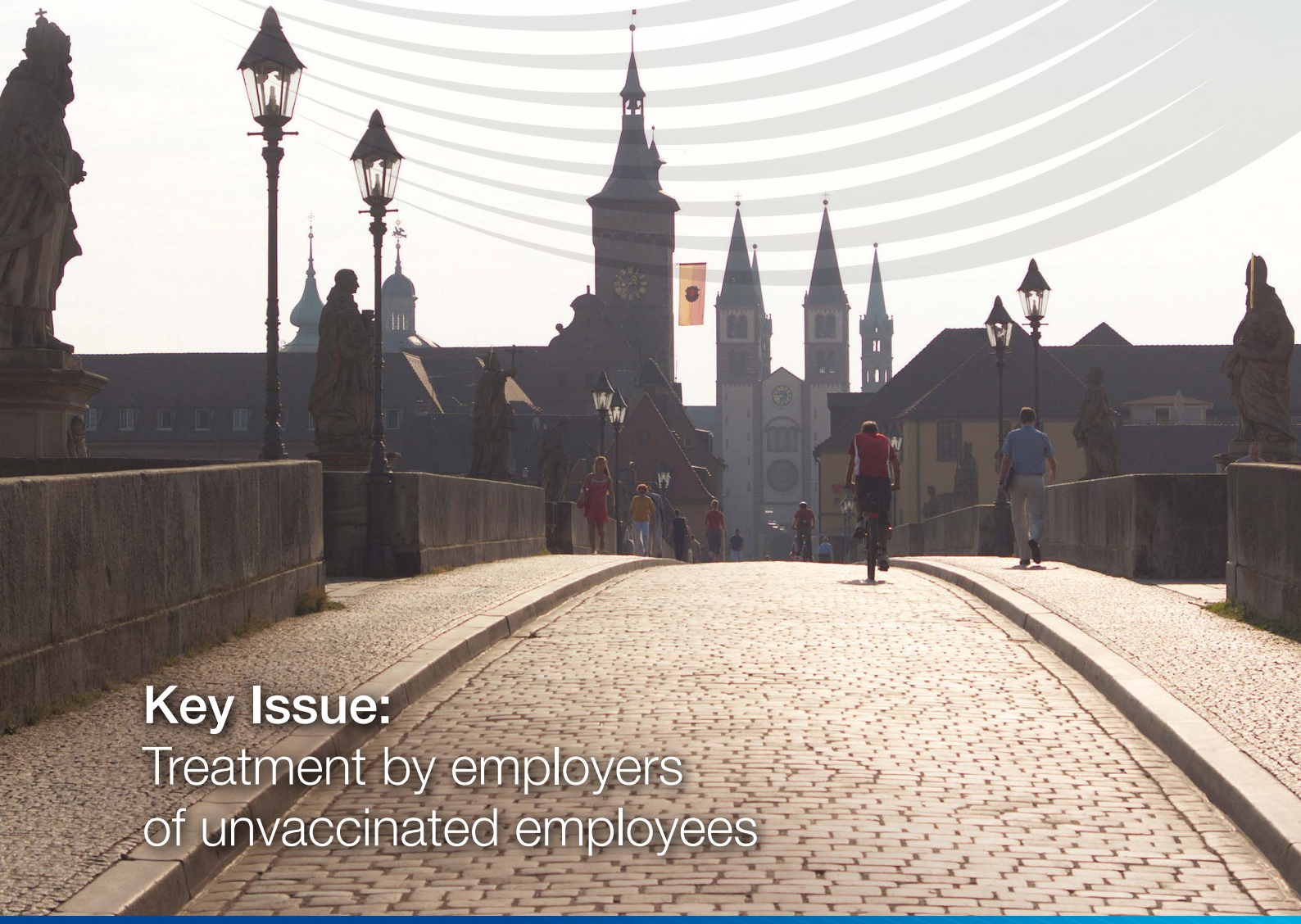
Newsletter



Key Issue:
Treatment by employers
of unvaccinated employees

07-08|21

Dear Readers,

The Key Issue for this double edition, prior to the summer break, appears under the Legal section and deals with the **treatment by employers of unvaccinated employees**. To begin with, we discuss the cases where there is a requirement to get a vaccination against COVID-19 and the legal consequences that arise if the instruction to get vaccinated is not complied with and the employment relationship is terminated. Then we provide an outlook as to whether a statutory vaccination requirement can be expected and consider if employers have the right to ask whether or not vaccination has taken place.

We start off the Tax section with a summary of an important Federal Ministry of Finance circular on the **transfer** of stakes in commercial partnerships **for no consideration**; what matters here is the correct treatment of the so-called **special business assets** in order to **prevent the realisation of hidden reserves**. This subject is also relevant with respect to the option for partnerships to be taxed as corporations. The two subsequent contributions are about the amended case law of the Federal Fiscal Court. First of all, this concerns **renting to close relatives** with respect to the possibilities for determining the average market rental level for the local area when there is no rent index available. There follows a description of the narrowly restricted cases where **input tax deduction on incoming supplies** is possible even though the supply is carried out free of charge. In the final tax-related report we examine the looming **double taxation of pensions.**

In the Accounting & Finance section we deal with the issue of **assessing the existence of reasons for opening insolvency proceedings**. To this end, the Institute of Public Auditors in Germany (Institut der Wirtschaftsprüfer, IDW) has produced a revised version of its draft for a standard **(IDW ES 11 amended version)** and has recommended early application of this standard in view of the changes to the German Insolvency Code. Of particular importance for the IDW in terms of the contents are, firstly, the specification of the forecast period in the case of imminent illiquidity and over-indebtedness as well as compliance with the insolvency filing deadline.

In this issue we also continue our journey around the PKF locations in Germany; last month, we started in Berlin and, this time, the illustrations are from Würzburg and Tauberbischofsheim.

We hope you have a lovely summer and a relaxing holiday while reading this newsletter.

