PKF

Newsletter

Key Issue
Implementation of the DEMPE concept for intangible assets

05|22

Dear Readers,

We start the May edition of our newsletter with problem-solving in the field of transfer pricing. Since the start of this year, the **so-called DEMPE concept** has had to be **applied to intangible assets**. In our Key Issue section, we present this concept and demonstrate that, in practice, an increase in documentation requirements for the functional and risk analysis with respect to intangible assets can be expected if the aim is to avoid a correction to income and, as a result, higher tax. In the report that then follows, in the Tax section, we discuss what distinguishes a **home office** from a **workroom at home.** Following on from this is an article on changes to the **German renewable energy levy.**

Next up is the second part of our series of articles on **sustainability reporting**. It deals with the **specific opportunities and challenges** especially **for small and medium-sized companies**. The derivation of structures, processes and ESG metrics are worth mentioning here in particular.

In the Legal section we kick off with a discussion of the **EU Whistleblower Directive** that has been in force since the end of 2019. Despite the fact that the Directive has not yet been transposed into national law in Germany, nevertheless, we would strongly recommend companies to focus on its specific requirements.

Electronic signatures are increasingly replacing original (handwritten) signatures; however, **employment law** is struggling somewhat with this development. In the second contribution in the Legal section, you can find out how this topic is now gaining momentum because implementing extensive possibilities for the use of electronic signatures into employment law could constitute a milestone for enhancing the efficiency of personnel departments.

Once again, we continue our journey around the PKF locations in Germany through the illustrations that break up the reports from our experts – this time we visit Stuttgart.

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

Your Team at PKF

Front cover photo: Stuttgart Palace square with Jubilee Column

Key Issue

Implementation of the DEMPE concept for intangible assets

Contents

TAX

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New provision in the German External Tax Relations Act for the purpose of implementing the DEMPE concept for intangible assets in the context of transfer pricing

In the PKF newsletter 7/2020 we already provided information on changes in the area of transfer pricing rules that would result from the transposition of the EU Anti-Tax Avoidance Directive (ATAD). In this edition of our newsletter we have turned our attention to the implementation of the so-called DEMPE concept for intangible assets in the context of transfer pricing. With the introduction of Section 1(3c) of the External Tax Relations Act *(Außensteuergesetz, AStG*), for periods starting in 2022, the German government has, for the first time, provided a definition of the term 'intangible assets' as well as a guideline for determining the allocation of income derived from transferring such assets or making them available for use.

1. New legal rules based on EU requirements

Up to now, cross-border taxation has not been directly regulated in the AStG in cases where intangible assets had been transferred or made available for use within a group as well as where remuneration had been paid for functional contributions made to value creation. However, in this regard, the so-called DEMPE concept has been part of the OECD Transfer Pricing Guidelines already since 2017. In the wake of the above-mentioned EU Directive, Germany was therefore required to transpose the concept into national law. The aim of this is to ensure that group profits are taxed worldwide where the actual value added is also created by the group companies achieving this.

2. Implementation of the DEMPE concept in Section 1(3c) AStG

If a group company in Germany assumes a function connected with the

- **D**evelopment,
- **E**nhancement,
- **M**aintenance,
- **P**rotection and
- **E**xploitation

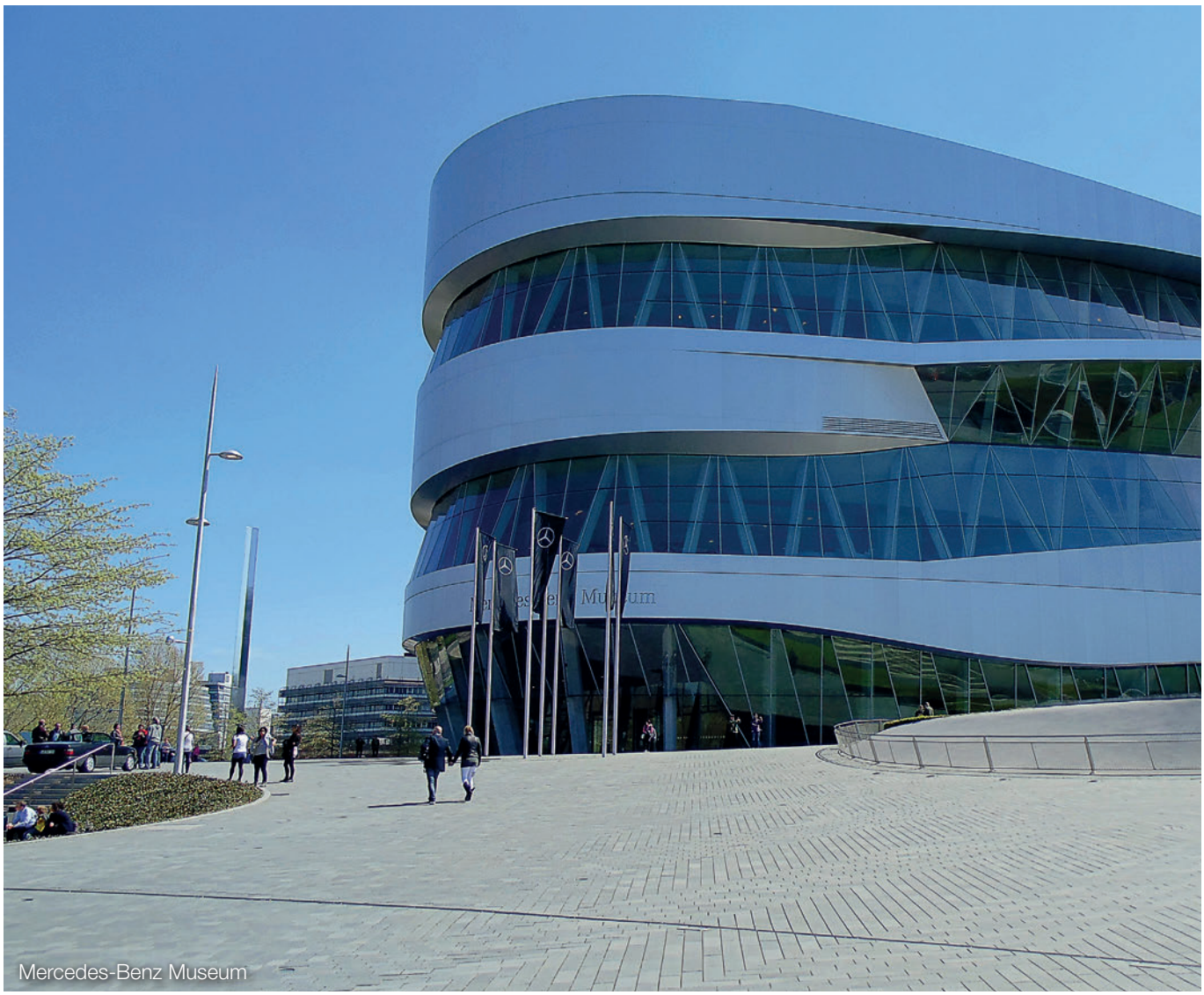
of intangible assets, or if this company bears the corresponding risks then Section 1(3c) AStG prescribes an appropriate remuneration for this that then has to be taxed in Germany. This would not apply if these functions were merely being financed. Consequently, while the financing has to be appropriately remunerated, the income derived from the intangible asset may however not be taxed. The background to this is that the DEMPE concept in the OECD Transfer Pricing Guidelines is based on the value-adding functions of the development, enhancement, maintenance, protection and the exploitation of intangible assets. For the first time, the national legislator has provided a definition, based on cumulative criteria, of intangible assets as assets that

