Newsletter Commercial

Issue 2 2024

unyer GLOBAL ADVISORS

Content

Dear readers,

after the Easter holidays, we are pleased to present to you our quarterly newsletter. This quarter, we have once again prepared a compilation of current and relevant legal topics that are of particular importance to companies and their management.

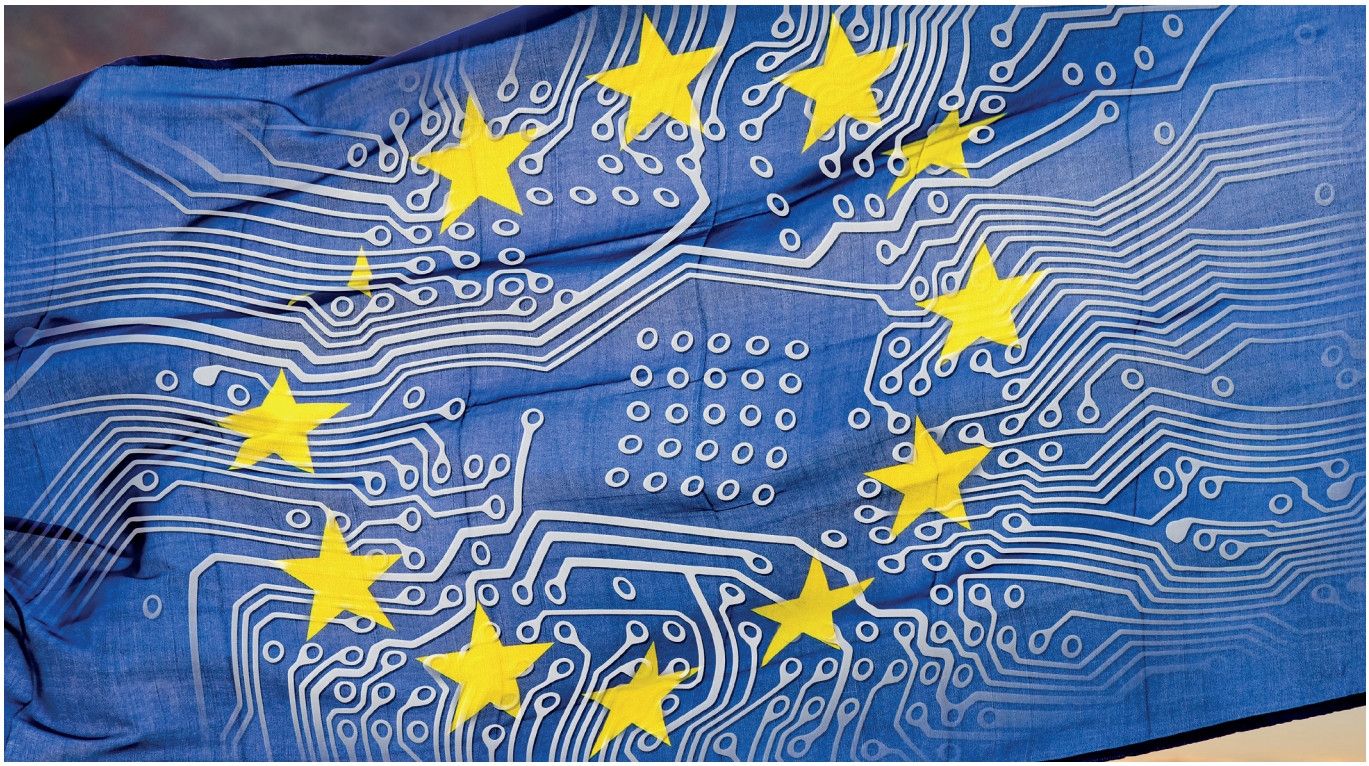
Our aim is to provide you with a clear and practice-orientated overview to keep you informed and up to date with the latest developments in commercial law. This time, our articles deal with the EU Product Liability Directive, which is currently being discussed by the EU bodies, the current status of the Russia embargo, the recently passed Barrier-Free Accessibility Reinforcement Act as well as a decision by the Federal Court of Justice on the defence of avoidance-relevant restitution claims by means of the small party privilege under insolvency law and the termination button in Section 314k BGB.

We hope that you regard our articles as useful and interesting and look forward to your feedback.

Dr Steffen Gaber, LL.M. (Sydney)
Head of Commercial

Dr Paul Derabin
Legal Content Creator

Commercial.Liability: Stricter product liability – Commission Proposal for a new EU Product Liability Directive



Background

In September 2022, the European Commission presented a proposal for a new EU Product Liability Directive to replace the Product Liability Directive 85/374/EEC, which entered into force in 1985 (and, in Germany, was transposed into national law by the German Product Liability Act). The new EU Product Liability Directive responds to the numerous challenges posed by digitalisation, artificial intelligence (AI) and the circular economy and is intended to guarantee the protection of consumers in the digital age.

