PKF

Newsletter

Key Issue
Alternative forms of financing and the accounting aspects with respect to planning large-scale projects

12 | 23

Dear Readers,

During 2023, which is now coming to an end, many laws were passed and a number of them will cause even more bureaucracy. You can read about one example of this in our first report; while in many EU states waste separation and deposits on beverage containers are admittedly unfamiliar concepts, Germany has once again taken a very exacting approach - in the course of transposing an EU Directive - to the introduction of a **plastic tax in 2024.**

We start off the Accounting & Finance section with our Key Issue report on the topic of large-scale project planning, which is discussed in the context of the **construction of a logistics centre**. In Part I of this report, **alternative forms of financing and the accounting aspects** are considered. We will then follow this up in the January issue of our newsletter with a closer analysis of, in particular, the special features in cases of leasing as well as of the tax aspects. Next up, we examine **M&A transactions** in a difficult environment; we first look at the current trends and then provide impetus for the possibility of successfully concluding deals.

From 2024, capital market-oriented companies initially and, subsequently, most other companies will have to intensify their reporting on sustainability topics. To this end, in the report that then follows we have summarised a recent **survey of the DAX 40** companies where the responses in respect of the **challenges** of the new **ESG standards** are particularly interesting because this could be considered to be an 'early warning' for all the other companies.

In the Legal section, first of all, there is an overview of the **information and control rights of shareholders and partners**. Subsequently, we discuss a ruling on a common practice of **streaming services** that involves automatically increasing prices on the basis of general **terms and conditions** that are unlikely to have been read by anyone.

Finally, in short reports, you can find current information on the funding for e-mobility and on the EU's SME relief package.

You can look forward to an interesting read. We wish you and your families a lovely Christmas season.

Your Team at PKF

Nutcrackers at a Christmas market

Front cover photo: Traditional German spiced Christmas cookies (Elisenlebkuchen)

Key Issue

Alternative forms of financing and the accounting aspects with respect to planning large-scale projects

Contents

TAX

WP/StB [German public auditor/tax consultant] Daniel Scheffbuch / Christina Schultz

Introduction of a ‘plastic tax’ from 2024

Single-use plastic products that have been improperly disposed of constitute a notable source of environmental pollution. In order to reduce the consumption of such products, to stop them being carelessly thrown away and to manage ‘plastics’ as a resource more sustainably a so-called plastic tax will have to be paid by many companies from the 2024 calendar year.

1. European law background

To achieve the climate targets that were set in the framework of the Paris Agreement, the EU resolved in its Green Deal that, in the future, a ‘plastic tax’ would have to be paid in the EU on non-recycled plastic packaging waste.

The EU Green Deal is a set of policy initiatives that aim at achieving climate neutrality by 2050. The tools with which this target should be achieved include the EU emissions trading system, the Carbon Border Adjustment Mechanism (CBMA), the Energy Tax Directive as well as the taxation of plastic waste. In addition, there is also the aim of encouraging more efficient use of resources and creating a smooth transition to a circular economy/recycling economy.

The national transposition of the directive into the respective laws of the EU Member States has however been very different because it has been possible for the Member States to individually define the corresponding parameters for the plastic tax.

At the Nuremberg Christmas Market

2. The Federal Government's draft law

Germany is transposing the directive via the Single-Use Plastic Fund Act (Einwegkunststofffondsgesetz, EWKFondsG), which was published on 15.5.2023. According to that, 'manufacturers' of the products concerned will have to pay into a fund. The 'beneficiaries' of this fund, such as towns and municipalities, will likewise register the costs that arise for cleaning public paths and for waste disposal. The excess revenues will then be paid out to the beneficiaries on the basis of a points system.

3. Material and personal scope of application

(1) The products concerned will be those that are wholly or partly made of plastic and are mentioned in the appendix to the EWKFondsG (so-called single-use plastic [SUP] products). The main focus here is on SUP products in the food sector, e.g., food boxes with or without lids, film wrapped around food, or beverage containers with a capacity of up to three litres, or cups for beverages. Lightweight plastic carrier bags, packets and film packaging as well as certain types of wet wipes, balloons, filters for tobacco products and - from 2026 - also fireworks complete the list.