- are neither physical assets, nor equity interests, nor financial assets,
- can be the object of an accounting transaction but without having to be separately transferable, and
- can be factually or legally attributed to a person.

Please note: These could be, for example, patents, know-how and trade secrets, trademarks, trade names and brands, contractual rights and state concessions, etc.

3. Determining the right to tax

In order to be able to ultimately ascertain which group company is entitled to the income from the exploitation of a particular intangible asset, it is first necessary to determine its owner/holder. In order to avoid subsequent add-back estimates to or correction of the income, it has to be apparent from the requisite functional and risk analysis,


Mercedes-Benz Museum

which must be carried out for transfer pricing documentation purposes, precisely

- which DEMPE functions were performed by the owner/holder or other group companies,
- which assets were employed for this purpose and
- who has assumed which risks.

Even if the ownership position is the starting point for determining the right to tax, nevertheless, it is possible that no income for taxation will remain there. This is because, in the future, the attribution of earnings derived from intangible assets will ensue solely on the basis of the DEMPE concept. Consequently, there will be cross-border allocation and taxation of earnings based on the above-mentioned functions and risks as well as on the assets employed in the sense of an economic approach.

Although, the legislation does not specify which transfer pricing method should be used to determine the remuneration for the functional contributions made to the value creation by the individual group companies. In the opinion of the fiscal administration, the most appropriate transfer pricing method should always be used to calculate the remuneration. To select the method it will first be necessary to perform a detailed functional and risk analysis so as to be able to determine the functional characterisation of group companies in cases where intangible assets are made available for use.

Recommendation: When intangible assets are transferred, in the absence of arm's length comparators a hypothetical arm's length test will frequently have to be applied. Unlike the case of a transfer of a function, here, the price adjustment clause would have to be taken into account during the following seven years. This can be avoided if such a clause is contractually agreed.

4. Impact on practice

For each group company involved, a detailed review should be carried out of the existing transfer pricing documentation with respect to the DEMPE functions per-

formed and the risks as well the assets that are employed in relation to intangible assets. To begin with, all the transactions in the group companies that involve the transfer of intangible assets or making them available for use should be identified by means of an analysis of the facts and circumstances. This also includes an analysis in terms of the risks that are assumed when performing the DEMPE functions. Subsequently, it is necessary to identify the legal ownership as well as the rights, obligations and risks that have been assumed on the basis of existing contracts between the group companies. Next, it will be necessary to identify the group companies that perform the DEMPE functions, use assets and assume or control risks. If the earlier analysis of the facts and circumstances has been completed then the insights gained have to be compared with the actual circumstances in the group as well as with the existing transfer pricing documentation.

At the end comes the determination of the appropriate transfer pricing method for the calculation of the arm's length price for each transaction that has been analysed according to the contributions of the group companies to functions, assets and the risks assumed in relation to the individual intangible asset.

Conclusion

By introducing the DEMPE concept into national law, the lawmakers have for the first time created legitimacy for determining transfer pricing in the case of intangible assets. In view of the lack of more precise legal or administrative specifications, there will be both room for manoeuvre and potential for conflicts in the implementation for the group companies affected. A divergent interpretation by the countries concerned entails the risk of double taxation that could result in a mutual agreement procedure. Therefore, advice and documentation will be required in the run-up.

