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Luther News, January 2010

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# German Law & Business News

A quarterly review of current legal and tax developments in Germany

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## Greetings from the Editors

Dear Reader,

On behalf of the partners and staff of Luther Rechtsanwaltsgesellschaft mbH we would like to take the opportunity to wish you a happy, healthy and successful 2010! This year promises to be brighter for the world economy. According to research done by Handelsblatt and Droege & Comp., 75 per cent of German managers are satisfied with the current business conditions in Germany and only 13 per cent believe that conditions will worsen. A new country report by IBM Global Business Services concluded that Germany continues to attract FDI in significantly growing amounts. On this optimistic note, Luther is launching a new newsletter for overseas clients, friends and investors in the German economy, whether current or future. Our aim is to support your business with regular updates on significant developments in the areas of law, tax and German business in general. Please keep in touch with suggestions, questions and comments to help us shape this service to be as useful as possible to you. You will find our contact details in the imprint. We hope that you find this first edition both interesting and informative!

Best wishes,

Eike Fietz and Thomas Weidlich

## German Economic Growth Acceleration Act

The Wachstumsbeschleunigungsgesetz ("WachstumsBG"), which was passed after the last federal election in autumn 2009 and came into effect as of 1 January 2010, introduced comprehensive new tax reliefs for businesses. Some of the major changes are:

- **Preservation of tax losses in case of inter-company restructurings:** Generally, in case the shares in a corporation are transferred to a single acquirer, the corporation's tax loss carry-forwards and current year tax losses incurred up to the date of share transfer are lost (i) partially, when more than 25 and up to 50 per cent of the shares are transferred or (ii) in total in case of a transfer of shares of more than 50 per cent ("**Change of Ownership Rules**"). However, a change of ownership is not harmful, if the share transfer is part of a restructuring measure effected within a consolidated group which is exclusively headed by a single company or individual (directly or indirectly 100 per cent – ownership).
- **Enhanced tax deductibility of interest expense:** The tax deductibility of interest expenses is generally restricted by interest ceiling rules (*Zinsschranke*). These rules do not apply, however, if the excess of interest expense over interest income (*Zinssaldo*) does not exceed a certain threshold (*Freigrenze*). The WachstumsBG introduced the permanent increase of such threshold from EUR 1 million to EUR 3 million.



- **Real estate transfer tax (RETT) relief in case of company reorganisations:** According to the WachstumsBG, the transfer of German real estate or of the shares in a real estate owning company does not trigger RETT, if the transfer is effected as part of a group reorganisation transaction (e.g. in the form of a merger, spin-off or hive down) and if certain holding period requirements are met. (GEB)

### Germany Adopts Stricter Data Protection Law

The new German Data Protection Act took effect on 1 September 2009, changing parts of the Act significantly. The comprehensive amendments cover a range of data protection issues, such as stricter regulations for usage of personal data for marketing purposes, higher protection of employee data or notification requirements for breaches of the Data Protection Act. Further, the new law states that data processing contracts now need to contain detailed data protection requirements. Data controllers who close incomplete contracts will commit a regulatory offense which is punishable by a fine. This also applies to intra-group agreements (which already had to be concluded in writing under the previous provisions). Furthermore, internal corporate data protection officers benefit from stronger employment rights. The amendments also increase the maximum fines (up to EUR 300,000.00) and grant new powers to the data protection authorities. Companies doing business in Germany should urgently review their data processing practices in order to avoid breaches of the new legislation. (SCB)

### Arbitration as a New Dispute Settlement Alternative for GmbH-Shareholders

The German Federal Court of Justice (*BGH*) recently ruled that disputes about the validity and legality of shareholders' resolutions passed by GmbH-shareholders may – under certain circumstances – be subject to arbitration proceedings. Until now, such disputes could only be decided by German courts. Following this, the German Institution of Arbitration (*DIS*) now suggested supplementary arbitration rules which meet the requirements set by the *BGH* ('Supplementary Rules for Corporate Law Disputes'). These rules are of particular importance for international joint ventures in Germany which are commonly run in the legal form of a GmbH. They will allow the joint venture partners to settle disputes on shareholder's resolutions as well as other corporate law matters before an arbi-

tration tribunal in a more time and cost efficient manner and without facing the publicity of state courts. The new rules also perfectly fit into dispute resolution schemes of large, multinational corporations. It is therefore also advisable to evaluate the potential benefits of the *DIS*-Supplementary Rules for existing joint ventures. (JFI)