(2) The term 'manufacturer' should be interpreted broadly and independently of the legal form. In Germany this includes, besides producers, also market participants that make available the affected SUP products concerned, for payment or without payment, or sell them on the German market for the first time on a commercial basis; consequently, fillers, sellers and importers will also be covered. All those who sell digitally from abroad directly to private households or other users in Germany will also be considered to be manufacturers. These market participants will moreover have to appoint a representative in Germany who will have to fulfil the obligations in their own name.

Please note: Operators of electronic marketplaces and certain fulfilment service providers will likewise be affected insofar as the SUP products are placed on the market by or through them.

4. Reporting

4.1 Timing and registration obligation

The businesses concerned will have to submit the first report for the 2024 calendar year to the Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection (Bundesministerium für Umwelt, Naturschutz, nukleare Sicherheit und Verbraucherschutz, BMUV) by 15.5.2025. In their reports, the manufacturers will have to declare, for the first time, the single-use plastic products made available or sold on the market during 2024, in kilogrammes, broken down by their respective types and weights.

In order to comply with the obligation to pay the SUP levy manufacturers will have to register with the BMUV prior to the start of their activities. The report will need to be checked and confirmed by a registered expert within the meaning of Section 3(15) of the Packaging Act (Verpackungsgesetz, VerpackG), or by a registered auditor, tax consultant or vereidigte Buchprüfer [licensed auditor in public practice authorised to perform only statutory audits of annual financial statements of mid-sized German limited liability companies (GmbH)] in accordance with Section 27(2) VerpackG. A violation of the requirements may be punished by the imposition of a fine of up to €100,000.

4.2 Levy rates

The single-use plastics levies that have to be paid by the manufacturers will be determined annually via a levy assessment notice from the Federal Environmental Agency. The levy rates in euros per kilogramme will be as follows:

Food containers	0.177
Packets and film wrappers	0.871
Non-returnable beverage containers	0.181
Returnable beverage containers	0.001
Cups for beverages	1.236
Lightweight plastic carrier bags	3.801
Wet wipes	0.061
Balloons	4.340
Tobacco products	8.972

5. Beneficiaries

The aim of the plastic tax is to partially reimburse the costs incurred by the public sector. These include, for example, waste management and cleaning of public areas as well as raising awareness in the form of waste management advice or the collection and processing of data. Beneficiaries likewise have to register themselves with the BMUV.

The points system that will be used for payouts will assign a certain number of points to the services that are performed. For example, the municipalities will have to pro-

vide information about the waste bin volumes, number of cleaning kilometres driven and the quantity of waste disposed of. The municipalities will then get ten points per kilometre for the cleaning of sections, three points per 1,000 square metres for cleaned areas and 31.5 points for disposing of one tonne of waste. All in all, it is expected that there will be payouts to around 6,440 beneficiaries.

Please note: In future, the levy rates and the points system will have to be reviewed by the Federal Government every three years.

Recommendation

Even though the first report only has to be submitted in 2025, nevertheless, the obligation to pay the SUP levy, which is detailed in section 4.2, means that the acquisition of the relevant data will have to be carried out from the start of 2024 already.

ACCOUNTING & FINANCE

WP/StB [German public auditor/ tax consultant] Dr. Harald Riedel · StB [German tax consultant] Steffen Heft

Large-scale project planning – the construction of a logistics centre

Financing – Accounting – Taxation (Part I: Alternative forms of financing and the accounting aspects)

When planning large-scale projects - such as the construction of a logistics centre -, besides structural engineering and logistical aspects etc., other fundamental matters can arise, for example, the financing of the project, questions about the accounting or also tax issues. In Part I of this report, we provide a short overview of alternative possible forms of financing and outline the basic recognition and measurement issues for the financial accounts. In Part II, we will discuss the special features in cases of leasing, the impact on the equity ratio as well as specific tax aspects.

1. Short overview of forms of financing

How such a large-scale project should be financed is something that has to be thought through by the decision-makers already at a very early stage. The basic forms of financing that can be considered here are:

- non-debt financing,
- debt financing,
- lease financing with the variants of
  - finance leases and
  - operating leases as well as
- the sale-and-lease-back model as a special form of financing.

These forms of financing can be briefly defined as follows:
(1) Non-debt financing - This can occur either in the form of internal financing via accumulated earnings (revenue reserves, retained profits), or non-cash expenses (e.g. depreciation financing), or by way of external financing via equity capital inflows from outside, thus via capital contributions from partners/shareholders or from capital increases.

(2) Debt financing - Here, the project is financed through borrowed funds, usually in the form of bank loans. To this end, besides the interest charged on loan capital during the construction phase, longer-term financing interest is also usually incurred.