Your Team at PKF

Front cover photo: Old Main Bridge, Würzburg

Key Issue

Treatment by employers of unvaccinated employees

Contents

TAX

RA/StB [German lawyer/tax consultant] Frank Moormann

Basis rollover *(Buchwertfortführung)* when gifting stakes in partnerships

The transfer of stakes in commercial partnerships *(Mitunternehmerschaften*, or co-entrepreneurships) for no consideration is a transaction that, in principle, does not result in the realisation of hidden reserves that are subject to income tax. Difficulties in relation to rolling forward carrying amounts could nevertheless then arise if there are 'special business assets' for tax purposes that will not be transferred. Special business assets are deemed to be those assets (frequently property) owned by a partner that are made available for use by the partnership. In the Federal Ministry of Finance's circular from 5.5.2021, the fiscal authority has now adjusted its view in this respect and brought it into line with the current case law of the Federal Fiscal Court.

1. The problem with 'special business assets'

From a tax point view, a partnership stake includes not just the holding in the partnership itself but also the 'special business assets'. If these are special business assets that are essential for operations - this is usually the case with properties -, then these, too, generally have to be passed on to the beneficiary in order to ensure the overall tax neutrality of the transaction. However, frequently, there is no desire to transfer these assets. Yet, if the special business assets are simply retained then not all the business assets that are essential for operations will have been transferred and, consequently, all the hidden reserves will be realised, namely, those that form part of the stake as well as those deemed to be special business assets and, consequently, tax would be payable on these reserves.

2. The timing is crucial

Therefore, if, with regard to the special business assets, there is to be a withdrawal in private assets or a sale to a third party then, in terms of timing, such a measure would have to be carried out prior to the transfer of the stake. In that case, the stake in the partnership may be transferred with a basis rollover if the remaining transferred business assets, in any event, still constitute a functioning operating entity. This would have to be judged on the precise date of the transfer and it would also be sufficient if the withdrawal or the sale had taken effect 'one legal instant' prior to the transfer of the partnership stake. This has now been conceded by the fiscal authority and declared to be generally applicable.

Recommendation: Therefore, in respective cases, particular attention should be paid to the precise contract arrangements.

3. An alternative solution is the transfer to business assets

If the aim is to likewise roll over the hidden reserves in the special business assets, then, in parallel, these can be transferred to the taxpayer's other business assets, e.g., to a newly founded single-member GmbH & Co. KG [German limited partnership with a limited liability company as a general partner]. Unlike in the case of a withdrawal/sale, this does not necessarily have to occur prior to the transfer of the stake but can, in fact, happen at the same time.

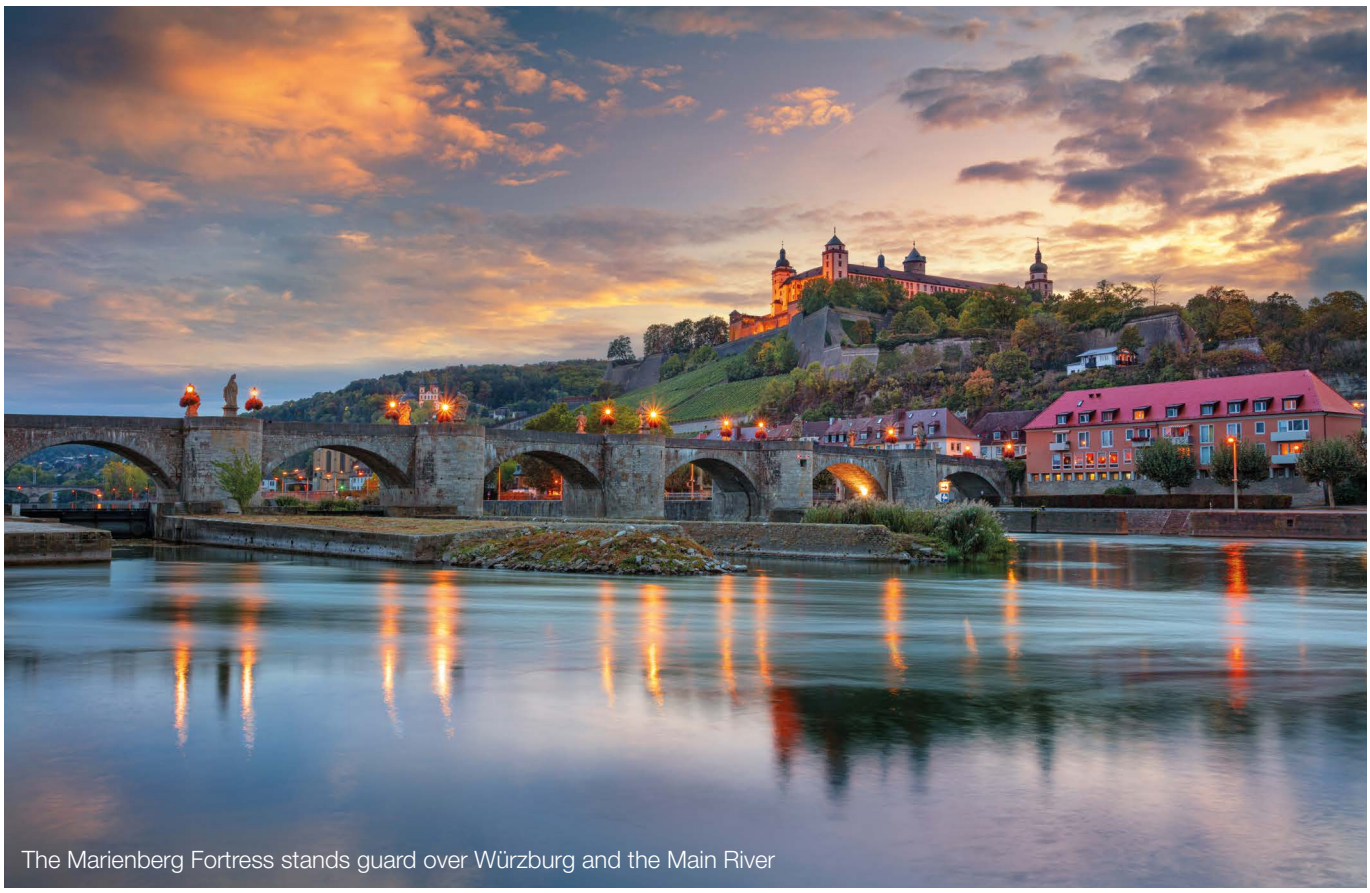
Please note: This would no longer be viewed as an overall plan that constitutes a harmful tax measure.

