German law changes and outlook for 2016-03-07

By writers from **TMF Group Frankfurt and Munich**

Surmila Ghorai, *lawyer, compliance officer*
Dr Agnes Mercz *(ELTE), lawyer, structured finance*
Johannes Schönfeldt, *lawyer, head of structured finance department legal*
Angela Bartl angela.bartl, *attorney-at-law, managing director strategy and business development*

the administrative

German law saw various changes in 2015 and this will continue over the next 12 months. Some of these changes will result in fewer legal, accounting and administrative obligations while others will increase the responsibility for businesses

Changes affecting corporate secretarial, administrative and accounting requirements

- **New act to facilitate the administrative and accounting burden for SMEs and start ups**

The so-called *Bürokratieentlastungsgesetz* (BüroKrEntlG) was implemented on 1 January 2016. It affects small and medium-sized companies (SMEs) in Germany, including start-ups, pursuant to its new definition and understanding based upon the new act.

A company is now qualified as a SME if its annual profit does not exceed €60,000 (previously, €50,000) and if annual turnover amounts to less than €600,000 (previously, €500,000). The BüroKrEntlG exempts SMEs and start-ups from certain accounting and reporting requirements and reduces the storage or archiving rules.

This means that qualified SMEs are exempt from on-going requirements and interim reporting. Preliminary VAT returns, annual tax returns and statutory financial statements still need to be prepared within the legal time frames. However, less information is required. Archive rules have been relaxed and SMEs are only required to archive mandatory (not all) information for up to 10 years.

Start-up companies will benefit from the new rules. Aside from accounting facilitations, start-ups will be exempt from providing information on certain statistics/the economic environment in the first year. Statistical information must be provided in years two and three only where annual turnover exceeds €800,000. From year four, all formal statistic requests from the authorities must be followed.

To verify whether a company qualifies as an SME pursuant to the BüroKrEntlG, a special SME test will be implemented, and details are still pending.

- **Payment processes/bank accounts**

It has been mandatory for companies to use an IBAN for any and all payments since 2014. Private persons will now have to follow this rule, as payments without a valid IBAN will not be executed. Since 1 February 2016, a BIC code is no longer required for any payments within the European Economic Region (EU, Island, Liechtenstein and Norway).

As per the EU Payment Account Directive (EU-Zahlungskonten-Richtline), banks are requested to open bank accounts for everyone who is legally accepted in Germany, independent of whether he/she has a permanent residence in the country or not. The implementation of this directive will be transformed into German law by 16 September 2016 at the latest.

- **Safe Harbour and data protection in Germany/EU**

For about 15 years, safe harbour rules allowed companies in the EU including Germany, to transfer personal and sensitive data to the US, despite the US not having a data protection law comparable to Europe.

The European Commission decided in 2000 that US companies must bind themselves to seven rules on how to treat sensitive data in the US. Based upon a lawsuit of an Austrian citizen against Facebook (Facebook transfers personal data of European citizens to the US) the European Court of Justice (EuGH) decided in October 2015 that Safe Harbour rules did not provide sufficient security in relation to the usage of the transferred personal

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data from EU citizens in the US, and accordingly stated that Safe Harbour rules did not comply with EU data protection law.

On 2 February 2016, the European Commission and the United States agreed on a potential solution for transatlantic data flows - the EU-US Privacy Shield. How the outcome of negotiations will be embedded in a framework agreement which needs to be confirmed and carefully reviewed by the representatives of each member state, as well as by the European parliament, remains to be seen and will determine what exact consequences the entities may face. As the aforementioned will have an effect on each data transfer to the US, it needs to be monitored on a regular basis.

- **Compliance**

With significant intensification and tightening of sanction regimes, the EU published the Fourth Directive on money laundering and the new money transfer regulation against money laundering on 5 June 2015, with effect from 25 June 2015.

The directive demonstrates the determination of the European legislator to step up against money laundering and terrorist financing. Member states have two years to transpose the new provisions of the directive into national law.

The objective is to ensure greater transparency on risk-sensitivity, especially with business and financial transactions.

Article 30 of the new directive establishes stricter fulfilment of customer cooperation duties. Thus, the obliged persons and responsible entities falling under the German money laundering regulations have the duty to comply with customer due diligence. In particular, they are obliged to obtain accurate information in regard to identification of the contracting party, ultimate beneficial owner, background of the business and financial transactions, and to monitor and control these processes on a regular basis.