(3) Operating leases - The characteristic feature here (at least in theory) is that the contractual relationship can generally be terminated (at short notice) at any time, thus no basic lease term is agreed; however, in practice, there are effectively no cases where there is no basic lease term (for the construction of a logistics centre such an operating lease model would hardly be possible and we have only briefly mentioned it here for the sake of completeness). By contrast, of the utmost importance in practical terms are the leasing decrees issued by the fiscal administration and the understanding of the terms therein (more on this subsequently under (4) and then in the next PKF newsletter under section 3 in Part II).

(4) Finance leases - These constitute cases of (hidden) rental arrangements that include the elements of a pur-

chase agreement. Here, the characteristic feature is that the lease agreement is concluded for a fixed basic term during which regular cancellation is excluded. Furthermore, according to the so-called leasing decrees issued by the fiscal administration that are relevant for lease accounting, a condition that proves the existence of a finance lease is that the lease rates to be paid by the lessee during the basic term should at least cover the lessor's acquisition and construction costs as well as all their ancillary expenses including the financing costs.

(5) The sale-and-lease-back model, in principle, constitutes a special case in lease financing where the lessor acquires the leased item not from a third party but, instead, from the lessee and then leases it back to the vendor.

In addition to these 'pure forms' of financing, in practice you can also frequently find mixed finance operations thus, for example, a combination of equity and debt financing.

Please note: Moreover, more specialised forms of financing also exist - often referred to as **mezzanine capital** - such as, for example, profit participating loans, silent partnership holdings, etc. However, for reasons of simplicity, these will not be further expounded here.

2. Basic recognition and measurement issues for the financial accounts

For accounting purposes, the financial accounting regulations under the **Commercial Code (Handelsgesetzbuch, HGB), tax law governing German accounting treatment and the internationally focused IFRS** have partly separate rules available. In the following section, for the practical case to be presented (the construction of a logistics centre), we primarily consider German regulations governing financial accounts and tax accounts; here, the German principle of *Maßgeblichkeit* (under which financial accounting leads tax) means that the overlap between the two sets of accounts are not insignificant.

2.1 Recognition issues - Land, buildings and operating equipment

Land has to be separately capitalised in addition to the buildings and it is not subject to any scheduled depreciation. With regards to the construction costs for a building, in the financial accounts the portion of the construction costs that relate to the building itself have to be clearly demarcated from those that relate to the **operating**

equipment, which has to be separately capitalised. This distinction between the components of a building and the operating equipment will be important

- for depreciation (operating equipment is usually depreciated over a shorter expected useful life),
- for the amount of the assessment base for real estate transfer tax (RETT) purposes (if, in the future, the property should be the subject of a transaction that generates a RETT liability, for example, as part of a share deal that generates a RETT liability) or also
- for the extended trade tax exemption for property.

Please note: As regards the distinction between real estate and the operating equipment, it is possible to turn to the comprehensive decrees of the fiscal administration that were issued by the German federal states - these provide a good initial point of reference for practice.

2.2 Measurement – Component approach for depreciation purposes?

(1) Under **German commercial law,** the component approach may be used for depreciation purposes in cases where physically separable components are exchanged that are essential in relation to the entire tangible fixed asset (cf. accountancy notes from the Institute of Public Auditors in Germany *[Institut der Wirtschaftsprüfer, IDW]* in their (German language) opinion statement HFA RH 1.016). The component approach should be understood here to mean a method by which an asset is notionally split into its main components of differing economic useful lives in order to determine the amount of scheduled deprecation of the asset for a period as the sum of the scheduled deprecation apportioned to its individual components for a period. Here, the IDW has provided the example of a building where the roof (useful life 20 years) is depreciated separately from the rest of the building (useful life 60 years). When compared with determining scheduled deprecation for a period for an entire asset on the basis of its general overall useful life, such component-by-component depreciation leads to differing depreciation amounts and, ultimately, to a more appropriate periodisation of the expense of using the asset.

Please note: It is then however not possible to likewise treat the costs for replacing such separable components

Christmas cookies

that correspond to the component-by-component depreciation as maintenance expenses but, instead, they have to be capitalised as subsequent acquisition and construction costs. For the sake of good order, it should also be noted that the asset (e.g. a building) as a unit to be reported will itself not be affected by the use of the component approach - the only thing that will change is the method for determining scheduled depreciation.