Stuttgart's television tower

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

Home office vs a workroom at home

The so-called 'home office blanket deduction' was introduced in the German 2020 Annual Tax Act as an instrument for mitigating the consequences of the pandemic. The German tax legislator relaxed the previously strict requirements relating to the deduction of costs for a workspace at home.

1. A workroom at home

Expenses may be deducted for a workroom at home if, among other things, no other workspace for the business or professional activities is available and, furthermore, there is a self-contained room. Frequently, at least one of these two requirements cannot be fulfilled so that many taxpayers are not able to benefit by deducting the costs for a workspace in the private home as work-related costs or business expenses.

2. Home office blanket deduction

In the context of the pandemic, a vast number of people had to work from home in order to reduce the risk of infection. In this respect, German lawmakers took this situation into account when they introduced a so-called 'home office blanket deduction'; accordingly, taxpayers were able to deduct € 5 per calendar day on which business or professional activities had been carried out solely at home and no workplace outside of it had been frequented. The maximum amount that could be deducted was set at €600 in the assessment year.

There is no requirement here to provide proof of a workroom at home so that the business or professional activities may also be performed in, for example, a living room or dining room. The blanket deduction covers all the expenses for the use of the home. An itemised list of costs is not necessary.

3. There is another option

If the home constitutes the focus of the entire business or professional activities and the other criteria for a workroom in the home have been satisfied then the taxpayer will have the possibility of choosing whether they wish to deduct work-related costs or make use of the home office blanket deduction. The taxpayer will also be able to choose between the above two options even if the home does not constitute the focus of the entire business or professional activities but there is no workspace available in an office. In this case, the work-related costs deduction on the basis of actual costs would be limited to €1,250.

Please note

You should make use of the home office blanket deduction if the duly documented actual costs are below €5 per day. Although, you do not have to opt for the blanket deduction consistently for the whole year as it is possible to switch between the home office blanket deduction basis and the actual work-related costs over the course of the year.

WP/StB [German public auditor/ tax consultant] Michael Strack

Changes to the German renewable energy levy

The draft act to 'Alleviate the Cost Burden of the Renewable Energy Levy and to Pass on this Reduction to End-Consumers' was passed by the lower house of the German parliament *(Bundestag)* on 15.3.2022.

1. Changes to the German renewable energy levy

Following the last reduction in the renewable energy levy from 6.5 cents per kWh to 3.72 cents per kWh, as of 1.1.2022, now, as of 1.7.2022 until the end of December 2022 it will be completely suspended. From 2023 onwards, the renewable energy levy will be permanently abolished or financed out of the Federal Government's Energy and Climate Fund. The renewable energy levy [referred to in German as the EEG-Umlage = Erneuerbare-Energien-Gesetz, or Renewable Energy Sources Act] was originally intended to subsidise electricity generation from renewable energy sources.

2. Impact on end-consumers

Changes to the levy are a response to the sharp increases

in energy prices and are supposed to provide relief for end-consumers. An amendment to the German Energy Industry Act will guarantee that the reduction is passed on to end-consumers. Therefore, a family of four, for example, can expect to save approx. €300 when compared with 2021.

ACCOUNTING & FINANCE

Antonia Kempfer / WPin/StBin [German public auditor/ tax consultant] Ariane Büchtmann

On the pathway to sustainability reporting – Part II: Opportunities and challenges for small and medium-sized companies

In the first of our series of three articles on sustainability reporting, in the April edition of our newsletter, we provided information on the legal foundations and the future changes at the national and European levels. Here, in Part II, there is an examination of the opportunities and practical challenges for small and medium-sized companies and, moreover, recommendations are provided for the specific structure of sustainability reports.

1. Opportunities from the perspective of stakeholders

Sustainability is the order of the day – also in the case of businesses. There is therefore hardly any business that does not at least present the issue of sustainability on its website. Moreover, empirical studies have shown that the number of sustainability reports is likewise steadily increasing – particularly in the case of small and medium-sized companies – and that these reports are becoming ever more extensive.

This is not surprising because social and environmental aspects are now assuming ever greater significance in the decision-making processes of (future) employees, customers and capital providers. While, previously, the salary and the company car were the primary factors that were decisive when choosing an employer, these days, flexibility, diversity and short-distance public transport season tickets for employees are more likely to be prioritised. What do you then need a car for in a big city if you have a good public transport network? And if it is nonetheless still necessary then the car should at least be eco-friendly. Furthermore, customers are taking an ever-greater interest in the conditions under which clothing is produced. In cases of doubt, people would rather choose a product that is 'Made in Germany' than one from a country where the working conditions meet with their disapproval, or are they not able to make an assessment of them. In times where the product offering is limitless, customers wish to ensure that their consumption is compatible with their personal conscience.

Moreover, capital providers – whether in the form of private investors, institutional investors and/or banks – are also mindful of the sustainability of their capital investments. For example, investors now have the option of making investments that are explicitly sustainable and, for the banks, the EU Commission will make it an obligation that when extending loans, in the future, the banks will also need to look at the use of the loan.

Please note: The consequences in practice will be that, in cases of doubt, the loan interest rate for a zero-emission vehicle will be lower than for the same vehicle with a combustion engine.

2. Implementation in corporate governance

From a corporate governance perspective, actively dealing with these requirements early on means ensuring the sustainability of your own business model and your competitive position. Transparency and credibility are important here because otherwise there is a risk of 'greenwashing', which could cause damage to the image of a business.