4. Excursus - Option for corporation tax

The above considerations regarding the separation of special business assets could also become relevant for partnerships that are thinking about making use of a new option model that is planned for 2022 (electing to be taxed as a corporation). Exercising this option should be treated like a notional change of legal form and, therefore, requires that, in the run up, a solution be found to existing special business assets that are essential for operations - as in the case of gifting - so as not to jeopardise the tax neutrality of the overall option mechanism.

Recommendations

In this case transferring assets to a new GmbH & Co. KG could constitute an appropriate arrangement.



The Marienberg Fortress stands guard over Würzburg and the Main River

StBin [German tax consultant] Elena Müller

Renting to close relatives – The average market rent for the local area as an objective benchmark

Income from the letting and leasing of immovable assets and rights also includes, among other things, renting out residential property – frequently at a reduced price – to close relatives. From a tax perspective, rent reductions can be harmful if they do not comply with the standard benchmark of comparison of the average market rent for the local area.

1. General information on renting between relatives

The basic prerequisite for the recognition, for tax purposes, of rental relationships between close relatives is that the rental agreement has to have been concluded effectively under civil law. Furthermore, the content of the agreement and its execution have to be in accordance with the terms and conditions that would be usual between unrelated parties. The starting point for determining the relevant rent has to be the average market rent for the local area for residential properties of comparable type, location and fit-out.

If the consideration paid in return for providing a domestic property for residential purposes is less than 66% of the average market rent for the local area then the provision for use of the property has to be divided up into remunerated and non-remunerated portions. This in turn means that, for tax purposes, the allowable expenses will not be fully recognised but, instead, only on a pro rata basis.

2. Determining the average market rent for the local area

Consequently, in order for the rent to be recognised for tax purposes it is crucial that the level does not fall by an excessive amount below that of the so-called average market rent for the local area. This average has to be understood as the net rent - exclusive of heating, lighting and other service costs - in the local area for residential properties of comparable type, location and fit-out, taking into account the ranges in the local rent index plus the apportionable costs. The average market rent for the local area should generally be determined on the basis

of the local rent index. This was expressly clarified by the Federal Fiscal Court *(Bundesfinanzhof, BFH)* in its ruling from 22.2.2021 (case reference: IX R 7/20).

Should no rent index be available then, according to the BFH, there are other equally valid options for determining the rental level in the local area, namely,

» an appraisal by a publicly appointed and sworn expert,
» information from a rent database, and
» the rent levels for at least three comparable residential properties.

Use can also be made of these three options if a rent index is indeed available but has not been updated for market developments, or if it is the case that the let property is a special property.

3. Individual cases do not constitute reliable benchmarks

According to the BFH, the average market rent for the local area may not be determined solely on the basis of the rent paid by a third-party tenant for a residential property in the same block. This is because the average rent for the local area should constitute an objective benchmark for the residential properties in a town or municipality and should be determined by taking into consideration a broad spectrum of comparable residential properties in the respective location.

Conclusion

In its above-mentioned ruling, the BFH distanced itself from its previous opinion with respect to determining the average market rent for the local area. This ruling will be particularly important for those cases where the average rent for the local area was determined solely on the basis of a single property rented to a third party and, as a consequence, the deduction of allowable costs without any reductions was refused due to the lack of full rental payment.

StBin [German tax consultant] Elena Müller

Deduction of input tax despite a free-of-charge contribution

In principle, businesses can deduct as input tax the VAT that is legally due on the supply of goods or other services that have been provided for their businesses by other businesses and that is shown separately on invoices as defined in Section 14 of the VAT Act *(Umsatzsteuergesetz, UStG)*. There is no entitlement to input tax deduction if the incoming supplies were purchased with the intention of using them for a non-economic activity (e.g., free-of-charge supply) (essential link between incoming supplies and outgoing supplies). Then again, up to now, free-of-charge contributions through the acceptance of unpaid benefits in kind have had to be taxed. Based on the new rulings by the ECJ and the Federal Fiscal Court *(Bundesfinanzhof, BFH)* this view is now outdated.

1. ECJ's stated opinion on input tax deduction

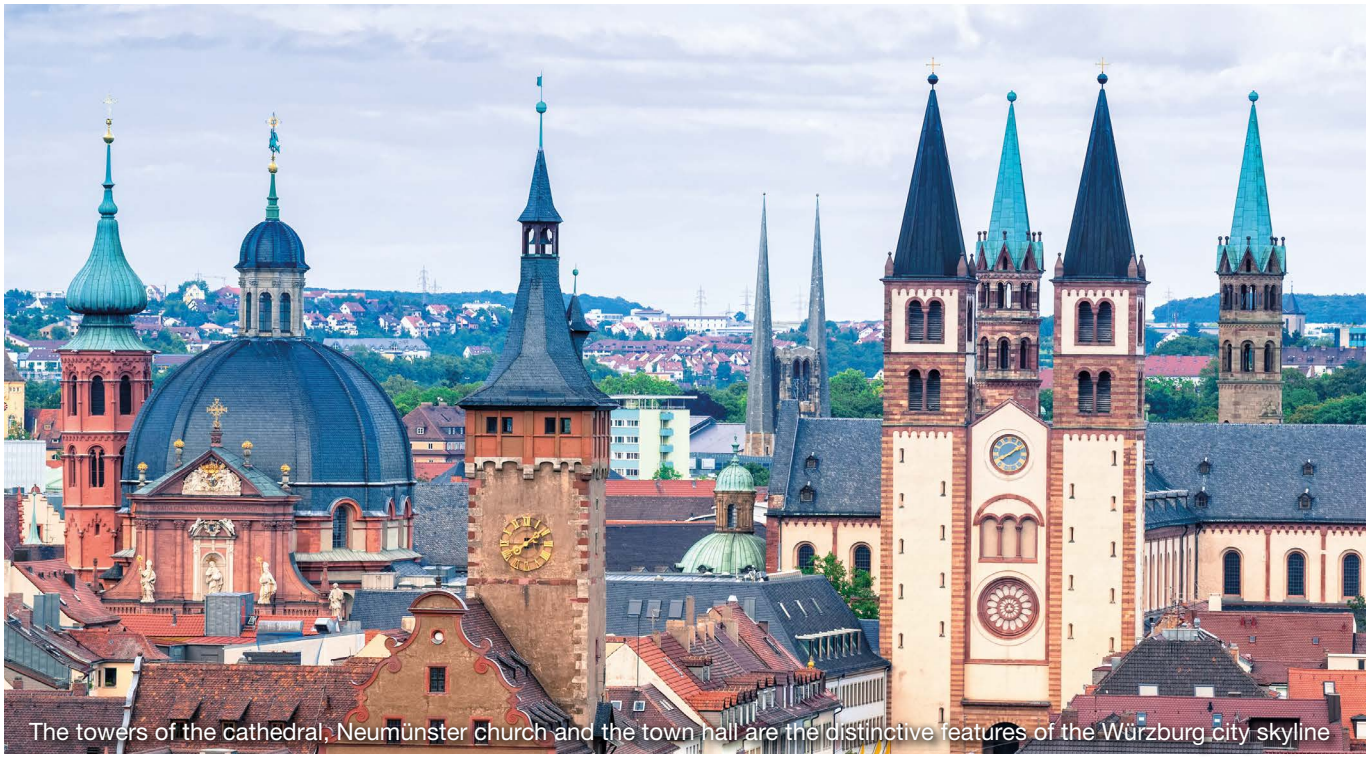
If a company, in the course of its business activity, provides a free-of-charge supply or other service then, potentially, the input tax deduction for the related incoming supply may be granted. The ECJ decided this in its ruling from 16.9.2020 (C-528/19), although the precise circumstances in the respective cases will need to be carefully examined. Specifically, the crucial factors for input tax deduction are that

