in particular, regardless of whether the respective executive is an employee under social security law or a controlling shareholding managing director.

Please note: It is worth recalling the German Maternity Protection Act that already applies to external female managing directors if they are subject to social insurance.

The new rules will be implemented through the right for business executives to have their mandates suspended. In this respect, a new paragraph 3 that will be added to Section 38 of the German Limited Liability Companies Act will state that: “If business executives are temporarily unable to comply with the obligations associated with their appointments in office because of maternity leave, parental leave, having to care for a family member or because of illness and if at least one other business executive has been appointed then the business executives shall have the right to request that their appointments in office be revoked. If business executives make use of this right then the appointment in office of these business executives has to be revoked and, in such cases, reappointment has to be guaranteed after the end of the period specified as the term of protection in Section 3(1) and (2) of the German Maternity Protection Act (…).“

For the other legal forms of the Aktiengesellschaft or SE appropriate amendments are planned for Section 84 of the German Stock Corporation Act and Section 40 of the European Stock Corporation Act.

Please note: The new rules apply to all GmbHs and also the small general partner GmbH of a tradesperson’s GmbH & Co. KG. (a German limited partnership with a limited liability company as a general partner).

3. Practical significance

Consequently, business executives (m/f/x) may request revocation of their appointments in office and subsequent reappointment for their desired period of time off work. The intention is that during the period of personal leave the executive’s functional obligations lapse. During this period, they do not have any obligations, for example, in respect of filing a petition for bankruptcy and neither any liability risks ensuing from a breach of any obligations.

In cases of maternity leave, the shareholders’ meeting or the supervisory board are not allowed to reject the request of the executive board; in cases of parental leave, sickness or care the appointing body may nonetheless object to the request for good cause.

4. Conclusion

In the event that the legislation is finally passed it will enable new strategies, for example, in a company crisis; in future, business executives could thus effectively pull themselves out of their official duties for 14 weeks (maternity leave) or up to three months (in the event of sickness or because of paternal leave or care leave) and saddle the potential sole remaining business executive with these responsibilities.

IN BRIEF

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

Interest of 6% on tax arrears and tax refunds is unconstitutional

Interest becomes due on tax arrears and tax refunds if 15 months after the end of the calendar year in which the tax liability arose the tax has not yet been paid. Currently, the interest rate is 0.5% per month, or 6% per year. The Federal Constitutional Court *(Bundesverfassungsgericht, BVerfG)* now holds that this rate of interest is unconstitutional given that interest rates have consolidated at a low level; the BVerfG's ruling will give rise to far-reaching consequences as of the 2019 interest period.

1. History

The standardised interest rate of 6% p.a. on tax arrears and tax refunds was determined in 1961 already and has remained unchanged since then. The interest period always begins 15 months after the date on which the tax liability arose. However, the fact that interest rates on the capital markets have been falling for decades has not been taken into account. For some time now, the deposit rate has indeed even been in negative territory - currently it is at minus 0.5%. Interest of 6% per year on tax arrears and tax refunds has thus been divorced from the reality on the capital market for a long time and it was for this reason that the issue of the constitutionality of this rate was referred to the BVerfG for a review.

2. The decision of the Federal Constitutional Court

The BVerfG, in its decision of 8.7.2021 (case reference: 1 BvR 2237/14, 1 BvR 2422/17) concluded that the standardised annual interest rate of 6% became divorced from reality at the very latest in 2014 and that it now has an excessive effect. In its decision, which was published on 18.8.2021, the BVerfG stated that interest incurred for all interest periods from 2014 onwards was incompatible with the Basic Law. Despite this unconstitutionality, the BVerfG will continue to allow interest of 6% for the 2014 to 2018 interest periods that fall in the years up to and including 2018. However, for interest periods starting 1.1.2019 the respective provisions on interest will no longer be applicable. The legislator is obliged to agree new rules by 31.7.2022.

Please note: All tax assessment notices that are not yet final and unappealable and with interest periods starting from 2019 will have to be corrected. Those who have paid too much interest will, in this case, benefit from a refund. Then again, tax refunds would potentially have to be partly paid back insofar as they included an interest component. In such cases, the amounts would depend on the interest rate that is set for the period from 1.1.2019.

