

Newsletter



Key Issue

Measures to tackle the energy crisis
and to combat inflation

Dear Readers,

We start this edition of our October newsletter in the Key Issue section with an overview of the large number of **measures** with which the German Federal government wants to **provide relief to citizens and companies**. The aim is to cushion, at least partially, the impact of inflation generally and, in particular, the steep **price increases for energy**. These expenses will be financed partly by the higher VAT revenues due to the price increases, but also in part by a so-called tax on the excess profits of energy corporations.

In the report that then follows, we present the measures planned by the German Ministry of Finance for the **modernisation of external tax audits**. That is the 'modern' term for yet more cooperation obligations for taxpayers. Subsequently, we provide a summary of the conditions under which another **fixed establishment for a parent company** would be created **abroad** in addition to the local subsidiary there. Next up is a guest contribution from our French PKF colleagues about the measures that are being taken in **France** against the backdrop of inflation and the energy crisis with a view to increasing the **purchasing power of employees**.

In our Legal section, we first take a look at the **stabilisation and restructuring framework** (abbreviated in German to **StaRUG**). Here, the focus is on the early detection of crises, advisor obligations to warn as well as on the instruments for corporate restructuring. Then we once again discuss the obligation of managing directors to pay mandatory social security contributions. Our report here deals with the question of the circumstances under which **minority shareholding managing directors** would have to pay contributions even though special rights have been conferred on them.

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 Magdeburg and Haldensleben.

We hope that you will find the information in this edition to be interesting.

Your Team at PKF



Magdeburg Cathedral

Front cover photo: View across the Elbe to Magdeburg

Key Issue

Measures to tackle the energy crisis and to combat inflation

Contents

Tax

Measures to tackle the energy crisis and to combat inflation	4
Planned modernisation of external tax audits	8
European tax law – When does a business owner have a fixed establishment?	9
Measures to provide relief for employees in France	11

Legal

New possible ways of avoiding insolvency proceedings	12
Minority shareholding managing directors – Social insurance payment obligation despite special rights	14

In Brief

Customs app for complying with import rules	15
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TAX

WP/StB [German public auditor/tax consultant] Daniel Scheffbuch / Christina Schultz

Measures to tackle the energy crisis and to combat inflation

Russia's war on Ukraine triggered an energy crisis and clearly demonstrated the need to switch to a climate-neutral energy supply. The German Federal government and also the EU Commission have responded to this with a multitude of legal acts intended to reduce the burden on citizens, combat inflation and drive forward the sustainability transformation.

I. National measures

At the national level, the Federal government has taken various measures to counteract the rise in living costs associated with the war. Besides adopting a third relief package, this also includes passing the Inflation Compensation Act and the 2022 Annual Tax Act. The 24(!) individual measures are listed below.

1. Relief package III

On 3.9.2022, the governing coalition agreed on a third package of measures to ensure an affordable energy supply and to bolster incomes in this year.

1.1 Energy market

(1) Electricity price brake to provide relief – The electricity price brake was adopted with the aim of enabling both private households as well as small and medium-sized enterprises to purchase the amount of electricity for their baseline consumption at a reduced price. It is intended that this will be financed out of the income that the State receives from the introduction of an upper limit for the profits of energy companies that produce electricity from sources that are cheaper than gas (see also Section II.1, below, and compare with the measures in the emergency package from the EU Commission).

(2) Curbing rising grid fees – To stop the announced increase in transmission grid fees, as of 1.1.2023, the grid fees will be subsidised. As in the case of the planned electricity price brake, here too the State intends to finance this by skimming off the earnings of energy companies that

have experienced a significant increase in their margins.

(3) CO₂ price relief – The increase in the CO₂ price of €5 per tonne that was planned for 1.1.2023 will now be postponed to 1.1.2024. Moreover, in order to enable further savings in the transport sector, there is an intention to make commitment appropriations of around €1.5 bn available.

(4) Price curbing model for the heating market – Experts intend to meet to discuss the feasibility of a price curbing model for the heating market in Germany or Europe.

1.2 Legal measures beyond tax law

(5) Extension of the short time working allowance – These special regulations will be extended beyond 30.9.2022.