» the incoming supply that was purchased should not exceed what is necessary/essential in order to achieve this aim,
» the costs of the incoming supply are included in the (imputed) price of the output transactions that were carried out, and
» the benefit to a third party (e.g., the general public) is, at all events, immaterial.

Furthermore, in the above-mentioned ruling from 16.9.2020, the ECJ specified that, in compliance with EU law, the (German) national regulation relating to the taxation of unpaid benefits in kind has to be restrictively interpreted and, consequently, such taxation has to cease.

2. BFH case law has been amended

The BFH subsequently had to decide whether or not a business has the right to deduct input tax if it first has to


The towers of the cathedral, Neumünster church and the town hall are the distinctive features of the Würzburg city skyline

build a public road in order to provide access to a quarry so as to be able to pursue its business activity (limestone quarrying). Since the road was built predominantly to serve the commercial interests of the business and, ultimately, resulted in VATable output transactions, the BFH, in its ruling from 16.12.2020 (case reference: XI R 26/20 (XI R 28/17)), complied with the ECJ's order for reference; accordingly, an indirect link to the incoming transactions is sufficient for an input tax deduction to be possible.

Moreover, according to the BFH and in a departure from its previously held legal position, the taxation of unpaid benefits in kind cease to apply because the costs incurred for road building constitute the cost elements of the output transactions. Furthermore, there is an overlap between the economic interests of the business and the interests of a third party (in this case, the general public) that will likewise, potentially, generally obtain a benefit.

Please note

The modified BFH ruling, in compliance with the ECJ, will be of practical relevance particularly for those businesses that provide incoming supplies that directly lead to free-of-charge contributions to third parties. Thus, for example, taking over the task of carrying out development measures, in particular, would, on the one hand, make it possible to deduct input tax and, on the other hand, not give rise to any tax liability for the output transactions.

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

The double taxation of pensions looms

In a recent ruling from 19.5.2021 (case: X R 33/19), the Federal Fiscal Court *(Bundesfinanzhof, BFH)* confirmed that the current arrangements for the taxation of pensions are constitutional. The Court did however say that, in specific cases, the double taxation of pensions would have to be prevented. Up to now, there has been no general 'double taxation' of pensions, however, from 2025 onwards, those who start drawing their pensions could be affected by this.

1. Double taxation claims rejected by BFH

The reason behind the ruling was that, since 2005, the system for taxing statutory pensions has been changing. This is because while the pensions of German civil servants have to be fully taxed, in the case of statutory pensions, only the so-called 'earnings portion' was taxable. This was measured on the basis of the age of the pensioner and related to approximately 27%

to 35% of the pension payment that was subject to income tax.

The legal action had been brought by a tax consultant who had been drawing an old-age pension, since 2007, from the German statutory pension scheme. The BFH clarified that there would be no double taxation if the sum of the pension inflows likely to remain tax-exempt is at least as high as the sum of pension contributions made from taxed income.

Interim conclusion: According to the BFH, in the case of the tax consultant there was no double taxation, however, this ruling could have an impact on those who start to draw a pension in the coming years.

2. Comparative calculation and forecast ...

According to the BFH, the pension tax allowance, which is provided for in the transitional rules, for both the taxpayer's pension and any survivor's pension for the spouse who is statistically likely to live longer should be included in the comparative calculation and the forecast for the purpose of assessing if there could possibly be double taxation. By contrast, other tax reliefs, such as e.g., the basic tax-free allowance or the special expense deduction for health and long-term care insurance premiums should not be taken into consideration.

... for the purpose of assessing if there is double taxation

To prevent 'double taxation' a comparison is made between the payments into the pension fund that came from income that had been already taxed with the portion of the pension that will be paid out tax-free. Here, the annual pension payment is multiplied by the statistical life expectancy in order to be able to compare both amounts. This is the so-called pension allowance *(Rentenfreibetrag)*

Tauberbischofsheim, the market place in the evening

- a fixed Euro amount that is determined once. If this pension allowance is higher than the sum of all the contributions that were paid out of taxed income into the pension fund during working life then there is no 'double taxation'.

Please note: 'Double taxation' would only be deemed to exist if the total amount of pension that was paid out free of tax is lower than the contributions that were paid out of taxed income.

3. Result

Whether or not there is double taxation depends, in particular, on how big the tax-free portion of the pension (the pension allowance) is. Up to now, when calculating the pension inflows that will remain tax-exempt, the fiscal authority has additionally taken into account the general basic personal tax allowance (currently € 9,744). The BFH has now decided that the basic personal tax allowance must not be included in the calculations. As a result, the tax-free pension contribution will fall and, in this way, it is more likely that there will be double taxation in the future. According to the current forecast and if the pension arrangements remain unchanged, double taxation will become an issue for those who start to draw their pensions from 2025 onwards.