Furthermore, as there have, of course, been significant changes in the way products are produced, distributed and operated compared to the situation in 1985, the European Commission considers there is a need for new liability rules for defective products. All economic operators should take into account that the scope of liability will be extended and the burden of proof alleviated in favour of injured persons. Please find below an overview of the most important changes.

AI systems, AI-enabled products and software

The draft Directive confirms that AI systems and AI-enabled products are “products” that fall within the scope of the new EU Product Liability Directive. If defective AI causes damage, the injured person can – just like with any other product – claim compensation without having to prove the manufacturer’s fault. So far, it has been unclear whether software is a “movable” object and, hence, whether it is a “product” within the meaning of the EU Product Liability Directive.

The Commission’s draft puts an end to this discussion: in addition to movables, electricity and AI systems, the EU Product Liability Directive also applies to software and digital manufacturing files, which will be included within the definition of “product” in the future, even if they are not placed on the market in tangible form (for example, “embedded” in a product). Consequently, a provider of digital services which affect how a product works (such as a navigation service in an autonomous vehicle) can also be held liable on the basis of the new EU Product Liability Directive.

Liability of a manufacturer's authorised representatives, fulfilment service providers and online platforms

Until now, only manufacturers, quasi-manufacturers (i.e. anyone who, by putting his or her name, trademark or other distinguishing feature on the product, presents himself or herself as its manufacturer) and importers have been subject to liability under the German Product Liability Act (and secondarily also suppliers, where the manufacturer could not be identified).

The draft now provides that also a manufacturer's authorised representatives (natural or legal persons established within the European Union who have received a written mandate from the manufacturer to act on its behalf in relation to specified tasks under product safety law) and fulfilment service providers (companies providing order handling services, such as warehousing, packaging or dispatching, to other companies) are liable for damages if defective products cause personal injury or property damage. Moreover, also operators of online platforms are intended to be liable when they perform the role of manufacturer, importer or distributor in respect of a defective product. This is to ensure that injured persons have an enforceable right to compensation even if the manufacturer is established outside the European Economic Area (EEA).

So far, the aforesaid economic operators have not been subject to any such product liability risks, but should be prepared to be subject to such risks in the future. Finally, economic operators may be considered manufacturers in the future and be liable like manufacturers if they "substantially modify" a product and such modification is undertaken outside the original manufacturer's control. Substantial modifications are defined as modifications that either create a new risk or heighten a risk that already exists.

Broader definition of defectiveness and damage

Under the Product Liability Directive currently in force, a product is considered to be defective if it does not provide the safety which the public at large is entitled to expect. A list of criteria provides information about the circumstances to which the public's safety expectations can legitimately be related. For the new Product Liability Directive, this list is now being extended to include criteria such as the presentation of the product and its reasonably foreseeable use. However, product safety requirements and safety-relevant cybersecurity requirements are also to be taken into account in this respect. Product recalls issued by a manufacturer could also be an indication that the product is defective. What's more, the draft provides that even a product which, in itself, does not contain any defect has to be regarded as defective within the meaning of product liability law if this product may present a risk when used together with a product of another manufacturer.

The defectiveness of a product is still to be determined based on the safety standard which the general public is entitled to expect in relation to the product. The general public is entitled to have particularly high safety expectations in relation to, for example, life-sustaining medical devices. Even where the actual defectiveness of such a medical product cannot be established, this medical product may still be considered defective if it belongs to the same production series as a product already proven to be defective. The draft additionally extends the definition of damage to include loss or corruption of data which is not used exclusively for professional purposes.

Obligation to disclose evidence

There is a new rule whose relevance should not be underestimated and according to which companies may be required by a court to disclose and surrender evidence in their possession. This procedure, which is known as "disclosure of documents" in Anglo-American legal systems, is in principle alien to German procedural law.

The rule is due to frequent complaints about a lack of evidence preventing an injured person from proving that the product was defective and that it caused the damage suffered. This is said to apply in particular in view of the manufacturer's advantage in terms of technical and scientific information. The injured person often does not have such information, or does not understand its implications.

This is why an injured person's access to evidence to be used in legal proceedings (for example, technical design documents) is to be facilitated. If the company fails to comply with its obligation to disclose and surrender evidence, the court will presume the defectiveness of the product. Courts must, of course, consider the confidentiality of trade secrets as best as possible. It remains to be seen how precisely the EU Member States will transpose these obligation to disclose evidence into their respective national law.

No more deductible or liability limit

In addition to the above, in the draft version of the new Product Liability Directive, the EUR 500 deductible for injured persons in the event of damage to property and the liability limit (the German Product Liability Act currently provides for a maximum amount of liability of EUR 85 million for personal injury) have been removed without replacement. These changes are likely to lead to higher insurance premiums for companies.

Outlook

The European Council and the European Parliament have already reached an agreement on the principles of the new EU Product Liability Directive. Once the Directive enters into force, the Member States will probably have 24 months to transpose the requirements of the Directive into their respective national law – for example, by amending the German Product Liability Act.

Conclusion

The Proposal for a new EU Product Liability Directive will lead to a further tightening of the product liability regime, rather than easing the burden on the economic operators concerned.