Even though the implementation of sustainability measures will initially be associated with costs, eventually, you will be on the winning side. This is because using natural resources responsibly generally results in the discovery of savings potential or the start of innovative developments – such as for example, replacing gas with hydrogen – that

can provide long-term benefits. In addition, the reputation of your own business will be enhanced along with the above-mentioned benefits for employees, customers and capital providers. In the long term, a more sustainable corporate governance will lead to the development of a positive impact with respect to climate protection and climate change – which will benefit subsequent generations, too.

Interim conclusion: Therefore, striving for sustainability or sustainability reports that provide information about this harmonise perfectly with the sense of responsibility, ingenuity and the long-term perspective of German small and medium-sized companies, in particular, family enterprises.

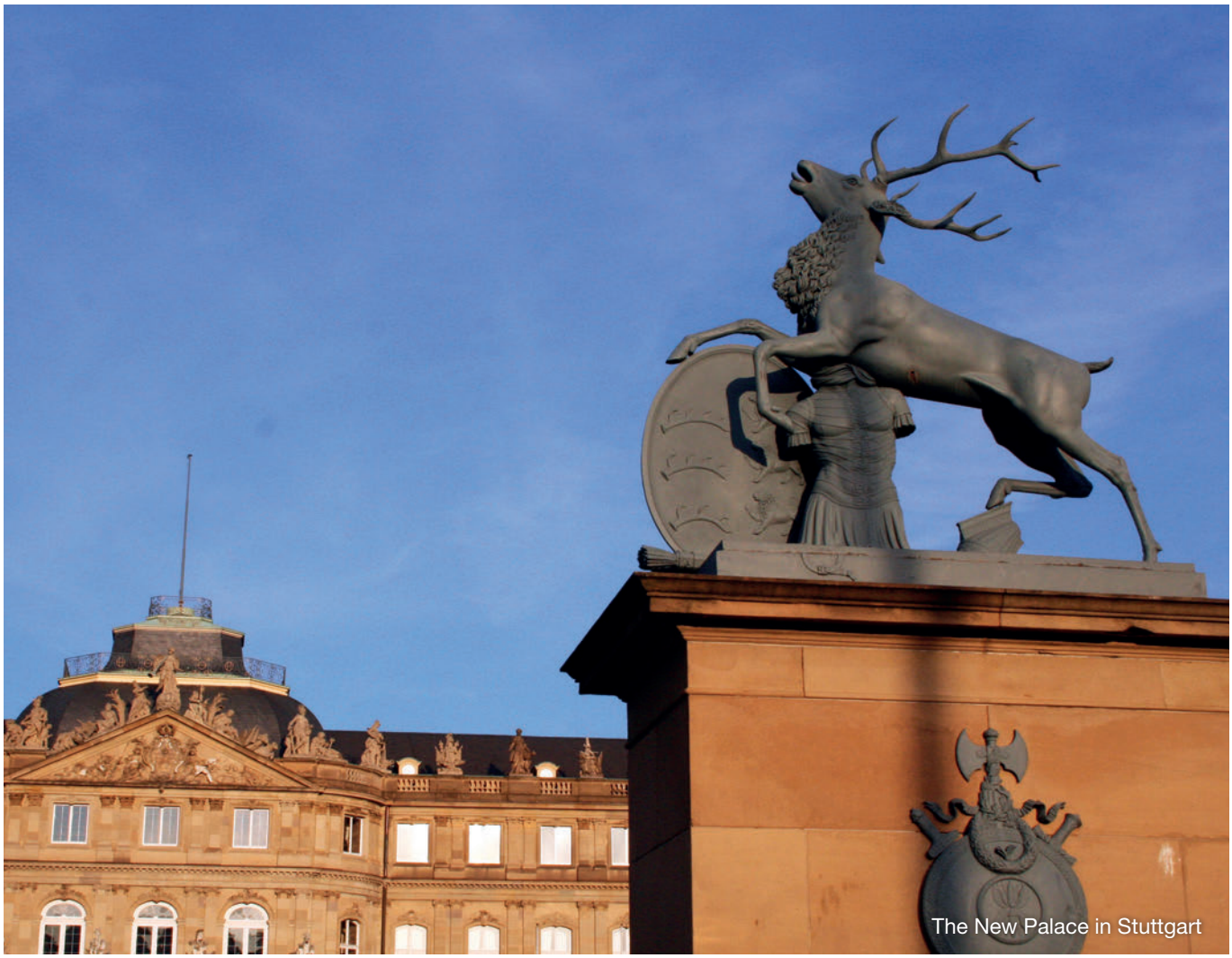
3. Challenges in the context of sustainability reporting

3.1 Regulatory momentum and first steps

It can be anticipated that sustainability reporting – which is already partially enshrined in law – will grow in importance. This will entail huge changes for many businesses at the procedural and strategic levels. The momentum of the regulatory requirements for sustainability reporting constitutes one of the most fundamental challenges. Therefore, it may be useful – particularly also for small and medium-sized companies – to proactively tackle the requirements that are already foreseeable. These include, for example, an evaluation of business divisions, products, planned investments and expenditure with regard to their environmental sustainability as well as an up-to-date materiality assessment in order to determine the relevant ESG topics. Here, the reciprocal effects of the company on the environment and on society have to be taken into account.

In this regard, it is advisable to have a dialogue with various stakeholder groups in order to ensure the relevance of sustainability reporting. This is because, at the end of the day, the report will be written for interested members of the public and not for your own use. From a 'bird's-eye perspective' it is possible to identify potential topics for the sustainability report and to find answers to the question concerning the greatest impact as regards sustainability.