Please note

In another ruling, from 19.5.2021 (case reference: X R 20/19), the BFH clarified, among other things, that in the case of pensions based on private investment products that fall outside of the basic pension (in short, private pensions), which are taxed merely on the respective earnings portion, inherently, there cannot be any double taxation.

ACCOUNTING & FINANCE

WPin [German public auditor] Julia Hörl

Changes relating to assessing the grounds for opening insolvency proceedings according to the IDW draft standard 11 (IDW ES 11)

On 8.1.2021, the Institute of Public Auditors in Germany *(Institut der Wirtschaftsprüfer, IDW)* published a revised version of its draft for standard 11 (IDW S 11) where the changes to the Insolvency Code *(Insolvenzordnung, InsO)* had been incorporated into the opinion statement. The changes in ES 11 relate, in particular, to the specification of the forecast period as well as stricter definitions of the three grounds for opening insolvency proceedings.

1. Grounds for opening insolvency proceedings

In view of the particular economic situation triggered by the COVID-19 pandemic, German lawmakers felt it necessary to repeatedly suspend mandatory filing for insolvency over the last few months and to reframe it. The aim of this was to facilitate access to restructuring assistance for companies. The InsO basically provides three separate reasons for mandatory filing for insolvency:

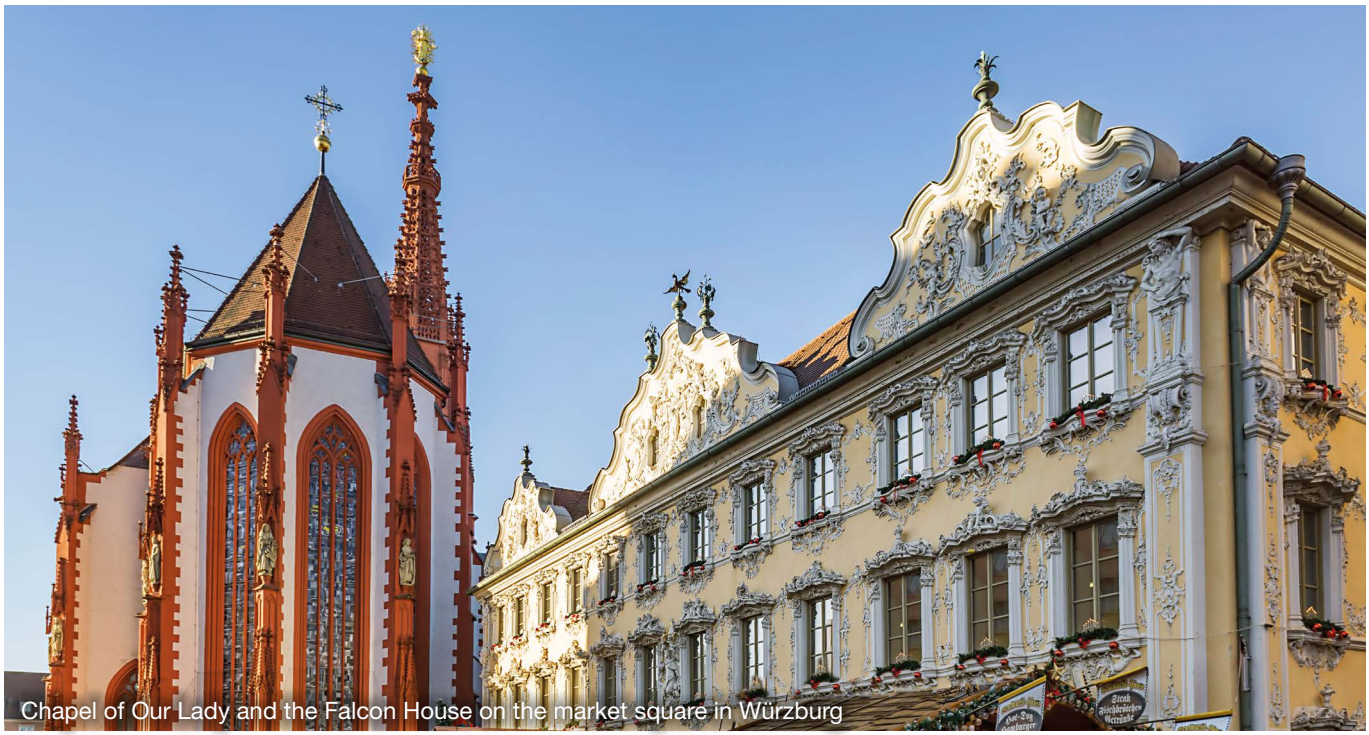
» imminent illiquidity (Section 18 InsO),
» illiquidity (Section 17 InsO) and
» over-indebtedness (Section 19 InsO).

2. Imminent illiquidity

In contrast to the other two reasons for opening insolvency proceedings, imminent illiquidity merely constitutes a right and not a requirement to file for insolvency. For companies in crisis situations that are not yet over-indebted, this right facilitates access to restructuring measures (such as, e.g., the newly created stabilisation and restructuring framework, which came into effect in 2021 – read more about this in the next PKF newsletter).

3. Illiquidity

As soon as a company establishes – on the basis of a reference date-related statement of assets – that it will not be possible to meet all the payment obligations that are due, a financial plan then has to be prepared. When it becomes apparent from this financial plan that at least 90% of the liabilities that are due to be paid could be


Chapel of Our Lady and the Falcon House on the market square in Würzburg

settled within three weeks, this is then referred to as a payment delay and not illiquidity. If a payment delay is identified then a liquidity plan has to be drawn up next. If it is not possible to demonstrate here how the liquidity gap could be closed within three months, at the very latest, then illiquidity should be assumed once again. This would then lead to a mandatory requirement to file for insolvency.

Please note: To avoid a delay in filing for insolvency, following the expiry of the suspension provisions on 31.5.2021, where illiquidity is the reason for opening insolvency proceedings you still have to file for insolvency within three weeks.