Affected companies will need to prepare for heightened product liability risks and adjust their risk management accordingly. Fulfilment service providers, technology companies and online platforms that are not currently exposed to liability risks under the German Product Liability Act should assess the liability risks which may result from the new EU Product Liability Directive in relation to the specific products sold.

Authors

Volker Steimle
Cologne

Guido Dornieden
Cologne

Commercial.International Trade Law: Russia embargo: 12th and 13th sanctions package

On 18 December 2023, the EU published its 12th package of sanctions, comprising Regulations (EU) 2023/2873, 2023/2875 and 2023/2878, to tighten the embargo against Russia. Amongst other things, the package contains two deadline-related amendments that affect a large number of German and European companies. On the occasion of the second anniversary of the start of the war of aggression against Ukraine, the EU also added the 13th sanctions package with the two Regulations (EU) 2024/745 and 2024/753 of 23 February 2024.

New Article 12g of Regulation (EU) No. 833/2014: "No-Russia-Clause"

As part of the 12th sanctions package, Regulation (EU) 2023/2878 inserted a new Article 12g into the applicable Russia embargo Regulation (EU) No. 833/2014, under which all (European) companies selling, supplying, transferring or exporting specific goods or technology to a third country outside the EU are obliged, **since 20 March 2024**, to ***"contractually prohibit"*** re-exportation by the respective other contracting party to Russia or (via intermediaries) for use in Russia. This so-called "No-Russia-Clause" must also contain *"adequate remedies"* in the event of a breach. Furthermore, any such breach by the respective other contracting party must be reported to the competent authority.

The obligation concerns the goods and technology listed in the already known Annexes XI, XX and XXXV to Regulation (EU) No. 833/2014, as well as firearms and ammunition as listed in Annex I to Regulation (EU) No. 258/2012 and *"common high priority items"*, as listed in the **new Annex XL**, which – rather than merely including particularly sensitive military items or key technology – affect a large number of suppliers and industries.

Sales to the "partner countries" listed in Annex VIII to Regulation (EU) No. 833/2014 (currently, USA, UK, Japan, South Korea, Australia, Canada, New Zealand, Norway and Switzerland) are exempt from the obligation to contractually prohibit re-exportation to Russia. In addition, contracts that were entered into before 19 December 2023 may continue to be performed unchanged until 20 December 2024 or until their expiry date, whichever is earlier.

There is no binding definition of what the required contractual agreement should or must look like and what remedies can be considered "adequate" (possible remedies include contractual penalties, rights to rescind/terminate contracts not yet fully performed and internal blacklisting). Although the Commission has provided further guidance on this in its FAQs and submitted a (non-binding) formulation proposal, this has encountered considerable problems in practice.

The EU appears to assume that each delivery to a third country of goods concerned is based on an individually negotiated contract that could easily be amended on a case-by-case basis to include an adequate prohibition clause. The same applies to existing framework agreements, which could be supplemented with an adequate clause by means of an addendum. This fails to take into account that, in practice, contracts are frequently entered into electronically using automated processes, without negotiating individually and that an order may comprise both non-critical goods and goods concerned, making it difficult to differentiate between these two types of goods (this item may be re-exported, that item may not be reimported). Furthermore, a distinction would also have to be made based on the country of destination: While a customer in the USA could be supplied without restriction, a customer in China would have to agree to a prohibition clause, which would be difficult to implement contractually in practice. An analogous formulation such as "*If the goods supplied by us are goods within the meaning of Art. 12g of Regulation (EU) No. 833/2014 and the sale is made to a third country that is not a partner country within the meaning of Annex VIII of that Regulation, (...)"* is likely to trigger numerous queries from customers in third countries.

In any case, there should be no doubt that the contractual prohibition can (of course) also be contained in general terms and conditions, provided it is ensured that the general terms and conditions are validly incorporated into the respective contractual relationship. This frequently causes problems and inconsistencies, in particular in cross-border business relations.

It is remarkable in this context, however, that the Federal Office for Economic Affairs and Export Control (BAFA) has announced that it is not responsible for the interpretation and monitoring of Article 12g, and so far no other authority has declared itself to be responsible in this respect. However, this raises the question to which authority a breach of a legally agreed No-Russia-Clause should be reported, as stipulated in Article 12g(4) of the Regulation.

Amended Article 5n of Regulation (EU) No. 833/2014: Prohibition on intra-group services and software

Article 5n of Regulation (EU) No. 833/2014 was also changed with the 12th sanctions package and Regulation (EU) 2023/2878, which is particularly important for all EU companies that (still) have **subsidiaries in Russia**.

According to Article 5n of the Regulation, it was already prohibited to provide to legal persons, entities or bodies established in Russia (or to the Government of Russia), directly or indirectly:

- *accounting and auditing, including statutory audit, services;*
- *bookkeeping and tax consulting services;*
- *business and management consulting and public relations services;*
- *architectural and engineering services;*
- *legal advisory services;*
- *IT consultancy services;*
- *market research and public opinion polling services;*
- *technical testing and analysis services; and*
- *advertising services.*

At first glance, this prohibition appears to affect only "external" providers of such services. De facto, however, it is also relevant with regard to intra-group services. Based on the wording of the prohibition, it does not matter whether such "business and management consulting services", "legal advisory services" or, for example, "IT consultancy services" are provided by an independent consultancy firm to a Russian client or whether they are provided by an EU parent company to its Russian subsidiary.