(6) Introduction of social entitlements – Besides expanding the entitlement to the housing benefit, there is also the intention to introduce heating cost and climate components. Furthermore, the introduction of the Bürgergeld [literally: citizen's income, or basic income support] will replace the entitlement to 'unemployment benefit II' and income support.

(7) Funding for public transport – Timely development of a joint concept for an attractively priced successor to the nationwide €9 ticket.

(8) Aid for businesses – For a start, aid for businesses will be extended and expanded. In addition, there are plans to extend the cap on energy tax and electricity tax for energy-intensive companies by another year.

1.3 Measures related to tax and social security regulations

(9) Reduction in VAT rates – The reduced VAT rate of 7 percent will continue to apply to food in restaurants. Furthermore, – probably from 1.10.2022 – the VAT rate for gas consumption will likewise be reduced to 7% until the end of March 2024.

(10) Support for employees via an inflation premium

– Companies will be able to give each of their employees a one-off payment in the amount of €3,000 that will be exempt from tax and social security contributions.

(11) Home office blanket deduction – This will be extended for an indefinite period of time for the operating costs and work-related expenses deduction.

(12) New upper limit for midi-jobs – For employees in this transitional sector the wage limit will be increased to €2,000.

(13) Energy price lump sum – As of 1.12.2022, pensioners will now also receive a one-off payment of €300 from the German Federal Pension Scheme – previously this amount was paid only to taxpayers with unlimited tax liability. In the absence of payroll tax, the energy price lump sum will be taxable as income so that the amount of the one-off payment will depend on the respective income. All university students and vocational students will receive a one-off payment of €200. It is currently not yet clear to what extent this amount will have to be taxed. It has

moreover not yet been determined how the money will be disbursed to them. The fact that the energy price lump sum will be paid irrespective of any other relief measures that are claimed (such as, e.g., housing benefit) is positive for consumers.

(14) Pension contributions – Taxpayers will be able to fully deduct their pension contributions already from 1.1.2023.

(15) Support for children – The Federal government's plans for relief for children will be detailed in the Inflation Compensation Act.

(16) Reduction of tax bracket creep – In order to counteract bracket creep, the threshold values for 2023 and 2024 in the income tax scale will be adjusted. A more extensive discussion of this is presented below in section 1.2 on the Inflation Compensation Act.

2. Inflation Compensation Act

On 14.9.2022, the Federal Cabinet approved a rightward



Town Hall with Golden Rider Statue

shift in the income tax scale for 2023 and 2024 to compensate for the bracket creep – this measure had already been announced in its Relief package III – and the respective governmental draft of the Inflation Compensation Act of 8.9.2022 was thus introduced into the legislative process. The Act includes, in particular, the following measures:

(17) Top marginal tax rate – For the assessment year 2023, the top marginal tax rate of 42% will be payable on taxable incomes above €61,972 (previously €58,597) for those who are separately assessed for tax, although another increase in this threshold value is planned for 2024. For those who are jointly assessed, the taxable income will go up respectively from €117,194 to €123,944. At the same time, the threshold value for the ‘tax on the rich’ (at a rate of 45%) will however be maintained.

(18) Raising the basic personal tax allowance – As of 1.1.2023, the basic personal tax allowance for those who are separately assessed for tax will go up from €10,347 to €10,632 and for those who are jointly assessed from €20,694 to €21,264. In addition, the maximum amount of maintenance will correspondingly be retroactively adjusted as of the assessment year 2022.

(19) Child tax allowance – Firstly, the German government sees the need for a retroactive adjustment for a retrospective increase in the child tax allowance for 2022. Secondly, an increase in the child allowance for 2023 and 2024 is planned pursuant to the result that is expected from the 14th report on minimum subsistence levels.

(20) Child benefit adjustments – Child benefit will likewise be correspondingly increased. From 2023, for the first, second and third child this will be, in each case, €237 per month and for the fourth child and each additional child this will be €250 per month. Up to now, child benefit for the first and second child has been €219, for the third child €225 and for each additional child €250 per month.