4. Over-indebtedness

Section 19(2) InsO defines over-indebtedness as a situation where a company's assets no longer cover its existing liabilities. The basis for ascertaining whether or not there is over-indebtedness is a two-step over-indebtedness test.

In a first step, a projection of continued operations is prepared where the viability of the company for the next 12 months is extrapolated (up to now this was for the current year and the next financial year). For the projection, starting with the liquidity on the reference date of the statement of assets, a financial plan has to be drawn up on the basis of a business concept and the integrated planning derived from this. If this initial projection of continued operations is positive then there will be no over-indebtedness under insolvency law.

If the projection of continued operations for a 12-month period is negative then there is a requirement to prepare an over-indebtedness status report. In this connection, the liquidation values of the net assets that have been valued are reviewed to see if they are negative, which, in turn, would constitute over-indebtedness and result in a mandatory requirement to file for insolvency. The insolvency petition has to be submitted within six weeks.

If the liquidation values of the net assets that have been valued are positive, or if the projection of continued operations for the period from the 13th to the 24th month is negative then there is a right to file for insolvency in view of the imminent illiquidity. Thus, for imminent illiquidity a longer projection period of 24 months applies.

Conclusion

The IDW's draft statement specifies that the projection period for imminent illiquidity is normally 24 months and for over-indebtedness normally 12 months. Furthermore, a sharper distinction is made between over-indebtedness and imminent illiquidity as grounds for opening insolvency proceedings. In view of the fact that the changes to the InsO came into force already on 1.1.2021, it is recommended that the amended version of IDW S 11 be applied early despite the current draft status accorded to it by the IDW.

RAin [German lawyer] Maike Frank

Treatment by employers of unvaccinated employees

Now that employees in many companies in Germany are able to be vaccinated against COVID-19 by their company doctors, this is giving hope to employers that there will be a 'return' from the home office and a normalisation of business processes. At the same time, however, questions have arisen in relation to the treatment of unvaccinated employees under employment law.

1. Is there a requirement for vaccination against COVID-19?

There is currently no legal requirement for vaccination against COVID-19. Whether or not it is possible for an employer, by exercising its right to give instructions, to require its employees to be vaccinated against coronavirus is an issue that has to be evaluated critically and on a case-by-case basis. This is because an employer's right to give instructions is not unlimited but, instead, must be consistent with the exercise of reasonable discretion and, in particular, comply with mutual consideration obligations. Arguments in favour of a vaccination requirement would appear to be that, in this way, an employer would be complying with its duty of care and obligation to protect vis à vis its employees in order to preserve health in accordance with Sections 241(2), 618 of the German Civil Code and Section 3 of the German Occupational Health and Safety Act because this would reduce the risk of infection.

However, against the background of the serious encroachment on basic employee rights (in particular, the right of self-determination and the right to physical integrity), currently, for the most part it is considered that an employer's right to give instructions does not normally cover a vaccination requirement. At any rate, this applies to 'ordinary employment relationships'. Yet, as regards 'special employment relationships' such as, e.g., in the area of care services and with healthcare professionals who are in close contact with risk patients, the debate is about whether or not, by way of exception, the conflicting interests should be weighed up differently when an employer, for example, as an operator of a hospital, a doctor's surgery or a care home (for the elderly) has protection obligations vis à vis third parties, e.g., its patients. The close physical contact here means that there is not only a particular risk situation, but also that these groups of individual employees are essential for maintaining the health care services. Medical centres and care facilities have to ensure that, in accordance with the current state of medical science, all the necessary measures have been taken to prevent infections and the further spread of pathogens.

Here, within the scope of discretionary decisions, there are therefore good reasons for applying other criteria when exercising the right to give instructions. Since discretionary decisions - as always - are taken on a case-by-case basis, in medical and care settings an instruction by the employer to get vaccinated with the appropriate justification would be completely reasonable and legitimate. This would apply, in particular, if on account of their professional activities the employees are privileged with respect to vaccination and, by contrast, the people with whom they have contact are not.

Employees who do not follow the employer's instruction would expose themselves to the risk of getting a warning (that may be subject to judicial review). Should the instruction be unlawful then employees would not have to follow it and such a warning would then be invalid. Should an employer thus mistakenly assume that it may order employees to be vaccinated and stop employing an unvaccinated employee for failing to do so then the employer would be obliged to continue paying remuneration even though the employee had not performed their work. The employee would, in turn, bear the risk that a warning would be justified, or even risk dismissal on the grounds of refusal of performance.

Recommendation: Therefore, it is advisable to have the specific risk in an individual case assessed by a lawyer. It remains to be seen how case law will develop with respect to the right to give instructions in such cases.

2. Will there yet be a statutory vaccination requirement?

It should be borne in mind that for employment relationships in the health care sector there are already statu-

tory vaccination requirements, e.g., as part of the Measles Protection Act, which came into force in Germany on 1.3.2020. Since the people covered by the legislation, in some cases, are not able to protect themselves from measles (e.g., because they have an immune system that is too weak) they have to rely on the other people in their immediate environment to show solidarity and get vaccinated.

The compatibility of a statutory vaccination requirement with the Basic Law is an issue with which the Federal Administrative Court has already engaged intensely, back in 1959 (with respect to smallpox vaccination). Accordingly, a vaccination requirement for highly infectious diseases that pose a serious risk to the life and health of other people is deemed to be permissible. It would thus be possible for the Federal Ministry of Health to make use of its right, which is regulated in the Infectious Diseases Protection Act [Infektionsschutzgesetz, IfSG] (Section 20(6) IfSG), and also impose a vaccination requirement with a view to curbing COVID-19.

3. An employer's right to ask questions

The newly introduced Section 23a IfSG, which expressly allows employers to ask employees about their vaccination status, only covers particular professional groups in the health care sector. According to this provision, for example, directors of hospitals or care services (Section 23(3) IfSG) are allowed to request proof of the vaccination status of their employees. However, case law likewise acknowledges that employers have a right to ask questions: *"if their interest in the answer to a question is justified, fair and reasonable as well as protectable with respect to the performance of the employment relationship and if the employee's interest in keeping their data confidential does not override the employer's interest in collecting such data"*.