Recommendation: Sustainability goals should thus also be an explicit element of the business strategy so as to be


The New Palace in Stuttgart

able to communicate clear objectives for employees and other stakeholders.

3.2 Possible reporting standards

Within the framework of the legal requirements for sustainability reporting it is currently possible to freely choose the set of reporting standards. This then serves as a guideline and provides orientation for drawing up the report. Established standards that are frequently used by small and medium-sized companies are the German Sustainability Code or the Global Reporting Initiative (GRI) standards.

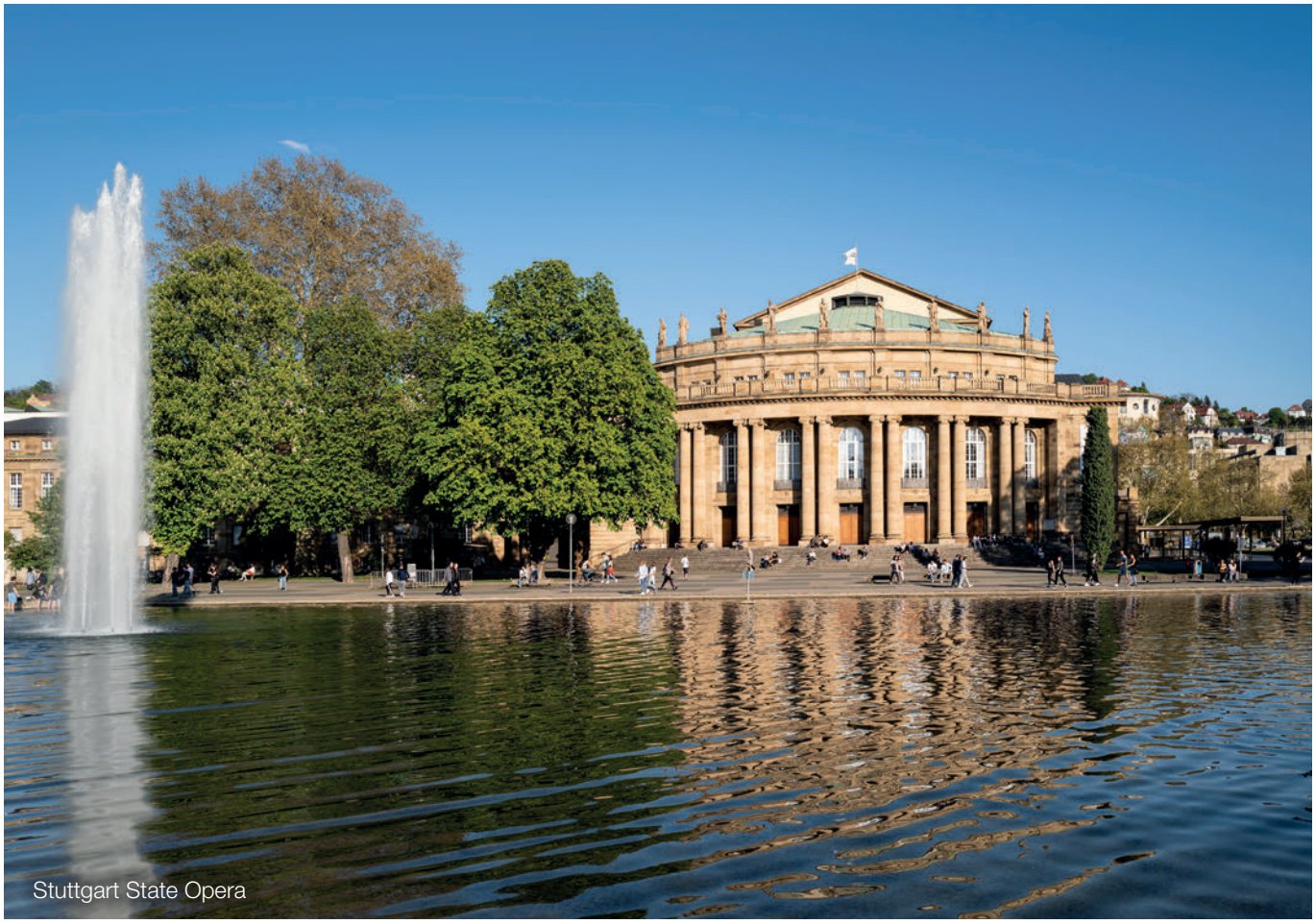
In view of the heterogeneity of the current standards, the EU Commission assigned the role of developing reporting standards in conformity with the Directive and with the taxonomy regulation to the European Financial Reporting Advisory Group. In addition, the International Sustainability Standards Board is developing reporting standards where the main focus for the assessment of enterprise value is on the investors' perspective. Ultimately, all reporting standards – existing as well as future ones – cover three issues, namely, environmental, social and governance so that there will be no fundamental differences here.

Recommendation: Given that even future reporting standards will adopt elements from existing concepts it would be altogether advisable to focus on this topic now already.

3.3 Development of ESG metrics

Sustainability goals as well as goal achievement play an important role in the reporting process (for an overview of the so-called ESG criteria please see the graphic on p.10 of the PKF newsletter 04/2022). Providing metrics is of relevance in order to underpin these goals and their development over the course of time. Here, the selection of possible metrics will depend on the sector and the business model. Yet, there is a large number of universal metrics that are already being collected in many companies. These include, for example, information on gender diversity, employee turnover, on energy and water usage, on internal controls and the whistleblower system as well as about the number of data protection and compliance training sessions.