3. 2022 German Annual Tax Act

The governmental draft of the 2022 Annual Tax Act, which was approved by the Federal Cabinet on 14.9.2022, includes the following provisions:

(21) Modernisation of the deduction of expenses for business or professional activities carried out at home from 2023 (Section 4(5) sentence 1 no. 6b



Banks of the Elbe at Magdeburg

of the German Income Tax Act-draft) – The previous maximum amount of €1,250 for the use of a workroom at home will be turned into a yearly flat rate in the same amount (annual lump sum). If no other workspace for business and professional activities is available on a permanent basis then the expenses for the entire business and professional activities may be deducted in the amount of the annual lump sum. As a result, the taxation procedure can be substantially simplified and bureaucracy reduced because the individual expenses will no longer have to be determined and verified. Furthermore, if the workroom also constitutes the focus of the entire business and professional activities then instead of the annual lump sum – as previously – the actual expenses may be deducted.

(22) Home office blanket deduction – Besides the extension of the home office blanket deduction for an indefinite period (in this respect see under (11) above), there are plans to raise the annual maximum amount to €1,000. This will be granted irrespective of the definition of the type of workroom at home.

(23) Support for specific photovoltaic systems from 2023 (Section 3 no. 72 of the German Income Tax Act-draft) – An income tax exemption will be introduced for these and, in relation to the tax-exempted systems, the advisory powers of German Income Tax Assistance Associations (Lohnsteuerhilfevereinen) will be expanded. Moreover, for specific photovoltaic systems a VAT zero rate with input tax deduction for the supply and installation will be introduced.

(24) Increase in straight-line depreciation for buildings – The straight-line depreciation rate for residential buildings completed after 31.12.2023 will go up to 3% (previously 2%). However, from 2023, the possibility to opt to apply depreciation at the standard depreciation rate on the basis of an actual useful life that can be substantiated will be eliminated.

II. Global measures

In order to tackle high energy prices, the EU Commission put forward a proposal for an EU Emergency Regulation. In addition, the EU is aiming for a swift implementation of the global minimum tax.

1. 'Emergency package' from the EU Commission

The key points in the proposal concern the following announcements:

(1) The introduction of a cap on the revenues of elec-

tricity producers with low marginal costs, such as those that use renewables, nuclear and lignite – This draft corresponds to the compromise that was reached by the Federal government in its Relief Package III, namely, to support a revenue cap at EU level. We would like to stress that, irrespective of any decisions made at the EU level, the German Federal government is itself likely to take action at the national level.

(2) Introduction of a solidarity contribution from oil and gas companies.

(3) Measures to reduce gross electricity consumption during peak load times – According to the proposed regulation, the Member States should endeavour to reduce overall electricity consumption by at least 10% by 31.3.2023. To target, in particular, those hours when electricity is most expensive and when gas usually determines the marginal price, the Commission has proposed an obligation to reduce gross electricity consumption by at least 5% during specific peak price hours.

(4) Proposal for a gas price cap.

(5) Emphasis on the particular importance of hydrogen for the transformation.

The Commission expects measures (1) – (5) to raise revenues in the amount of €140 bn for redistribution to vulnerable private consumers and businesses.

2. Global minimum tax

On 9.9.2022, the finance ministers of Germany, France, Spain, Italy and the Netherlands published a joint statement where they affirmed their commitment to swiftly implement a global minimum tax.

If the unanimity that is needed within the EU cannot be reached in the next weeks then these states want to implement a global minimum tax with effect from 31.12.2023 on their own.

Please note

In Germany, according to a resolution by the coalition, it has already been decided that this will start by 1.1.2024. Here, the minimum tax will apply to businesses with sales of at least €750m.

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

Planned modernisation of external tax audits

A draft law published by the Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) includes proposed changes related to external tax audits. Among other things, qualified obligations to cooperate would be placed on taxpayers, and sanctions could be available in the event of violations. In particular, platform operators will face new reporting obligations. Then again, there is an intention to grant the possibility of partial final assessment notices.

1. Qualified request for cooperation

A qualified request for cooperation would allow the fiscal administration to randomly require a taxpayer to hand over documents and records within a period of one month without it having to provide an explanation or to state an objective reason for the request. If the taxpayer fails to comply with the request within the deadline then there would be a risk of heavy fines for the delay.

It is intended that specific framework conditions would be

agreed between the fiscal authority and the taxpayer. In the best case, a cooperative audit procedure would emerge. However, the question of what is meant here by specific framework conditions still remains. These types of framework conditions could be realised, for example, via an integrated tax compliance management system (CMS).