Consequently, for reasons of the duty of care on the part of the employer and to lessen the risk of infection in business operations and when performing work that is owed, a justified request for information by the employer about an employee's health status is generally reasonable. If, in a specific case, the weighing up of interests results in the employer's interests predominating and the employer having the right to ask questions about vaccination status then it would be incumbent on the employee to provide truthful information.

4. Other measures by the employer

Against the background that, up to now, employers have normally not been able to require their employees to be vaccinated, although employers do have to ensure that the unvaccinated do not constitute a risk for other employees and for third parties, other measures by the employer should

The old fortress and the elegant Fraunhofer ISC building

also be considered. First of all, it would be possible to redeploy an unvaccinated employee to a different but equivalent area of activity that is commensurate with their abilities, or to another location. Besides paid leave, it is also conceivable that there would be cases where the employees concerned could ultimately no longer remain permanently employed so that, if the criteria have been fulfilled, the consequence could be dismissal due to personal circumstances.

Please note: Employers could pay a 'vaccination bonus' to those willing to be vaccinated, e.g., by means of a special one-off payment, vouchers or extra days of leave. Although, this bonus may not be granted solely to the unvaccinated as an incentive to get a vaccination. Furthermore, it should be noted that any existing works councils will, in any case, have a right of say because such a bonus would be subject to co-determination regulations.

IN BRIEF

Partnerships as controlled companies in a consolidated tax group (for VAT purposes)?

In a recent ruling, the ECJ came to the conclusion that the opinion held, up to now, by the Federal Fiscal Court *(Bundesfinanzhof, BFH)* on the classification of partnerships as consolidated VAT groups is not compatible with EU law.

In the case in question a GmbH & Co. KG [German limited partnership with a limited liability company as a general partner] (a controlled company) wished to form part of a consolidated VAT group with M-GmbH [German private limited company] (the parent company). Besides the general partner GmbH, several natural persons and M-GmbH held stakes in the KG. According to the partnership agreement, each partner had one vote and M-GmbH had six votes. Resolutions - apart from some exceptions - were passed with a simple majority. The KG was of the opinion that a tax group relationship existed between it and M-GmbH. The local tax office disagreed, with reference to BFH case law, on the grounds that financial integration of the KG was not possible because several natural persons had stakes in the partnership. As the tax court had doubts as to whether BFH case law was compatible with EU law, the matter was referred to the ECJ.

The ECJ, in its ruling from 15.4.2021 (C-868/19), disagreed with the opinion of the BFH and ruled that the condition of the existence of close ties through financial relationships should not be interpreted restrictively. The Directive on the VAT System does not indicate that persons who are not taxable may not be integrated into a consolidated VAT group. Instead, the criteria applied here should be identical to those for legal persons.

The ECJ reasoned that a subordination relationship admittedly generally allows the presumption that there are close connections between the persons in question. However, in principle, this cannot be regarded as a necessary condition for the formation of a consolidated VAT group. In the case in question, M-GmbH was able to enforce its will at the KG by majority decisions. Close ties could be presumed to exist through financial relationships. The mere fact that the KG's partners could, theoretically, amend the partnership agreement through verbal agreements so that, in the future, resolutions would have to be passed unanimously is not sufficient to rebut this presumption. Excluding a partnership from a consolidated VAT group does not arise from the conditions contained in the Directive on the VAT System with respect to the existence of close ties through financial relationships.

Please note: Companies will now be able to refer to the case-law of the ECJ that could potentially be more favourable for them.

Deadlines for 2020 tax returns have been extended

The deadlines for submitting the 2020 tax returns have been extended following an application by the coalition parliamentary group. The deadline for submission of tax returns has been postponed for three months in each case for both taxpayers without tax consultants as well as those with tax consultants. For taxpayers without tax consultants, this means that the original set deadline of 31.7.2021 has now been extended by three months to 31.10.2021. For those with tax consultants, the deadline has been extended from 28.2.2022 to 31.5.2022.

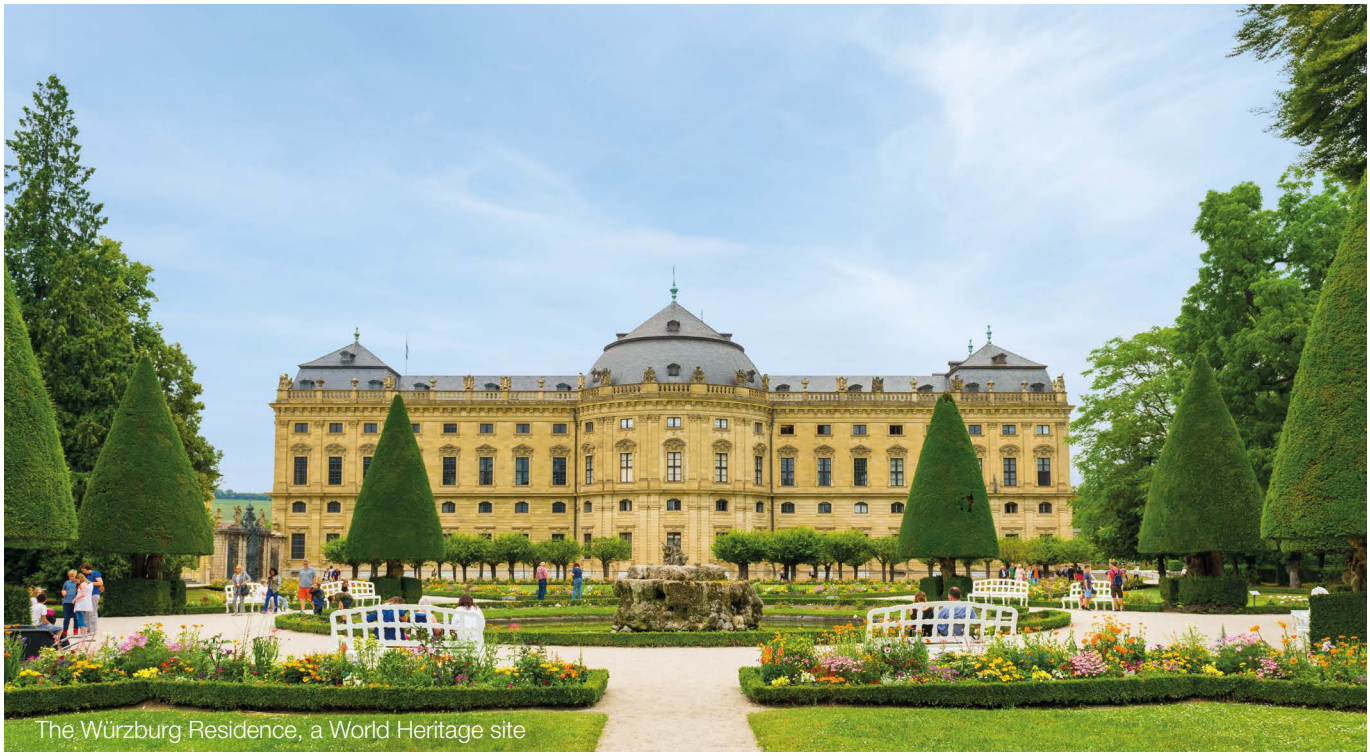
Appeals statistics – Two thirds of appeals are successful