A widely used example from the field of environmental factors is the measurement of CO_2 emissions. Besides measuring own emissions, the biggest challenge here is the inclusion of the entire value chain. For the purpose of subdividing emissions in the context of reporting, frequently, companies draw on the so-called Greenhouse



Stuttgart State Opera

Gas Protocol that provides for the classification of the CO_2 emissions that have been caused into three scopes:

- Scope 1: Direct emissions
- Scope 2: Indirect emissions from the generation and purchase of energy
- Scope 3: Indirect emissions along the value chain (e.g. purchased materials, business trips and transport).

What matters here is not just the creation of internal evaluation options but also getting information from suppliers.

Besides the goals that a business has to determine for itself and the appropriate metrics that have to be derived in this regard, for entities subject to the reporting obligation – currently these are capital market-oriented companies – the EU taxonomy provides for the mandatory reporting of three metrics. These are, in each case,

- the percentage of net turnover,
- the percentage of capital expenditure and
- the percentage of business expenses

in relation to assets and processes that are linked to business activities that should be classified as being environmentally sustainable.

Please note: The calculation of these metrics will require a detailed analysis of the company's business activities and possibly some limited restructuring of the cost accounting.

3.4 The structures needed for reporting

Given that the information frequently has to be supplied by various business divisions and that sustainability cuts across many aspects of a business, it will be essential to assign responsibilities and to form interdisciplinary teams (production, sales, legal, purchasing, marketing, HR, finance, technology, quality management, research & development, etc.) so that information can be successfully pooled early on and presented in a standard format. This will require comprehensive data collection and reporting systems as well as monitoring tools. In the sustainability reports, presenting information in graphical and tabular forms will simplify the preparation of complex data and ensure the transparency with regard to developments. Moreover, references to sections in the sustainability and annual reports would enable readers to find and link information more easily.

Conclusion and Outlook

In view of the regulatory momentum and the changes that will ensue for businesses as a result, it would be advisable to prepare for future reporting requirements early on and to make adjustments to existing structures in order to avoid the time pressure that might otherwise occur. In the next and last part of this series of reports, we will provide practical insights into the preparation of sustainability reports for SMEs.

LEGAL

RAin [German lawyer] Maha Steinfeld

Transposition of the Whistleblower Directive into German law

The EU Whistleblower Directive ("WBD"), which came into force on 17.12.2019 already, has not yet been transposed into national law in Germany (as is indeed the case in other EU member states) even though the transposition deadline expired on 17.12.2021 already. All the same, entities that will be affected by the new legislation are strongly recommended to focus on the specific requirements of the Directive. Admittedly, at present, the provisions of the WBD do not directly apply to businesses; however, in certain situations the provisions could nevertheless be applied now already. Moreover, in the public sector, in can be assumed that the provisions are already directly applicable.

1. The aim and scope of application of the directive

The aim of the WBD is to protect whistleblowers who

pass on information about possible violations of the law at a company or a public administration from being sanctioned. Here, the material scope of application only covers the reporting of violations of provisions under European law. Accordingly, this includes, in particular, breaches:

- in the area of public procurement regulations,
- in the area of financial services,
- in respect of product safety,
- in respect of environmental protection and consumer protection
- as well as violations in the area of public health regulations.

Please note: Each member state, nevertheless ,has the right to expand the list.

2. Requirement to establish internal reporting channels

Generally, in the future, organisations with 50 or more employees in the private sector as well as all legal entities under public law will have to establish so-called internal reporting channels that a whistleblower can use to report possible breaches. Here, the confidentiality of the report will have to be protected. Furthermore, the requirements of the GDPR with respect to all the data contained in the report will have to complied with and it will have to be ensured that a staff representative is involved when the reporting channels are being set up.

Recommendation: Whistleblowers are under no obligation to give priority to internal reports and they may thus also contact the authorities directly (external report). To prevent this, it would be advisable to put into place a functioning internal reporting channel.

3. Protection against retaliation

The Directive provides for a prohibition of retaliation against whistleblowers. The prohibition covers, among other things, suspensions, dismissals, salary reductions, issuing negative employment references, harassment and coercion.

Burial chapel on Württemberg hill

Among the measures to protect whistleblowers that are listed in the WBD, the reversal of the burden of proof is particularly important. If discriminatory measures are taken against a whistleblower then, according to the WBD, the employer will bear the burden of proof and will have to demonstrate that the respective measure was not due to the report by the employee.

It can be assumed that, when applying German law, the German labour courts will take into account the evaluations of the WBD by means of an interpretation in conformity with the Directive. For example, if an employee asserts something by instituting proceedings in the labour court after having been sanctioned following a report of a statutory violation at the company, it can be assumed that the court will invert the burden of proof.

Recommendation: It is, therefore, advisable with respect to actions such as, for example, notice of termination in the probationary period, to prepare thorough documentation of an employee's performance or documentation about their conduct.

4. Currently existing need for action

Despite the fact that national transposition of the Directive has not yet taken place, for legal entities under public law it can be assumed that the requirement to establish internal whistleblower systems has existed since 18.12.2021. This is because the WBD has a direct effect here in German law. This applies to all municipalities and other public authorities (irrespective of the number of inhabitants).

Please note: The internal reporting channels that have to be established must (currently) be open solely for reports of breaches of European law (see above for the material scope of application of the WBD under section 1).