According to the exception stipulated in Article 5n(7), however, this does (did) not apply to the provision of services intended for the exclusive use of companies established in Russia that are owned or solely or jointly controlled, by an EU company; the same applies accordingly to Russian subsidiaries of parent companies from within the European Economic Area or a partner country as listed in Annex VIII to the Regulation (currently, the USA, the UK, Japan, South Korea, Australia, Canada, New Zealand, Norway and Switzerland).

Regulation (EU) 2023/2878 of 18 December 2023 has amended Article 5n in significant respects. According to the new Article 5n(2b), for example, it is now also prohibited to sell, supply, transfer, export, or even merely provide, directly or indirectly, *"**software for the management of enterprises and software for industrial design and manufacture**"* as listed in the new Annex XXXIX to companies established in Russia (or to the Government of Russia). The relevant Annex contains a comprehensive list of software that is subject to sanctions, including software regarding, for example (non-exhaustively):

- *enterprise resource planning (ERP);*
- *customer relationship management (CRM);*
- *supply chain management (SCM);*
- *project management;*
- *accounting, fleet management, logistics and human resources;*
- *computer aided design (CAD); or*
- *computer aided manufacturing (CAM).*

The above prohibition is accompanied by the newly inserted Article 5n(3a), according to which it is prohibited to provide, directly or indirectly, **technical assistance, brokering services or other services or financing or financial assistance**, related to the already prohibited services or the aforesaid software.

In this context, it is important to note that the exception provided for in Article 5n(7), that is, the exemption from the current prohibitions on services, including the new prohibition on software, related to Russian subsidiaries has now been limited to the period until **20 June 2024.** The wording of the new prohibition on providing (inter alia) technical assistance and other services related to the services that are subject to sanctions or the relevant software (new paragraph 3a) does not provide for any transitional period at all. If applying the rule literally, this therefore means that such services to Russian subsidiaries (including at an intra-group level) have been prohibited since the day after publication of the 12th package of sanctions and thus since **19 December 2023**.

However, Article 5n(10)(h) of the Regulation, which has also been newly inserted, provides for the possibility of applying to the competent authority (in Germany, the BAFA) for a waiver for the provision of the services or software concerned. In view of the large number of applications to be expected (or already received) and because the BAFA sees no need to always carry out individual approval procedures in these cases, the BAFA issued **General Approval (AGG) No. 42** on 20 February 2024 regarding the "*provision of business software and services to non-sensitive recipients*". However, anyone wishing to make use of this AGG 42 has to register with the BAFA as a user before the first use or within 30 days thereafter and also report the actions taken on the basis of AGG 42 to the BAFA before or at the latest 30 days after the start of the provision of services (stating the service provider, the service recipient and the company that owns or controls the service recipient, whereby it is sufficient to report the first provision of services in each case); subsequent services provided to the same recipient do not have to be reported even if they are different services).

13th sanctions package

Announced as the largest sanctions package since the beginning of the war, the effects of the 13th sanctions package are proving to be very manageable in practice:

For example, Regulation (EU) 2024/745 of 23 February 2024 essentially only revised and expanded the lists of goods in accordance with Annexes VII and XXIII of Regulation (EU) No. 833/2014. In addition, Regulation (EU) 2024/753, also dated 23 February 2024, added 106 natural persons and 88 institutions and organisations to Annex I of Regulation (EU) No. 269/2014 regarding personal sanctions.

All economic operators are therefore strongly advised to always and regularly check both their product range and their business partners (customers and suppliers) for possible listings.

Author

Ole-Jochen Melchior

Essen

Commercial.Compliance: Accessibility – how companies can implement the German Accessibility Enhancement Act and benefit from inclusive design

In a constantly evolving business world, sustainability and social responsibility are no longer just buzzwords, but decisive factors for a company's success. Environmental sustainability, social commitment and accessibility are the new key components to forming and cultivating long-term customer and business partner relationships. In addition to acting in an environmentally conscious manner, companies today must also ensure barrier-free access to their products and services.

Accessibility is becoming increasingly important in the context of ESG (environmental, social and governance). Companies that pay attention to ESG issues tend to make their products and services accessible and to better integrate people with disabilities. An accessible design can also make economic sense, as it enables access to a larger market and ultimately leads to higher sales.

The German Accessibility Enhancement Act (BFSG), which was promulgated in July 2021, is an important milestone in this context. It requires companies to make their products and services accessible to everyone. But how can companies ensure that they fulfil the requirements of the Act? What role do ESG criteria play in this? And how can companies benefit from inclusive design? In this article, we show how companies can successfully implement the Accessibility Enhancement Act and benefit from inclusive design and a modern ESG strategy.