(2) In accounts prepared according to **IFRS**, under IAS 16.43 ff. a component approach is likewise applied within the scope of scheduled depreciation.

(3) In the **tax accounts**, however, component-by-component depreciation is precluded - Section 7 of the Income Tax Act (Einkommenssteuergesetz, EStG) takes into account the asset as a whole. The German principle of *Maßgeblichkeit* (under which financial accounting leads tax) does not apply here in view of the tax assessment reservation (Section 5(6) EStG). In the case of buildings in the business sector, tax law generally assumes a single standardised depreciation period of 33.33 years.

Please note

In view of the various priorities and alternatives with respect to financing, accounting and taxation and the interdependencies that exist between these, it is only possible to consider selected aspects here and to provide an initial overview. Your PKF partner would be pleased to clarify detailed questions in person.

Benedikt Imbusch

M&A in times of crisis – Current trends and challenges in respect of corporate transactions

A pandemic, war and inflation – over the past months, these crises and the resulting effects have severely stifled the previously booming M&A market. In the following section we describe the trends and the challenges that buyers and sellers have to face at the present time and how a successful transaction can nevertheless be accomplished.

1. Current challenges and trends

In recent years, the M&A market has undergone dramatic changes due to protracted crises (the COVID-19 pandemic, war in Ukraine and other geopolitical tensions, inflation, rising interest rate levels, etc.). Uncertainty and volatility have led to a marked decline in the number and volume of M&A deals. The trend here has been moving away from large deals towards medium-sized to small deals. The increased interest rate level has made the pursuit of large deals, in particular, more unattractive. Another trend mirrors demographic developments – while the generation of 'baby boomers' is gradually reaching retirement age, many successions still remain unresolved and require support for succession planning.

A further observation is that the expectations of sellers and buyers about pricing have become even more unbalanced. Even though this may generally be in the nature of things, this trend has gathered further momentum still in view of the higher interest rates as well as the decline in multipliers. Sellers continue to hope for purchase prices from the record-breaking year of 2021, while buyers however no longer have the financing options that were available to them in 2021. This is because, besides the increased interest rate level, the risk awareness of capital providers as well as the overall risk have gone up on account of changed market conditions. Those who have appropriate liquid funds are able to finance transactions – at least to a large extent – independently and are thus at an advantage (cash is king). As a result of this, the M&A market has thus recently increasingly developed from a seller's market to a buyer's market.

Please note: Naturally, despite these current challenges, it is basically still possible to successfully conclude a transaction, especially if the measures described below are implemented.

2. Factors for a successful transaction

Sellers and buyers will be able to take the following measures in order to successfully structure a transaction in the current difficult M&A environment.

2.1 Optimise due diligence

A thorough due diligence process is vital for identifying

and assessing potential risks. It is important to analyse the financial stability of the target company as well as the possible impacts of crises on its business model. Sellers should take preparatory measures and make all the relevant information transparently available, while buyers should carry out a careful review with respect to, in particular, any impact from the aforementioned crises (extraordinary effects recognised in income, changes in supply chains and the customer structure, etc.).

2.2 Demonstrate flexibility

Compromises will help to bring a transaction to a conclusion. This also applies to the price and contract negotiations. Sellers should potentially be prepared to adjust their price expectations and be accommodating towards the buyers in order to compensate for the effects of rising interest rates. Buyers could try to suggest alternative payment structures or earn-out agreements in order to minimise the risk and still be able to submit an attractive overall package to the sellers.

2.3 Secure the financing

Buyers should ensure that they have sufficient financial resources available in order to conclude the transaction. In doing so, alternative sources of finance should also be considered in order to mitigate the effects of higher interest rates. This could involve looking for investors or partnerships, for instance. Sellers can also make their own contribution towards this. For example, vendor loans and earn-out agreements, among other things, could optimise a buyer's financing structure and yet ensure that the overall package is fair.

2.4. Enhance communication and transparency

Open and transparent communication between the parties is crucial for avoiding misunderstandings and maintaining trust. Regular updates about the progress of a transaction could help to reduce uncertainty. Moreover, transparency in the data and the documents – on the part of both the buyer as well as the seller – is a major prerequisite for a successful transaction. Therefore, even before the start of any M&A process, it would be advisable for sellers to set up their businesses in such a way so that, during a subsequent process, the highest possible level of transparency could be ensured and any hurdles could be addressed (internally) at an early stage.