For organisations in the private sector, at present, the WBD has no direct effect in Germany. Therefore, there is currently (still) no requirement to establish internal reporting channels in accordance with the WBD.

Recommendation

However, if companies do not provide internal reporting channels and a whistleblower therefore addresses a relevant report directly to an external body (competent authority) then they could now already be covered by the protection under the WBD against retaliation. For this reason, it is recommended to promptly establish an effective internal reporting channel if this has not already happened.

RAin [German lawyer] Katharina Stock

The electronic signature under German employment law

Since the introduction of the German Electronic Signature Act, more than twenty years ago, an electronic signature has generally had the same status as an original (handwritten) signature. German employment law moreover appears to be gradually moving closer to accepting electronically signed fixed-term agreements following the transposition of Directive (EU) 2019/1152 and in view of a decision yet to be made by the Berlin labour court in this respect. This was reason enough for us to take a look at the electronic signature under German employment law.

1. The basics

An employment contract is basically not subject to any formal requirements insofar as the law does not stipulate a formal requirement. Here, the written form requirement under the German Civil Code, in particular, comes into consideration. This may be replaced by an electronic form insofar as the criteria for the qualified electronic signature (QES) have been satisfied and the law does not expressly exclude its use.

2. Fixed-term agreements

Under the German Part-Time Work and Fixed-Term Contracts Act, fixed-term agreements are subject to a mandatory written form. However, the issue of the effectiveness of those time limits in employment agreements that have been signed electronically is one that is hotly disputed. To-date, there has still not been a court decision on this. It is therefore all the more gratifying that twelve respective actions against fixed-term employment contracts are pending before the Berlin labour court (among others, case reference: 20 Ca 8498/21 and 20 Ca 8500/21) that could provide clarity with regard to this issue.

Recommendation: With a view to the legal effects in the event of the invalidity of such fixed-term agreements, we would recommend that until the courts have finally clarified the issue you should comply with the written form requirement at all times for these agreements.

3. Proof of essential elements of the contract

If no "written employment contract" has been concluded then, under the Act on Notification of Conditions Governing an Employment Relationship (Nachweisgesetz, NachweisG), the employer is required to hand over written proof of the essential elements of the contract to the employee within one month. However, there is a dispute as to what requirements should be placed on the "written employment contract" mentioned here.

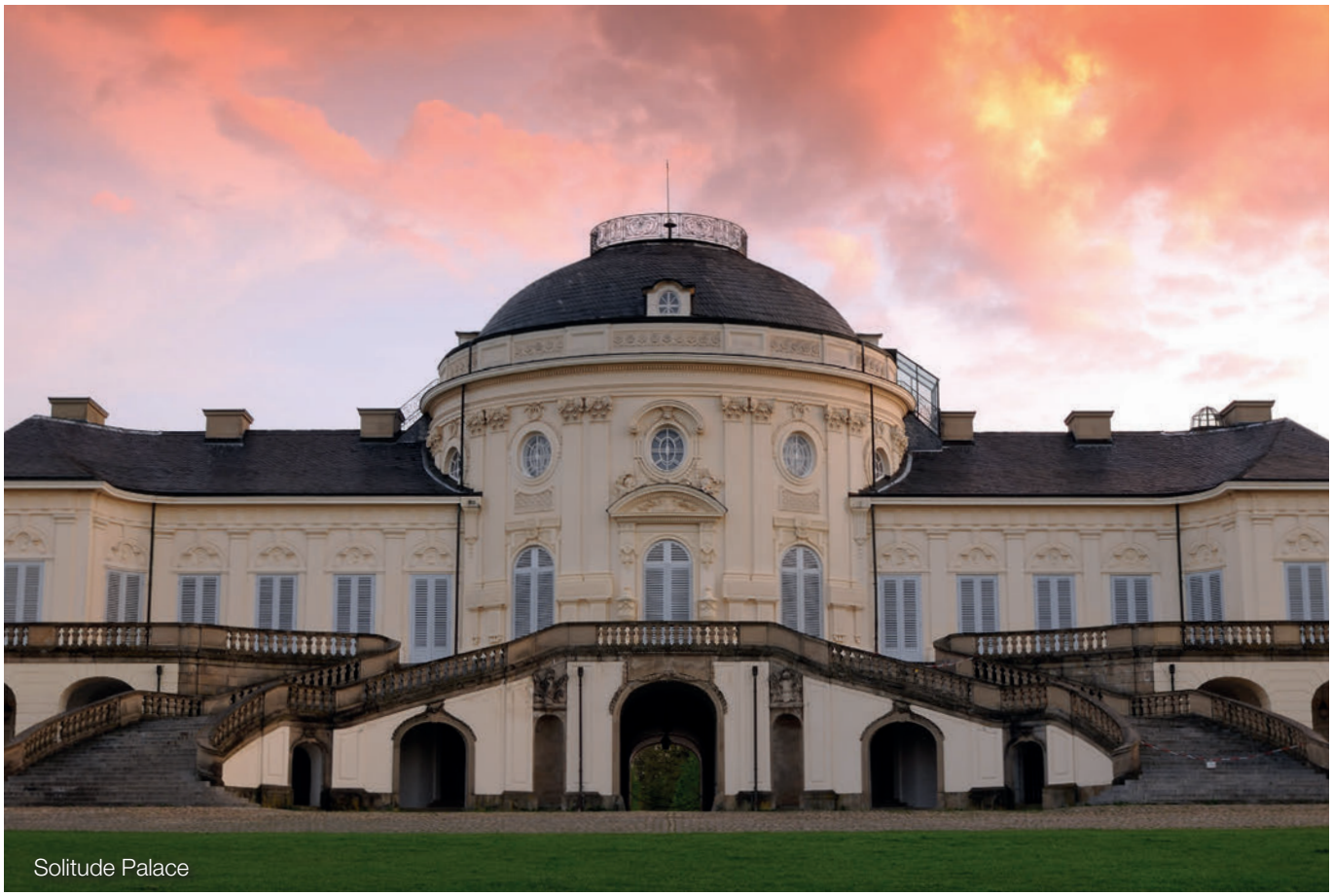
A specific rule that, in this context, excludes an electronic signature on an employment contract is not provided for by law. However, if the electronic form were to become admissible then this would erode the principle of written documentation of employment contracts (whether these are actual employment contracts or the proof thereof) that has been applicable under the NachweisG up to now.