2. Cooperative audit procedure

Details about how the audit should be carried out were already mentioned in the draft that was updated by the BMF on 6.7.2022. Thus, by implementing the EU Directive on Administrative Cooperation (referred to as DAC7), an obligation will be introduced for digital platform operators to report information to the fiscal authorities on the income derived by sellers on these platforms. According to the BMF, the term 'platform operator' covers any system based on digital technologies that enable users to enter into contact with each other and to conclude legal transactions via the internet by means of software. Moreover, platform operators will also be affected by specific due dil-



State Parliament of Saxony-Anhalt

igence obligations such as checking the tax residency of the sellers and the plausibility of certain pieces of reportable information.

If, in the course of an ongoing tax audit, the effectiveness of the ICS has been confirmed and thus there is no, or merely a minor, tax risk then, in the future, the local fiscal authorities may bindingly confirm - with the knowledge of the German Federal Central Tax Office - that there will be simplifications for subsequent external tax audits.

3. Associated sanctions

An amendment to the German Fiscal Code will mean that there will be particular legal consequences in the event of non-compliance with an enforceable administrative order. A failure to meet the obligations to cooperate would result in, above all, an extension to the suspension of the deadlines prescribed by the statutory limitation period, according to which the authority would, in the future, be able to intervene within five years after issuing a tax audit notice. This would provide the competent authority considerable flexibility, but unfortunately at the taxpayer's expense. The latter would thus frequently get legal certainty at a very late stage. In addition, the taxpayer could be at risk of having to pay tax arrears related to a tax issue from way back in the past.

4. Partial final assessments

Then again, upon application by the taxpayer, the authority would issue partial final assessment notices for tax bases that have been determined during the audit period and that are separately identifiable. This could provide great relief for the taxpayer during the taxation procedure. An application would also seem like a sensible course

of action if particular intervals had already been worked through.

5. A glimmer of light

In the future, tax audit notices for income tax and VAT returns would be issued by the end of the year following the one in which the tax assessment notice became effective. This corresponds to the desire of taxpayers for tax audits to take place in a timely manner. However, this provision would not protect against the possibility of tax audit notices also being issued at a later point in time.

6. Conclusion

By modernising the provisions on the procedural rules under tax law the aim is to speed up external tax audits in order, in particular, to reduce the burdens on taxpayers that result from long audits and, thus, to curtail the associated bureaucracy costs. Taxpayers' obligations to cooperate would indeed be broadened, however, the tax auditors would specify the focal points of their audits and also hold interim talks.

Please note

Under DAC 7, specific due diligence and reporting obligations for operators of digital platforms will come into force already on 1.1.2023. However, as the purpose of the regulation is to pilot alternative audit methods, initially, it will automatically expire at the end of 2027, unless German law makers extend it.

WP/StB [German public auditor/tax consultant] Daniel Scheffbuch / Christina Schultz

European tax law – When does a business owner have a fixed establishment?

A matter that is often disputed with fiscal authorities is the question of the circumstances under which a German parent company would create another fixed establishment abroad in addition to its foreign subsidiary. In a recent case, the ECJ had to rule on whether a Romanian company supplied services itself to its German parent company, or whether these had been supplied by a fixed establishment that the German parent company has in Romania. When determining VAT, the place of supply of the services matters.

1. Background

Under Article 44 of the EU Directive on the common system of value added tax, the place of supply of the services will be mainly determined by the place where the recipient of the supply has established their business. However, if those services are provided to a taxpayer's fixed establishment then the place of supply of the services will be deemed to be where that fixed establishment is located. It is thus questionable if and under what circumstances another

fixed establishment would be created abroad for a German parent company in addition to its foreign subsidiary.

2. The issue

In the case in question, of 7.4.2022 (case reference: C-333/20), a Romanian subsidiary had taken legal action. Its German parent company markets pharmaceutical products in Romania and had concluded a storage contract with the subsidiary. The Romanian company's main activity consisted in exclusive marketing, regulatory, advertising and representation services. The companies concluded a contract under which the Romanian company undertook to actively promote the products of the German company in Romania. So, the Romanian company invoiced the services in question to the German company exclusive of VAT because it assumed that the place of supply of those services was in Germany.

However, following a tax inspection, the Romanian tax authority determined that the services supplied by the Romanian company to the German company were received by the latter in Romania, where the German

company had a fixed establishment. The German company had sufficient technical and human resources in order to supply periodic taxable services.