Subject matter of the Accessibility Enhancement Act

With the Accessibility Enhancement Act, the Federal Republic of Germany is implementing Directive (EU) 2019/882 of the European Parliament and of the Council on the accessibility requirements for products and services. The purpose of the Act is to ensure equal and non-discriminatory participation in society for people with disabilities, as well as taking account of the harmonisation of the internal market. By implementing uniform EU requirements, the Accessibility Enhancement Act is also intended to help small and medium-sized enterprises make full use of the opportunities offered by the European Single Market.

Computers, e-books and tablets for consumers and websites and telecommunications services are just some of the products and services that will fall within the scope of the Accessibility Enhancement Act if placed on the market after 28 June 2025. In addition, the Act will also affect the entire e-commerce sector, as services provided via the internet with a view to concluding a consumer contract will be covered as "e-commerce services".

According to Section 3 (1) of the Accessibility Enhancement Act, products and services are considered to be barrier-free if they can be found, accessed and used by people with disabilities in the usual manner, without particular difficulty and generally without the need for help from others. The specific accessibility requirements for products and services are determined by the German Accessibility Enhancement Act Ordinance (BFSGV), which was promulgated in June 2022.

The Accessibility Enhancement Act and the Accessibility Enhancement Act Ordinance impose various obligations on economic operators. In addition to the obligations that must be fulfilled before the products are placed on the market, manufacturers, importers and service providers are also required to perform special labelling and information obligations under the Accessibility Enhancement Act. The Accessibility Enhancement Act Ordinance defines a number of specific requirements that must be fulfilled by certain products and services. In order to meet the requirements of the Accessibility Enhancement Act, an accessible design should be included in the planning process from the outset, as subsequent redesign can be very costly for companies.

The importance of ESG criteria in the context of accessibility

ESG criteria play an important role in accessibility, as companies are obliged to act in a sustainable and responsible manner in their area of responsibility. This goes beyond a purely ecological perspective and also takes social and governance-related aspects into account. The Accessibility Enhancement Act requires companies to make their products

and services accessible to everyone. In order to fulfil the ESG criteria, companies must ensure that they design their products and services in accordance with national and international law. This is the only way to ensure that they comply with the applicable accessibility provisions. Compliance with these rules is very important, as non-compliance could result in legal consequences, such as fines, liability and loss of reputation. Companies should therefore take care to fulfil the requirements of the Accessibility Enhancement Act and other ESG criteria with a view to creating a sustainable, responsible and barrier-free future.

Advantages of inclusive design

One thing should be kept in mind in this context, namely that the effort can be worthwhile. Companies that design accessible products and services, thus meeting the requirements of the Accessibility Enhancement Act, can benefit from this: accessible design can lead to an increase in market shares, consumers – including those without disabilities – appreciate an inclusive business model, and accessible design also regularly increases the general usability of products and services. Consequently, implementing the Accessibility Enhancement Act can promote a company's image as socially responsible and inclusive. Furthermore, companies that provide accessible products and services have a competitive advantage over their competitors, as they offer a more varied range of products and services. This can help achieve and maintain an even stronger position in the relevant market.

There are many possible ways to integrate an accessible design into business practice. Providers should ensure, for example, that their website or app is accessible and usable at all times. Furthermore, documents should also be provided in a language which can be easily understood.

Conclusion

Companies should not wait to deal with the Accessibility Enhancement Act, as product development can be a lengthy process and compliance with accessibility requirements is already necessary today, including in e-commerce. In this context, it should be noted that the Accessibility Enhancement Act grants consumers the right to make an application to the competent market surveillance authorities if they believe that a product or service violates the law. The authorities can then initiate the appropriate measures, which can range from a simple request to take immediate remedial action to measures prohibiting the provision of the product or service concerned and may even include severe fines and criminal penalties.

Economic operators would be well advised to seek expert legal advice in order to correctly implement the requirements of the Accessibility Enhancement Act. This is the only way to ensure that non-compliant products and services are no longer placed on the market in future.

Autors

Dr Christoph von Burgsdorff, LL.M. (University of Essex)
Hamburg

Luisa Kramer
Hamburg

Commercial.Restructuring: Legal defense against avoidance-relevant restitution claims by means of the insolvency law small shareholder privilege based on the decision of the Federal Court of Justice of April 20, 2023 (case no. IX ZR 44/22)

Introduction

If a shareholder is held liable by an insolvency administrator for restitution claims relevant to avoidance (e.g. for repayment of distributed profits carried forward), vigilance is required before making premature payments.

First of all, it should be examined whether the type of contested financing payment even falls within the Sec. 135 (1) or (2) of the German Insolvency Code (shortly: “InsO”). A convincing argument for the legal defense against repayment claims asserted by the insolvency administrator exists in particular if the requirements of the privilege for small participants are given during the contestable period of one year prior to filing for insolvency. Shareholders should keep in mind that a repayment obligation could nevertheless exist if there are any grounds for exclusion.