However, it is likely that this uncertain legal situation will soon be a thing of the past. This is because Directive (EU) 2019/1152 on transparent and predictable working conditions is supposed to explicitly allow electronic transmission of the proof of essential elements of the contract subject to compliance with certain criteria that aim to protect the proof. National lawmakers have been given until 31.7.2022 to transpose the Directive.

Please note: It should however be noted that a violation of the NachweisG would merely invert the burden of proof as regards the content of the contract and place the onus on the employer. In this case the contract would be valid without compliance with the form requirement.

Please note

The legally uncertain territory, which is described above, will be reduced, bit by bit, by lawmakers and through case law, although clear legal rules, particularly in the area of fixed-term agreements, would be desirable. Implementing extensive possibilities for the use of electronic signatures into employment law could constitute a milestone for enhancing the efficiency of personnel departments and, thus, of businesses in general. Further developments remain to be seen.



Solitude Palace

Granting loans to partnerships – Controlling influence precludes favourable withholding tax rates

Taxpayers that enter into a loan arrangement with another person will be able to take advantage of a tax rate differential, which is mostly very pronounced, between withholding tax on capital gains and the taxpayer's normal rate of income tax. However, it is imperative to be mindful of the closeness of the relationship with the persons in question.

To take advantage of the tax rate differential, person A could, for example, take out a loan, for the purchase of a rental property, with a different person B. This would mean that Person A could claim the debt interest as allowable deductions for costs in relation to their income from letting and, in this way, reduce the amount of income that is taxed at a normal rate. Person B however will only have to pay tax at a rate of 25% on the interest payment received.

The German tax legislator has identified such tax structuring options and issued rules according to which the withholding tax rate of 25% would be precluded in cases where loan arrangements are between persons who are closely related to each other, insofar as the borrower is able to claim a deduction for the interest that is paid, as business expenses or as allowable deductions for costs in relation to their domestic (German) income.

The Federal Fiscal Court *(Bundesfinanzhof, BFH)* recently considered who would be deemed to be "persons who are closely related to each other" within the meaning of this exclusion rule and set this out in its ruling of 28.9.2021 (case reference: VIII R 12/19). In the case in question, a married couple had issued a loan to a limited partnership [Kommanditgesellschaft, KG] and had wanted to pay tax on the resulting interest income at 25%. What proved to be problematic was the fact that the married couple had held a partnership interest in the KG when the loan commitment was given; however, this was no longer the case when the interest was paid because they had transferred their partnership interests to a family foundation. The local tax office assumed that there was a close relationship between the creditors (the married couple) and the debtor (the KG) and taxed the interest income at the normal rate.

Nevertheless, the BFH now allowed the married couple to pay at the rate for withholding tax and ruled that the relationship that had existed had not been sufficiently close. A close relationship could be presumed if, among other things, one of the persons involved was able to exert a controlling influence over the other person, or such influence from the outside affected both persons. In a partnership, a partner would only able to exert a controlling influence if their share of the voting rights that had been agreed for partner resolutions enabled them to outvote their co-partners. Furthermore, 'de facto control' could also be sufficient in that a partner could actually exert the respective pressure on other partners so that they would submit to this particular partner's will.

Result: In the case in question, in view of the position of the partners, there was no controlling relationship since the married couple no longer held partnership interests in the KG when the interest was paid. Admittedly, the married couple had transferred their partnership interests to a family foundation. In the opinion of the court, however, in view of the regulations at the foundation, this step had not resulted in direct control either.

Mini jobs – Adjustments to earnings thresholds

The earnings threshold for marginal part-time workers will, in future, be based on a weekly working time of ten hours at minimum wage conditions. The aim of the German government's draft of an 'Act to Increase Protection through the Statutory Minimum Wage and to Make Amendments in the Area of Marginal Part-Time Work' is to implement this proposal.

Accordingly, the upper earnings limit for mini jobs is supposed to go up, on 1.10.2022, from €450 to €520 per month. For so-called midi jobs, the upper limit – below which the contribution rate to the overall social security contribution would be reduced – is supposed to go up, on 1.10.2022, from €1,300 to €1,600. At the same time, the minimum wage is supposed to be increased from, currently, €9.82 to €12 per hour.

AND FINALLY...

"The formula for success is simple. Start somewhere where you are really good and then question your assumptions, fix what you did wrong, and adapt everything to reality."

Elon Musk, born 28.6.1971, in Pretoria/South Africa. Co-owner, technical director and partly also co-founder of the payment service PayPal as well as the CEO of the spaceflight company SpaceX and of the electric car manufacturer Tesla.

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