The Rheinorange [Rhine Orange] sculpture marks the spot where the Ruhr flows into the Rhine

Simplification of tax rules for many taxpayers

A tax amendment act that came into force on 9.6.2021 will make life simpler for many taxpayers and provide improved possibilities for deductions.

The legislation in question is the new Act on the Modernisation of Withholding Tax Relief *(Abzugsteuerentlastungsmodernisierungsgesetz, AbzStEntModG).* Most of the changes concern capital gains tax relief for taxpayers with restricted tax liability (cf. the report in this regard in the PKF newsletter 03/2021, p. 6). Besides concentrating the refunding procedures at the German Federal Central Tax Office, from 2024 onwards there are plans for fully digitalised processing of applications. Refund applications for taxpayers with restricted tax liability would then be submitted electronically and refund certificates would likewise be provided electronically. The following changes, in particular, were also introduced in the AbzStEntModG:

» The applicable period for the tax exemption of Coronavirus special payments up to an amount of € 1,500 has been extended to 31.3.2022 and this is why employers now have more time to make special payments to their employees.

» As of 2021, when the child allowance is transferred then this will always also result in the allowance for the care and educational or professional training needs of a child being transferred, too.

» Evidence of a degree of disability of below 50 may continue to be provided by presenting a pension approval certificate or another certificate that provides proof of regular payments.

» If the revenues of a commercial operator or a land farmer and forest manager exceed the revenue threshold of € 600,000 then the German Fiscal Code provides for a requirement to keep accounts. In future, revenues will be calculated on the basis of the rules for determining overall revenues when applying the small business exemption.

Business hospitality expenses – New requirements from the Federal Ministry of Finance

In the Federal Ministry of Finance's circular, of 30.6.2021, the fiscal authority took into account the developments in digitalisation in the area of hospitality expenses, in particular, the possibility to provide a signature or approval electronically as well as the use of an electronic record-keeping system with a cash register function.

As previously, the mandatory information for entertainment expense receipts, from a VAT perspective, includes, in particular, the tax number or VAT identification number, the date of issue and a sequential invoice number. In future, the exemptions for invoices for small amounts (invoices up to € 250) will also apply for income tax purposes.

If a catering establishment uses an electronic record-keeping system with a cash register function, then hospitality expenses will only be permitted as a business expense deduction if the invoice has been automatically generated, recorded electronically and protected against tampering using a certified technical security system (TSS). In the case of digital hospitality receipts, where taxpayers have to keep written proof of the place, day, participants and the reason for the hospitality as well as the expense amount, taxpayers will now be permitted to give required authorisation by means of an electronic signature or by providing electronic approval. The most important proof requirements for digital or digitalised hospitality receipts include, in particular, the requirement for electronic records to be made of the date of the signature or approval, the requirement for an electronic own/internal receipt to be promptly issued with the legally required information and, as guidance, compliance with the 'Principles of Proper Keeping and Retention of Accounts, Records and Documents in Electronic Form as well as Access to Data' *(Grundsätze zur ordnungsmäßigen Führung und Aufbewahrung von Büchern, Aufzeichnungen und Unterlagen in elektronischer Form sowie zum Datenzugriff, GoBD).*

This also includes the need for the process that is used in each case to be described in the process documentation.

Please note: With respect to hospitality abroad, the circular states that there is basically no difference when compared with hospitality rules for Germany. There are however exceptions depending on the applicable requirements abroad.

AND FINALLY...

"My personal advice is that you should always stay true to yourself, although I don't know if that ultimately always leads to success in terms of a career."

Alfred Franz Maria Biolek, 10.7.1934 – 23.7.2021, was a German lawyer, television presenter and producer, talk show host, entertainer and cookbook author.

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PKF Deutschland GmbH Wirtschaftsprüfungsgesellschaft

EUREF-Campus 10/11 | 10829 Berlin | Tel. +49 30 306 907-0 | www.pkf.de

Please send any enquiries and comments to: pkf-nachrichten@pkf.de