In the case decided by the BGH, the plaintiff, as insolvency administrator, claimed back from the defendant the distribution of dissolved profits carried forward made by a GmbH (in the following: “debtor”) operating in the service industry by means of an insolvency avoidance.

As a shareholder of the debtor, the defendant holds ten percent of the share capital. From November 2014 to December 2017, the defendant was managing director of the debtor. He then left the management of the debtor permanently. The annual financial statements for 2017 were established at the shareholders’ meeting in June 2018. In addition, the shareholders’ meeting decided that the profits carried forwardshould be liquidated. The distribution to the shareholders was made at the end of June 2018 in accordance with the equity interest in the share capital. In April 2019, the

debtor filed an application for the opening of insolvency proceedings. In July 2019, insolvency proceedings were opened over the debtor's assets.

The Regional Court upheld the insolvency administrator's claim. The Higher Regional Court ruled in favor of the defendant. In its decision of April 20, 2023 (case no. IX ZR 44/22), the Federal Court of Justice ("BGH") confirmed the opinion of the Higher Regional Court. The BGH is thus following on from its ruling in January 2023 (ruling of 26 January 2023 - case no. IX ZR 85/21), which was positive for shareholders.

Key statements of the decision

In the decision, the BGH examined the requirements for insolvency avoidance in accordance with Sec. 129, 135 (1) no. 2 InsO in conjunction with Sec. 39 (1) no. 5 InsO against the background of a payment by the debtor to a minor shareholder in the form of the distribution of a profit carried forward.

The classification of the profit carried forward as a so-called loan-like act did not play a role. According to the BGH, an avoidance by the insolvency administrator is futile if the requirements of the small shareholder privilege (non-managing shareholder of a company receiving a loan holds ten percent or less of the liable capital) are given within a period of one year prior to filing for insolvency proceedings. The circumstances outside the one-year period are not decisive. The circumstances during the last year (Sec. 135 (1) no. 2 InsO) prior to filing for insolvency are decisive (see, among others, judgment of 15 November 2018 - case no. IX ZR 39/18); in this case, this is the period between April 2018 and April 2019. The background to this is that the "MoMiG" (Act to Modernize the Law on Limited Liability Companies and to Combat Abuses) deliberately abandoned the criterion of crisis, which is decisive for the law on equity substitution, and the associated requirement of an equity-substituting financing payment by the shareholder due to the under-certainty associated with this term and replaced it with a period of one year prior to filing for insolvency. Therefore, payments to shareholders can only be avoided during this critical period.

During this time, the defendant was consistently not part of the management and did not hold more than ten percent of the debtor's liable capital. It is irrelevant if a shareholder reduces his participation before the beginning of the one-year period or gives up his activity as managing director – as in the case of the defendant.

The small shareholder privilege is applied in the absence of a reason for exclusion. This involves, for example, coordinated financing of the company by a minority shareholder in cooperation with the majority shareholder. However, the defendant was not accused of coordinated action in cooperation with the majority shareholder. He did not go beyond his role as a small shareholder. The mere agreement of the shareholders on the resolution in the shareholders' meeting and/or the defendant's consent to the profit carried forward is not sufficient for the assumption of a "coordinated approach".

Practical advice

Examining the nature of the contested financing service

Even if the classification of the profit carried forward as an act similar to a loan was not discussed in detail in the decision, when defending against an action for avoidance, it should always be checked in advance whether the type of contested financing payment even falls under Sec. 135 (1) or (2) InsO. The regulation applies to shareholder loans and financing services equivalent to loans as well as security for third-party claims by a shareholder or equivalent person. Discussions regularly focus on what is meant by the term "equivalent to a loan". This generally includes loan-like transactions such as, in particular, the deferral of a (purchase price) receivable. Whether the distribution of a profit carried forward to a shareholder also constitutes an act similar to a loan has so far only been affirmed by the highest court in the case of a sole shareholder of a debtor.

If the action to contest insolvency is directed against a majority shareholder, the case law issued in favor of the creditor is likely to have considerable influence in the case of a sole shareholder. Nevertheless, no supreme court decision has yet been issued for the constellation in which profit carried forwardare distributed to several shareholders on a pro rata basis according to their respective shareholdings. The following argument could be made against the classification as "equivalent to a loan": A minority shareholder cannot exert any influence on the majority shareholder's specifications. The majority shareholder alone has the power to ensure that the annual profit is not distributed but carried forward to new account. Only the sole shareholder can then make a financing decision that results in the retention of profits being comparable to a loan. This possibility does not exist in a company with several shareholders. This means that the retention of profits – at least for the minority shareholder – is not a conscious financing decision.

On the requirements of the small shareholding privilege during the contestation-relevant period one year before filing for insolvency

However, the avoidance claim raised by an insolvency administrator can be invalidated in the case of several shareholders if the opposing party is a shareholder who meets the requirements of the small shareholding privilege. This is the case if the shareholder is not a managing director and holds ten percent or less of the liable capital. Both of these requirements must be given during the entire period relevant to avoidance one year prior to filing for insolvency. If, on the other hand, a small shareholder only relinquishes his position as managing director or reduces his stake in the liable capital to ten percent or less within one year prior to filing for insolvency, the conditions for avoidance are met.