Every year, the Federal Ministry of Finance publishes statistics, based on the reporting by the federal states, about the processing of appeals in the local tax offices. According to the latest publication, in 2019, taxpayers lodged about 3.5m appeals with their local tax offices. If the appeals that are still outstanding from previous years are added to this figure, then the local tax offices had even more than 5.8m appeals to process. As the statistics show, in most case, an appeal is crowned with success.

Almost two thirds of all appeals (65.6%) registered a success and, therefore, an amendment to the benefit of the taxpayer. Just 14% of appeals were indeed unsuccessful or, at least, partly unsuccessful - in the appeals procedure, these cases were wholly or partly dismissed through a (partial) appeal decision. Around another 20% of the appeals that were lodged were already withdrawn prior to a final decision by the lead decision-maker.

In view of the high success rates of appeals, it may be worthwhile proceeding with an appeal against a tax assessment notice. However, the success rate that appears in the statistics has been distorted because it also includes those 'appeal successes' that arise from appeals for the purpose of correcting the taxpayer's own mistakes and where, e.g., the taxpayer subsequently declares forgotten deductible costs. In order to avoid having to make such a subsequent declaration, it is recommended that tax assessment notices should always be checked for accuracy right away because taxpayers have to submit appeals within one month after receipt of the assessment notice. The appeal can be made by writing to the respective competent tax office, electronically via the Elster online portal, or even by sending an e-mail to the respective local tax office. Moreover, taxpayers also have the option to be joined as a party to comparable proceedings pending before the Federal Fiscal Court or the ECJ. In this case, taxpayers will have to lodge an appeal, indicate the case reference of the proceedings that are pending and request a suspension of the appeal until the court decision.

The time period for lodging appeals starts with the issue of the tax assessment notice. If the assessment notice is delivered by post - as is usual - then the letter is deemed to have been issued on the third day after the date printed on the assessment notice so that the time period starts from the fourth day. If the date of issue falls on a public holiday or a weekend, or if the appeal period ends on a public holiday or weekend then the issue day will be pushed back to the next working day.



The Würzburg Residence, a World Heritage site

Employee financial participation – The accrual of shares is independent from economic ownership

The transfer of shares for no consideration results in income from employment if these shares are granted to employees for the work they have performed. Remuneration is paid at the point at which economic authority to dispose is obtained.

This is the case for a share purchase if an employee's claim to obtain control over the economic authority to dispose of the shares is satisfied. The decisive criterion is the date on which the employer obtains ownership of the securities for the employee under civil law or, at least, economic ownership for the employee. However, determining this vital date is not unproblematic, as was demonstrated in a recent Federal Fiscal Court (Bundesfinanzhof, BFH) ruling from 26.8.2020 (case reference: VI R 6/18).

In the case in question, it was unclear if and when the benefit from the transfer of a block of shares for no consideration had actually accrued to an employee. The BFH referred the matter back to the Berlin-Brandenburg tax court (Finanzgericht Berlin-Brandenburg, FG) because, in the first instance, the FG had not determined if and when the employee had become the owner of the shares both under civil law and from an economic perspective. In the second hearing, the FG will now have to make up for its omission and, accordingly, determine when the disputed block of shares accrued to the employee.

Check your profit transfer agreements – A dynamic reference is now required

In the past, the wording of profit and loss transfer agreements has increasingly resulted in disapproval between the fiscal authority, courts and lawmakers. The reason for this was the amendment to the Stock Corporation Act *(Aktiengesetz, AktG)* and also the delay to the Corporation Tax Act. Consequently, a profit and loss transfer agreement that was concluded with a GmbH [German private limited company] as a consolidated tax group, from then on, had to contain not a static reference but, instead, a dynamic reference to Section 302 AktG.

Dynamic in this sense means that it has been agreed that the reference is to the provisions as amended in Section 302 AktG. According to a Federal Ministry of Finance circular from 24.3.2021, profit and loss transfer agreements that were concluded or last changed before 27.2.2013 that still contain a static reference will have to be amended, at the latest, by the end of 31.12.2021. Moreover, such an amendment to a profit and loss transfer agreement will not be deemed to be the conclusion of a new contract and that is why a new five-year minimum term would not begin again.

Posting of employees to the UK – The legislature has provided post-Brexit clarity

Brexit raises questions about the posting of employees to the UK, too. On 26.3.2021, the Bundesrat [upper house of the German parliament] approved legislation through which the rules for the posting of employees between the EU and the UK would remain in place even after Brexit.

The core of the Act 'on the notification concerning the rules on the posting of employees in accordance with the Protocol on Social Security Coordination to the Trade and Cooperation Agreement of 30.12.2020', from 25.3.2021, is to ensure that the previous EU regulations relating to social security arrangements for postings of employees as well as of independent professionals continue to apply in relations with the United Kingdom within the scope of the Trade and Cooperation Agreement.

The continuation of these arrangements means that employees as well as independent professionals who are merely temporarily deployed in another country do not have to switch into the social security system of the other country for a short time and, subsequently, switch back again.

AND FINALLY...

"As a leader, it is important to not just see your own success, but focus on the success of others."

Pichai Sundararajan, born 10.6.1972 in Madras, India, US-American manager.
He is the CEO of Google LLC as well as its Holding Alphabet Inc.

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