3. The ruling by the ECJ

The ECJ stressed that the existence, in the territory of a Member State, of a fixed establishment of a company established in another Member State may not be deduced merely from the fact that that company has a subsidiary there. The classification of an establishment as a fixed establishment of a parent company cannot depend solely on its association under company law with another taxpayer.

Instead, for the ECJ, when it comes to creating a fixed establishment abroad the following factors, in particular, would need to be considered.

- » The existence of a minimum degree of stability derived from the permanent presence of both the human and technical resources necessary for the provision of the specific services.



- » The taxpayer has to have the right to dispose of those human and technical resources in the same way as if they were their own.
- » Examples that might be cited here include service and leasing agreements on the basis of which those resources are made available to them and cannot be terminated at short notice.
- » The establishment has to be able both to receive the services that are supplied for its own use and utilise them there.
- » The same resources cannot be used both to supply and receive the same services.
- » Furthermore, other requirements are the direct involvement by the foreign company in the sale and supply of products as well as entering into commitments with third parties in the name of the German company.

In the case in question, the ECJ pointed out that the services supplied by the Romanian company for the German company were principally intended to provide better information to professionals in the field of health and to consumers, in Romania, on the pharmaceutical products sold by that German company. The Romanian company was not directly involved in the sale and supply of products and did not enter into commitments with third parties in the name of the German company.

Outcome

The company in Romania thus did not have a sufficient degree of permanence and a suitable structure in terms of human and technical resources so that it was not possible to assume that it was a fixed establishment.

Stéphane Schwedes / Carole Darbès

Measures to provide relief for employees in France

In France, the lawmakers have likewise adopted a number of legal provisions in order to compensate for inflation and higher energy prices. These provisions are significant because, in France, employees' social security contributions and, in particular, those of their employers are considerably higher than those in other countries. While an employee's share of these contributions is around 25% of gross salary, the employer's share is even higher at around 40-50%; moreover, income limits up to which contributions are chargeable rarely have an effect.

(1) Overtime can be paid out exempt from tax and social security charges up to an annual net amount of €7,500 per employee.

(2) Since the implementation of the shorter 35-hour working week, which is referred to in French as *réduction du temps de travail* (RTT), companies that still organise the work around 8-hour days may, if requested to do so by an employee, pay overtime in lieu of time off to compensate for the extra hours or days ('RTT' hours or days). Now, up to 2025, at least 8 to 11 days per year of overtime, based on a calculation factor of 1.25, together with 'genuine' overtime may be paid out largely exempt from tax and social security charges.

(3) New incentives have been created for the introduction of the profit-sharing schemes called participation and *intéressement*. If the amounts are capitalised for five years and kept in a so-called company savings plan account (*plan d'épargne entreprise*, PEE) they will remain exempt from tax and social security charges. In the past, only around half of employees made use of these tax advantages. The new provisions include a simplification for the introduction of a scheme and the elimination of a flat-rate charge for social security contributions for small companies.

(4) In 2022, employees have the option to withdraw up to €10,000 of their savings from the PEE account before the end of the 5-year period.

(5) The value-sharing bonus (*prime de partage de la valeur*, PPV) was raised up to €6,000 per year and per employee. This value-sharing bonus is largely exempt from social security charges and income tax. Employers can decide to pay this bonus without any negotiations with the works council and the amount can be staggered for each employee according to different criteria. Although, the bonus has to be paid to all of the employees in the groups concerned.

(6) On 1.9.2022, the amount that is exempt from social

security contributions for meals for employees during working hours was increased to €5.92 per meal.

(7) Subsidies for public transport season tickets, electro-mobility and fuel that are exempt from social security contributions have been increased considerably and made

more flexible. These measures will initially apply in 2022 and 2023.

(8) Furthermore, all French citizens can benefit from the cap on electricity and gas prices and from the temporary reduction in the taxes included in petrol and diesel prices.