In the above-mentioned decision, the BGH clarified that it is irrelevant if a shareholder held a position as managing director outside the one-year period and/or held more than ten percent of the liable capital. This is consistent, as the reduction of the shareholding in the company to the threshold of ten percent or less or the resignation of the managing director function is comparable to the resignation of a shareholder from the company. This means that a small shareholder is treated like an external party who is not involved in the company. A minor shareholder typically bears no co-entrepreneurial responsibility and lacks the insider status of another shareholder and the ability to exert influence.

On the grounds for exclusion

Shareholders should always keep in mind that in certain constellations they may be denied the benefits of the small shareholder privilege. It is both tempting and dangerous that the statutory provisions generally assume a privilege if the requirements of the small shareholder privilege are given by a shareholder. Nevertheless, actions for avoidance are successful in certain individual cases despite the existence of the requirements of the small shareholder privilege in the period relevant to avoidance. This is particularly the case if the requirements only exist “on paper” and the small shareholder is in fact a non-managing shareholder with more extensive entrepreneurial responsibility. An example of this is a small shareholder who has an influence (under the law of obligations) on the financing of the debtor that goes beyond his nominal participation in the liable capital. Case law assumes this in the case of so-called “coordinated financing” in the form of a syndicate agreement. This regularly involves a reciprocal obligation of shareholders to provide and maintain their financing contributions.

Conclusion

The decision is particularly relevant for shareholders who only have a small stake in the liable capital and are not part of the management. Shareholders should keep in mind the deadline of one year before filing for insolvency. The earlier the entrepreneurial influence dwindles, the lower the risk of avoidance. Caution is required if the conditions for the small shareholder privilege are actually given within the one-year period, but in reality a shareholder’s entrepreneurial influence has increased. In this case, there is an increased risk of avoidance.

Author

Johannes Müller
Munich

Commercial.E-Commerce: Requirements for companies for the design of a cancellation button in light of the decision of the Regional Court of Koblenz of 7 March.2023 - 11 O 21/22

Introduction

If a website enables consumers to conclude a contract in e-commerce that is aimed at establishing a continuing obligation that obliges a trader to provide a service in return for payment, traders are obliged to provide consumers with a cancellation surface on their website as well as a “cancellation button” for the digital declaration of cancellation for continuing obligations.

As the results of a consumer appeal and a website analysis by the Federation of German Consumer Organisations (vzbv) show, there are still considerable problems with implementation. For example, a cancellation button is often not even available or cannot be found. In some cases, even using the cancellation button does not lead to the contract being terminated or the cancellation still has to be confirmed by telephone. The website analysis revealed that traders fulfill the legal requirements in only 28% of cases. One of the problems with the implementation of the cancellation button is that it is still mostly unclear what the specific requirements are for such a cancellation button.

Legal requirements for the trader

The obligations imposed by the legislator on traders regarding the cancellation button are regulated in Sec. 312k (2) BGB. This regulation stipulates that the cancellation button has to be clearly labeled with nothing other than the words “cancel contracts here” or with a corresponding unambiguous wording. The consumer has to be taken directly to a confirmation page. A following confirmation page has to contain a button which the consumer can use to submit the declaration of cancellation and which is clearly labeled with the words *“cancel now” or* a corresponding clear wording. The buttons and the confirmation page need to be permanently available as well as immediately and easily accessible.

The contract has to be concluded via a website. This refers to the internet presence of a trader which does not relate exclusively to commercial customers for the purposes relevant here. It is irrelevant whether the contract is concluded via a website operated by the trader himself or whether he uses a website hosted by another third party. The trader's obligations are limited to contracts between businesses and consumers for the establishment of continuing obligations. Continuing obligations are only those obligations that are characterised by an ongoing performance relationship. The decisive factor is the obligation to provide services on a continuous or recurring basis by the trader, in particular in the case of mobile phone contracts, energy supply contracts, subscription contracts, online gaming contracts, telecommunications contracts or contracts with fitness studios.

The obligations imposed on the trader do not apply to contracts for the cancellation of which a form stricter than text form is required by law. Furthermore, they do not apply to websites relating to financial services or to contracts for financial services.

The decision of the Koblenz Regional Court

An important decision for companies in this regard was issued by the Regional Court of Koblenz on 7 March 2023, in which it was determined that a trader is permitted to provide further cancellation options such as a cancellation assistant on its website in addition to a cancellation button that complies with the legal requirements (see Sec. 312k (2) BGB).

Facts of the case

The lawsuit was brought by a consumer protection association. The defendant was a telecommunications company. The subject of the dispute was the design of the confirmation page and button as part of the online cancellation procedure. The defendant also set up a "cancellation assistant" on its cancellation page above the confirmation surface with the cancellation button. The plaintiff claimed that the actual confirmation button was not directly and easily accessible within the meaning of Sec. 312k (2) sentence 4 BGB due to the advanced window of the cancellation assistant. He argued that consumers would notice the top button with the cancellation assistant first and that this would distract them from the more simple cancellation option that complied with the requirements of Sec. 312k (2) BGB. The plaintiff sued for injunctive relief against the upstream activation of a corresponding cancellation assistant.