Recommendation

Despite the current difficult market environment, M&A transactions can nevertheless be successfully structured. In order for this to be achieved both buyers and sellers will be required, more than ever, to communicate openly and transparently and to cooperate with each other. Careful planning and preparation, a clear vision, professional advice as well as an in-depth analysis of potential partners and markets will increase the chance of bringing a transaction to a successful conclusion.

WP/StB [German public auditor/tax consultant] Daniel Scheffbuch / Christina Schultz

Implementation of ESG standards at DAX companies

The adoption of the Corporate Sustainability Reporting Directive (CSRD) and its specification in the European Sustainability Reporting Standards (ESRS) constituted the achievement of another milestone for sustainable finance. The fundamental objective here is to transform the EU into a modern, resource-efficient and competitive economy with no net emissions of greenhouse gases by 2050. To achieve these changes, besides the large public interest entities, large corporations, certain banks and insurance companies as well as small and medium-sized enterprises with a stock market listing will also have to prepare comprehensive sustainability reports as part of their management reports.

1. Scope of application of the ESRS

The ESRS have to be implemented by companies that fall within the scope of the CSRD. This includes an estimated total number of around 15,000 German companies that will successively have to prepare sustainability reports in accordance with the Accounting Directive and the ESRS. The DAX 40 companies will have to incorporate a sustainability report in accordance with the ESRS into their management reports already for the 2024 financial year.

2. Survey by the Accounting Standards Committee of Germany (ASCG)

To show how the DAX 40 companies are dealing with this challenge and to highlight the difficulties that are currently being encountered in the implementation of the ESRS, in the summer of 2023, the ASCG conducted an online survey of the companies that make up the DAX40 Index. The aim was to gain insights about the status and the difficulties of the ESRS implementation project. The following five questions were asked in this survey, whereby multiple answers were possible:

(1) Where is the Project Management Office located for your ESRS implementation project?
(2) When did you start your ESRS implementation project?
(3) How far along is your implementation project?
(4) Which implementation aspects are currently causing the greatest difficulties?
(5) Are you currently considering other sustainability reporting standards or using them in addition for the ESRS implementation? If yes, which ones?

In the following section we present the survey results.

Please note: In the final conclusion we point out the significance for non-DAX companies, too.

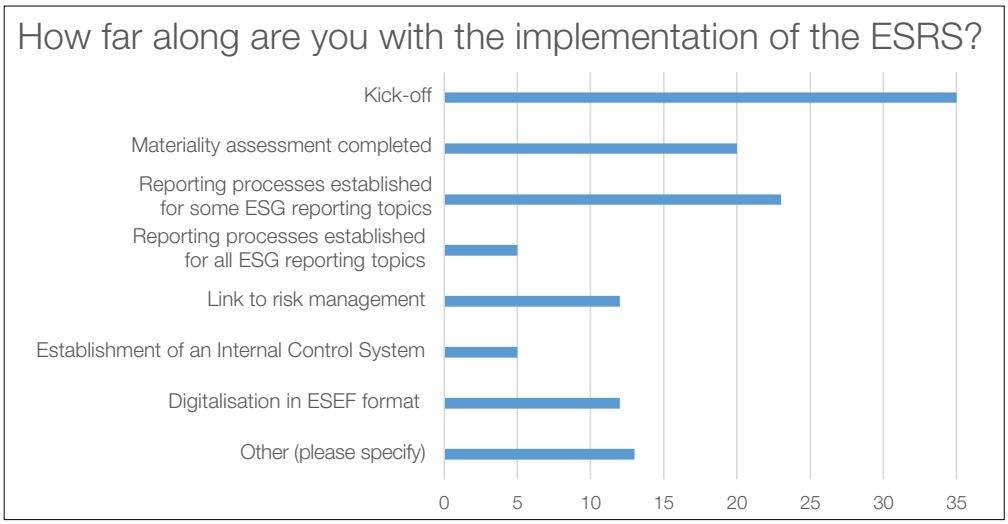

fig.1

3. Organisation

At most companies, the Project Management Office for the ESRS implementation project is currently situated at board level. Almost half of the companies surveyed stated that the project responsibility currently lies with the CFO or CEO or the finance department at the company. Setting up appropriate staff units should moreover help with the organisation of the new challenges that have to be addressed.

4. Implementation status

Out of 40 companies, 37 have started implementing the ESRS. 70% of the DAX 40 companies have already established reporting processes. Around 23 of these companies have addressed selected sustainability reporting topics (environmental, social or governance), while five companies have already implemented reporting processes for all these reporting topics. 20 companies can already point to a completed materiality assessment (cf. Fig.1).