### Court Ruling Requires Forecast in the Annual Management Report Despite Financial Crisis

Pursuant to sec. 289 para. 1 of the German Commercial Code, medium-sized and large corporations have to include in their annual management reports a forecast setting out the future development of the corporation. The same applies to the group management report. In the case at hand, a German listed corporation had abstained from including such forecast in its group annual report for the year 2009 arguing that due to the financial crisis a reliable forecast was not possible. The Higher Regional Court of Frankfurt ruled on 24 November 2009 that such approach is not in line with the applicable statutory accounting provisions. The court argued that especially in times of crisis, the capital markets need some indication as to the expected development of the business. Even though it is comprehensible that due to the current uncertainties of the future development of the economy, a forecast is difficult to make, the annual report must at least contain some information by the management related thereto. Non-compliance with the statutory accounting provisions by simply referring to the given crisis is not accepted by the courts. (ANY)

### New Delay for the European Private Company

In 2007, the European Commission bowed to pressure from the European Parliament and proposed a statute for a new form of legal entity which is to be created and operated according to the same uniform legal regime in all European member states. The intention was that by opting for the European Private Company (also called "Societas Privata Europaea" or "SPE") entrepreneurs should save time and money on legal advice, management and administration. While it is the focus of the initiative to provide a suitable form of doing business for small and medium-sized enterprises with the need for a limitation of liability, the concept seems equally interesting for companies with extensive group structures in Europe, simplifying compliance and management of shareholdings to a large extent. In its 3/4 December 2009 session, the Coun-

cil of the European Union discussed the proposal and, failing to reach the unanimous decision needed, noted that further work is required. Main points of discussion are the provisions regarding the seat of the SPE and issues concerning employee co-determination. Therefore, the implementation of the SPE, long awaited by many, is delayed further. We will keep you informed about the continuing legislative progress in this publication. (EIF)

## Control of Non-European Investments in Germany - One Year On

A year ago, Germany had introduced a new regime regulating direct investments by companies from outside the European Union. There has been much concern from industry and M&A advisors about the potential negative effect on FDI in Germany. One year later, nothing much has changed: not a single foreign transaction was prohibited and not even a formal investigation was initiated under the new law. The few cases where investors have applied for a clearance certification have been handled by the German Government in a very cooperative and professional manner. Nevertheless, the new regulations will need to be considered by many overseas investors when contemplating to buy at least 25 per cent in a German target company. (TW)

## English as an Official Language in German Courts?

According to the leading German daily newspaper *Frankfurter Allgemeine Zeitung*, the Ministers of Justice of the States North Rhine-Westphalia and Hamburg recently initiated a political discussion with the intention to introduce English as an official language into legal proceedings. Under the current legislation, German (and in certain regions of Germany Sorbian) is the official language. Legal proceedings may only be conducted in German. All foreign language correspondence, either communication in court proceedings or documentation to be introduced as evidence, requires official translation. With a view to these obstacles, the majority of cross-border contracts involving German partners includes clauses under which courts of non-German jurisdictions or courts of arbitration are to handle the disputes, thus by-passing the German judicial system. The initiative, which is supported by a number of judges and attorneys, aims to enable the parties of commercial matters to have their cases dealt with by specialised chambers in English. Such chambers are already an alternative for businesses in the precinct of the Supreme Court of Cologne for cases in which both parties in dispute mutually agree on their jurisdiction. (EIF)

**M&A Transactions 2007/2008/2009:** A recent study conducted by Luther's M&A partners, analysing small and mid-cap transactions before and after the Lehman insolvency, is now available in English. For copies please contact Dr. Markus Schackmann, Telephone: +49 211 5660 18028, markus.schackmann@luther-lawfirm.com

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