LEGAL

WPin [German public auditor] Julia Hörl / Dominik Römer

New possible ways of avoiding insolvency proceedings

The German Federal government approved the Stabilisation and Restructuring Framework legislation (*Gesetz über den Stabilisierungs- und Restrukturierungsrahmen, StaRUG*), as of 1.1.2021, as a response to the changes in the area of restructuring and insolvency that had been prescribed by the EU. In the following section we give an overview of the new rules with regard to insolvency and restructuring in enterprises. Here, the focus is on the early detection of crises, advisor obligations to warn as well as on restructuring instruments.

1. Early detection of crises

According to Section 1 StaRUG, the management is obliged to continuously monitor early warning signs of crises. If any risks are discovered then the appropriate countermeasures have to be taken. Furthermore, the management is obliged to report on the situation to the bodies overseeing the company, namely, the supervisory board, the annual general meeting or the shareholders' meeting.

In order to become aware of risks in good time, it is possible to set up so-called early warning systems for the purpose of getting early indications of crises. Early warnings can appear in various forms, for example, when external third parties - such as tax consultants, auditors or social security agencies - point out potentially negative developments. Moreover, within the company, different indicators – for example, in the form of earnings or liquidity metrics – could already provide specific evidence of an incipient crisis.

Please note: See also the previous key report on out-of-court restructuring in the PKF newsletter 9/2021.

2. Advisor obligations to warn

The Federal government has also laid down obligations for tax consultants, auditors and lawyers within the framework of the new legislation. Here, under Section 102 StaRUG, the above-mentioned professional groups, in the course of preparing annual financial statements for a client, also have to check for the presence of possible grounds for insolvency. If there are indications that grounds for insolvency may exist then the advisors are obliged to notify their clients, irrespective of their legal form, of these indications.

3. Instruments for corporate restructuring

In terms of the instruments for corporate restructuring, it is possible to make a distinction between, firstly, those based on previous restructuring plans prepared in accordance with the guidelines of the standard issued by the Institute of Public Auditors in Germany (Institut der Wirtschaftsprüfer, IDW) - Requirements for the Drafting of Restructuring Plans (Anforderungen an die Erstellung von Sanierungskonzepten) - (IDW S6) and, secondly, the additional instruments that resulted from the Act for the Development of Restructuring and Insolvency Law (*Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts, SanInsFoG*).

(1) An IDW S6 restructuring plan is, in practice, frequently a rather complex one. Its preparation involves, first of all, excluding factual insolvency. In order to be able to ensure this the following key elements are examined:

- » object of the contract
- » scope of work
- » assets

- » causes of the crisis
- » progress in the stage of the crisis
- » corporate mission statement
- » measures to avert the risk of insolvency
- » business planning

The consideration of the ability to continue as a going-concern fulfils stage 1 of the plan. Stage 2 involves an examination of how the company wants to achieve the ability to continue as a going-concern. To this end, the competitiveness as well as the profitability are analysed and evaluated. If the outlook is positive then the restructuring ability will be assessed as being high and the second stage of the plan will also be deemed to have been fulfilled. Otherwise, there will still be the previous option to open insolvency proceedings with the aim of the collective, non-discriminatory satisfaction of creditors.

(2) The expansion of the instruments that resulted from SanInsFoG includes the following options, in particular:

- » restructuring moderation
- » stabilisation and restructuring framework

Here, the aim of restructuring moderation is the conclusion of a restructuring settlement agreement with the creditors that is confirmed by the competent restructuring

court. The condition for such a settlement agreement is the debtor's ability to restructure. Unlike insolvency proceedings, these here involve a non-public procedure.

The newly introduced stabilisation and restructuring framework provides companies with the possibility of a restructuring without court proceedings. However, the management bears the responsibility for the restructuring here. A restructuring plan has to be drawn up that has to be confirmed by at least 75% of the creditors.

Conclusion

With the coming into force of StaRUG, the government has opened up new ways for companies to restructure and reorganise. Furthermore, a greater obligation has been imposed on advisors who are significantly involved in the preparation of the annual financial statements to notify their clients, at an early stage, if there are indications that grounds for insolvency may exist and to point out the associated obligations to the management. All in all, the new rules mean that the procedures can be processed in a less bureaucratic way and, thus, faster.



RAin [German lawyer] Katharina Pfaff

Minority shareholding managing directors – Social insurance payment obligation despite special rights

In recent years, case law related to the assessment of a managing director under social security law has steadily developed further. The Federal Social Court (Bundessozialgericht, BSG) recently decided that even the special right conferred on a minority shareholding managing director to assume a management role does not exclude them from compulsory insurance coverage in the German social security system.