5. Challenges for the implementation

All companies surveyed have major difficulties in implementing the ESRS. The biggest challenges are seen in the "lack of clarity regarding the ESRS requirements" and the "quality and verifiability of the data", both of which are mentioned by about 80% of the companies (cf. Fig.2). In addition, for 74% of the companies, "data availability" constitutes a major problem and, for 70% of the companies, it is limited "human resources" as well as limited "time resources". Under "Other", several companies point out that the, as yet, incomplete legislative process (i.e. the still pending publication of the final ESRS by the EU Commission) and, thus, the unclear legal situation are highly problematic. Furthermore, other companies also see these difficulties but mention them under the

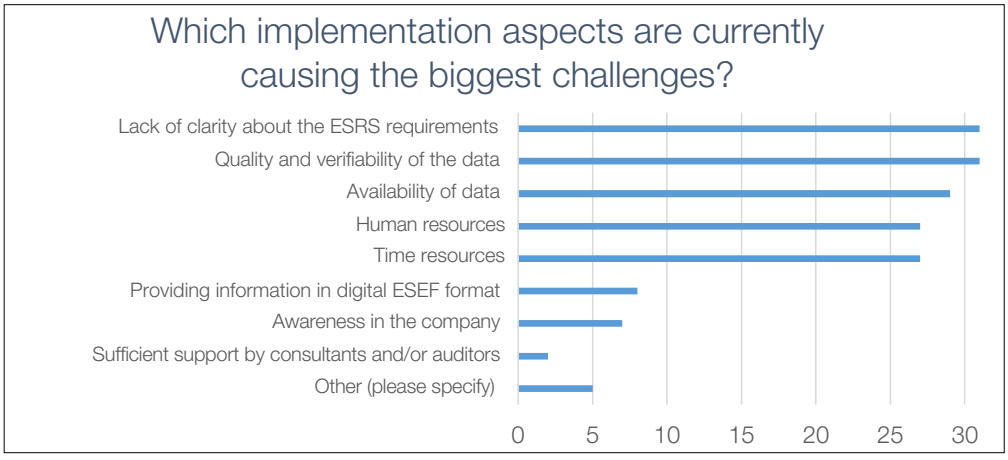

fig.2

category “lack of clarity regarding ESRS requirements”. The same applies to the difficulty of “identifying specific requirements in relation to the materiality analysis”, which one company mentions under “Other”.

6. Other comments from the companies

The companies were moreover surveyed about other reporting standards that they are currently considering/using for the implementation of the ESRS. It is noticeable that there is a large number of multiple responses here that reflect the variety of reporting standards. Consequently, it is likely that an additional challenge will be to track the developments and thus the changes and differences in the reporting requirements and to reflect and explain these changes in the sustainability reporting. Furthermore, it is pointed out that for some topics (e.g. biodiversity) there are still no recognised or established assessment methods. It is therefore expected that implementing and auditing these standards will entail a great deal of effort and expense.

7. Conclusion for non-DAX companies

The survey of the DAX companies about the approach to the implementation of the standards and the challenges that have to be addressed shows what soon lies ahead for non-DAX companies, too. For this reason, action is required now already in the form of the systematic collection and preparation of information.

LEGAL

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

Shareholders’/Partners’ information and control rights

Minority shareholders/partners, in particular, and/or shareholders/partners not authorised to manage a company frequently have only a limited amount of information about a company’s financial situation. Moreover, it is not uncommon for there to be a lack of awareness about the existing information rights for shareholders/partners and how exactly these can be exercised. That is why, in the following section, we provide an overview of the relevant regulations for the most common legal forms in the German SME sector.

To begin with, it should be pointed out that the statutory information and control rights may not be restricted via a company agreement. It would nevertheless be advisable to have a look at the agreement because, sometimes, the rights that are granted there can be more extensive than those provided for under the law.

1. Shareholders of a GmbH [German private limited company]

1.1 Extent of rights to information

The information rights of the shareholders of a GmbH have been very generously formulated. Besides the right to the presentation of the annual financial statements and the management report, all shareholders may, at any time, request from the company’s management:

- information about the company’s affairs (right to information) as well as
- an inspection of the books and records (inspection right).