Key statements of the decision

According to the view of the Koblenz Regional Court, the design of the website with the cancellation assistant does not infringe Sec. 312k (2) BGB. The defendant provided the cancellation option required under Sec. 312k BGB, with the required confirmation page and confirmation button being available. These are also permanently available and directly and easily accessible. The fact that the additional "cancellation assistant" button is located on the same page above the cancellation form does not indicate otherwise.

In any case, it is permissible to provide an alternative cancellation option in addition to the list of questions provided for by the legislator, as the procedure provided for in Section 312k BGB is merely intended to provide the consumer with an additional way to declare the cancellation.

Even if a consumer notices the button of the cancellation assistant first, it is to be expected that they will recognise the difference between an immediate cancellation and a cancellation assistant. An "assistant" is clearly an aid and not a direct and fastest way to cancel the contract; just because it is higher up on the website does not mean that the rest of the website is not noticed by the consumer.

Practical tips

The aforementioned decision clarifies that, in addition to the mandatory confirmation button with the cancellation button, companies can also provide other options for cancellation, provided that the options are clearly distinguishable from one another. This opens up further options for companies as to how they can design their websites with regard to the options for canceling contracts.

It is important that the cancellation surface with a cancellation button remains permanently available and immediately and easily accessible despite other cancellation options. Particular attention should be paid to ensuring that the button is designed in such a way that an average and reasonable consumer can take note of it and understand and use its function and scope without any further difficulties. In addition, the button for any other cancellation option may not be designed in a more attractive way in order to attract more attention than the button with the cancellation button. It has to be visually clear that the cancel button is the quickest and easiest way to cancel.

Traders need to consider that their customers, in their role as consumers, may legally cancel the contract at any time and

without observing notice in the case of infringements of Sec. 312k BGB. To avoid an undesired wave of cancellations for traders, it is advisable to check the design of the cancellation button according to the requirements of the legislator and the possibilities opened up by case law.

Authors

Dr Paul Derabin
Hanover

Johannes Müller
Munich

■ GENERAL INFORMATION

Authors of this issue

Dr Steffen Gaber, LL.M. (Sydney)
Lawyer, Partner,
Head of Commercial
Stuttgart
T +49 711 9338 19192
steffen.gaber@luther-lawfirm.com

Dr Paul Derabin
Lawyer, Senior Associate
Hanover
T +49 511 5458 24785
paul.derabin@luther-lawfirm.com

Ole-Jochen Melchior
Lawyer, Partner
Essen
T +49 201 9220 24028
ole.melchior@luther-lawfirm.com

Volker Steimle
Lawyer, Partner
Cologne
T +49 221 9937 24820
volker.steimle@luther-lawfirm.com

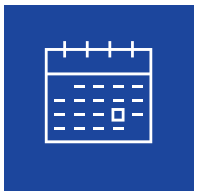
Dr Christoph von Burgsdorff, LL.M. (Essex)
Lawyer, Certified Specialist in Commercial and Corporate Law, Partner
Hamburg
T +49 40 18067 12179
christoph.von.burgsdorff@luther-lawfirm.com

Guido Dornieden
Lawyer, Counsel
Cologne
T + 49 221 9937 25680
guido.dornieden@luther-lawfirm.com

Luisa Kramer
Lawyer, Associate
Hamburg
T +49 40 18067 18792
luisa.kramer@luther-lawfirm.com

Johannes Müller
Lawyer, Senior Associate
Munich
T +49 89 23714 20966
johannes.mueller@luther-lawfirm.com

Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

Legal information

Published by: Luther Rechtsanwaltsgesellschaft mbH
Anna-Schneider-Steig 22, 50678 Cologne, Germany
Telephone +49 221 9937 0
Fax +49 221 9937 110, contact@luther-lawfirm.com
Responsible for the content (V.i.S.d.P.): Dr. Steffen Gaber, LL.M. (Sydney) Luther Rechtsanwaltsgesellschaft mbH Lautenschlagerstraße 24, 70173 Stuttgart, Telefon +49 711 9338 19192
steffen.gaber@luther-lawfirm.com

Disclaimer

Although this newsletter has been carefully prepared, no liability is accepted for errors or omissions. The information in this newsletter does not constitute legal or tax advice and does not replace legal or tax advice relating to individual cases. Our contact persons at the individual locations are available for this purpose.

Luther.

Bangkok, Berlin, Brussels, Cologne, Delhi-Gurugram, Dusseldorf, Essen, Frankfurt a.M., Hamburg, Hanover, Ho Chi Minh City, Jakarta, Kuala Lumpur, Leipzig, London, Luxembourg, Munich, Shanghai, Singapore, Stuttgart, Yangon

You can find further information at:
www.luther-lawfirm.com
www.luther-services.com

unyer GLOBAL ADVISORS