These measures make it possible to trace money flows and to detect unusual or even suspicious transactions. Where something suspicious is detected, there is a customer obligation to inform the authorities and information will be kept in a central register in each member state.

The register will not be publicly available and only accessible by the authority or other persons/ organisations that can demonstratetheir legitimate interest. Where the register is going to be established in Germany is still to be determined. ▶

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The Fourth Version of the Money Laundering Directive regulates cross-border cases. Obliged subsidiaries/branches must comply with the local money laundering rules in the host country. In order to fulfil requirements, obliged entities/ branches may consider bringing in specialised, experienced providers to help propose adequate customer due diligence.

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- **FATCA - required US-related reporting**

In 2013, Germany and the US agreed to the Foreign Account Tax Compliance Act (FATCA) with the first FATCA-related report out on 31 July 2015. In short, FATCA is an anti-avoidance tax measure and designed to prevent US citizens from hiding income and assets overseas.

Under FATCA regulations, German residential financial institutions with reference to the US are obliged to register themselves with the German Federal Central Tax Office and with the US Internal Revenue Service (IRS). These companies must appoint a responsible officer to take care of filing the required reports.

The German residential financial institutions report specific data on their bank accounts to the German Federal Central Tax Office at latest by 31 July of the following tax year. This data is automatically forwarded by the German authorities to the IRS. Failure to comply with FATCA requirements results in a 30 per cent withholding tax on certain US source payments.

- **Common Reporting Standards**

On 31 December 2015, the German Act for Standard for Automatic Exchange of Financial Account Information (FKAustG) came into effect. The aim of the automatic exchange of financial account information is to avoid cross-border tax fraud and evasion.

This act implemented the Common Reporting Standards (CRS), which was developed by the Organisation for Economic Co-operation and Development (OECD), with G20 countries and in close cooperation with the EU. Meanwhile, to date, 97 countries have shown intentions to adopt the Standard for Automatic Exchange of Financial Account Information.

German residents affected by CRS will need to provide specific data on their financial accounts to the German Federal Central Tax Office. The first report will be filed for the 2016 fiscal year by 31 July 2017 and then annually by 31 July.

The legal basis for CRS is FATCA, however there are some differences between FATCA and CRS. The question for applicability depends on whether or not the residential state and tax office has signed

a contract with the foreign tax authority requesting financial information. Those obliged to file reports must only register with the local tax authority and not with the IRS. No responsible officer is required. Failure to comply with CRS may result in a fine of €50,000.

- **Implementation of the Transparency Directive (2004 /109/EG) into national law**

The implementation of the EU Transparency Directive into German law in November 2015 led to changes to the Securities Trading Act (WPHG), causing various new notification duties as well as increased sanctions for violations of these duties.

The thresholds which trigger notification duties on the acquisition or sale of shares, which grant voting rights, are set by a German issuer. They are no longer calculated on the level of each company, but are consolidated on a group level. If the parent company files a respective notification, the affiliated companies are relieved from their duty to file a notification.

The effective date for notification duties on the sale or the acquisition of shares has been brought forward. While previously the notification duty was triggered with the actual settlement of a deal, according to the new legislation, the duty is triggered with the trade of the shares even if the transfer is still pending.

Another change imposed is the abolition of mandatory quarterly reporting for issuers of securities that are admitted to a regulated market. The deadline for the issuance mandatory semi-annual reporting has been extended from two months to three months.

Amendments in legislation also lead to tighter sanctions for the non-filing of notifications. Fines that have been imposed have increased drastically. Corporations can be penalised up to €10 million or as much as 5 per cent of annual turnover.

The German federal financial supervisory agency (BaFin) is obligated to publish its decisions to impose sanctions on its website, naming affected persons or corporations ("naming and shaming"). The changes also lead to an extension of potential notification duty violations, which can result in a temporary loss of shareholder rights.

An additional notification duty had been imposed on all issuers whose securities are admitted to trading on a regulated market, and have chosen Germany as home member state. As of 26 November 2015, they must publish this decision immediately.

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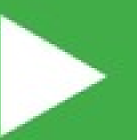

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