1. Background

For managing directors of a GmbH [German limited company] it is usually of great relevance whether they are classified as self-employed persons or dependent employees. This is because, depending on the status that is determined, social security contributions might have to be paid into the statutory insurance schemes for pensions, healthcare, long-term care and unemployment.

2. Distinguishing criteria

In the context of status determination, shareholding managing directors and external managing directors are classified differently.

In the case of external managing directors who do not have holdings in the share capital of the GmbH, normally, there is a dependent employment relationship and, thus, such employees are obliged to pay mandatory social security contributions because they are subject to the instructions of the shareholders' meeting.

The criteria that can be used for shareholding managing directors include

- » the size of the holding in the share capital and
- » the degree of influence over the company.



Hundisburg Palace near Haldensleben

Therefore, what matters is whether or not, at the shareholders' meeting, the managing director can exert influence beyond their position of that of a normal shareholder in order to be able to determine the fate of the company. At any rate, that would be the case if the managing director had a holding of more than 50%.

By contrast, a managing director who is a minority shareholder is basically a dependent employee. As an exception, they would only be regarded as a self-employed person if, on account of a special arrangement in the shareholder agreement, they were able to block all the resolutions of the other shareholders (a so-called comprehensive blocking minority). It would not be sufficient to have a blocking minority that is restricted to particular matters (a so-called 'false' blocking minority). In fact, a managing director has to be able to exert influence over all the key decisions.

3. Special right to assume a management role

A special right conferred on a minority shareholder to assume a management role does not yet however create a sufficiently comprehensive blocking minority in order to be regarded as a self-employed person. The BSG, in its ruling of 1.2.2022 (case reference: B 12 KR 37/19 R), decided that the managing director was obliged to pay

mandatory social security contributions. The managing director's holding in the GmbH was 49% and, in the shareholder agreement he had been granted the right, for the duration of his holding in the company, to be a managing director who is an authorised sole representative and is exempted from the restrictions under Section 181 of the German Civil Code (BGB), or alternatively to appoint such a managing director. In the opinion of the judges, such a right would indeed prevent him from being dismissed, however, it would not confer the decision-making power on the managing director that would enable him to exert influence over all the shareholder decisions and, thus, the entire company policy.

Please note

It is generally recommended to clarify the question of compulsory insurance coverage in connection with self-employment or dependent employment already prior to starting work. If a managing shareholder is registered as an employee then the clearing unit of the German Federal Pension Scheme would automatically initiate a mandatory status determination procedure.

IN BRIEF

Customs app for complying with import rules

The Federal Ministry of Finance has released a customs and postal app (Zoll-und-Post-App) as well as a customs and travel app (Zoll-und-Reise-App). The aim is to help you to stay up-to-date despite the many import rules and to ensure that cross-border mail order purchases or returning from a holiday from abroad can proceed without any surprises.

When goods are sent by post from a non-EU country, there are customs rules that have to be complied with and, frequently, import duties that need to be paid. The 'Zoll-und-Post-App' calculates the duties you can expect to pay and provides information on the customs rules for a wide range of product categories. In addition, it gives warnings about the risks that could arise from some products. In the 'questions and answers' section you can find the answers to the most frequently asked

questions. Moreover, an extensive directory provides information on contact possibilities and opening times of the competent customs office for your own place of residence.

The aim of the 'Zoll-und-Reise-App' is to help holiday-makers find out quickly and easily which goods they will be allowed to bring into Germany. Furthermore, it includes a duty-free allowance calculator that shows what can be brought into Germany free of duties. Once the app has been installed it no longer requires an internet connection so that roaming charges can be avoided when you are abroad.

Please note: Both apps can be downloaded free of charge from the Apple and Google App Stores, although attention should be paid to the respective data protection regulations when downloading.

AND FINALLY...

“When life seems hard, the courageous do not lie down and accept defeat; instead, they are all the more determined to struggle for a better future.”

Queen Elizabeth II, 21.4.1926 – 8.9.2022, from 1952 until her death on 8.9.2022 Queen of the United Kingdom of Great Britain and Northern Ireland and, most recently, 14 other sovereign states referred to as Commonwealth realms.

Legal Notice

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