The term ‘company’s affairs’ is to be understood in a broad sense here. In principle, the right to information covers everything that could be of significance for the shareholders in respect of their interests relating to controls, profits and assets. The inspection right is likewise correspondingly extensive. It includes all the business records of a company not just in paper form but also in electronic form. However, inspection is to be understood literally here, i.e. only the possibility to check the records at the offices of the company has to be granted.

Please note: There is no entitlement to be provided with the records. Although, copies or photos can be made at your own expense.

1.2 Is refusal possible?

A company’s management may refuse to provide information and allow inspection if there is a risk that the shareholder will use the information for non-corporate purposes and, as a result, the company would be disad-

vantaged to a not inconsiderable degree. This could be the case, for example, in a competitive situation. Nevertheless, the company's management would still have to gain approval for an intended refusal by passing a shareholders' resolution. In such a case, the shareholder concerned would not have the right to vote.

2. Limited partners

The information rights of the limited partners of a Kommanditgesellschaft (KG) [German limited partnership] (or of a GmbH & Co. KG [a German limited partnership with a limited liability company as a general partner]) are currently still significantly more restricted. There is no information right that is regulated by law, but solely an inspection right. Limited partners may request copies of the annual financial statements and they are then allowed to check these within a reasonable period (approx three months) by inspecting the books and records.

Please note: Bringing in an expert who is obliged to maintain professional confidentiality is usually permitted.

3. New regulations under the German Act on the Modernisation of Partnership Law

From the 1.1.2024, there will now however also be an information right regulated by law for limited partners. They will be able to request information from the partnership about the company's affairs insofar as this is necessary for the exercise of their rights as members, especially if there are grounds for assuming that the management of the company is acting dishonestly (Section 166 of the German Commercial Code in its amended version). As regards the necessity of the request for information, a consideration of the balance of interests will be required. Ultimately, the limited partner who is requesting information will however have to demonstrate and provide evidence for the necessity to do so.

Please note: Comprehensive inspection and also information rights for personally liable partners of an OHG [German general partnership) or a GbR (company/partnership under German civil law) will now likewise be regulated in the new Section 717(1) of the German Civil Code.

Recommendation

In this context, you should also keep a constant eye on the general fiduciary duties owed by shareholders/partners to a company. In case law, for example, exercising the legally guaranteed information rights excessively or vexatiously is regarded as being 'not appropriate' and therefore an abuse of the law. The agreements of partnerships should be reviewed in order to check that they are consistent with the new regulations.

WP/StB [German public auditor/tax consultant] Daniel Scheffbuch / Christina Schultz

Netflix and Spotify – Price-adjustment clauses are ineffective

In their terms and conditions of use, streaming services such as Netflix and Spotify have granted themselves the right to adjust their prices from time to time. Such clauses were reviewed by judges in a recent ruling – and declared to be inadmissible.

1. Background and legal development

Part of the business model of streaming services, such as Netflix and Spotify, is to simply inform their customers that the prices will shortly be increased. The streaming service companies view the relevant contractual clauses as the legal bases that give them the right to adjust their subscription prices. That is why the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband, vzbv) brought a legal action before the regional court of Berlin on the grounds that such clauses unreasonably disadvantaged consumers. The streaming providers subsequently lodged appeals. These have now however been rejected by the highest state court for the city-state of Berlin (Kammergericht) in its rulings of 15.11.2023 (case references: 23 U 15/22 and 23 U 112/22) and the decisions of the regional court of Berlin have thus been confirmed.

2. Inadmissible clauses

According to the rulings of the courts, in the case of ongoing agreements one-sided price adjustments are only allowed if they are structured fairly and transparently. The courts had to rule specifically on the reservation provisions of the streaming services in their GT&Cs according to which they would be allowed to "adjust their subscription offers from time to time as [they] reasonably see fit in order to reflect the effects of changes in the overall costs associated with [their] services." In this respect, it was decided that the use of such clauses in business transactions with consumers was at any rate prohibited insofar as this was supposed to take account of an increase in overall costs.

3. Legal and business implications

These rulings will have far-reaching consequences for the practices that relate to the GT&Cs of the streaming services because it will no longer be possible to automatically push through price increases. Customers will first have to be asked to consent to these. If consent is not given then the providers would be free to cancel the contractual relationship. However, the users could also make use of their special right of cancellation, or claim a refund of the additional costs.

Outcome

In any case, it is no longer possible to extend a contractual relationship via 'tacit consent'. This will entail a considerably greater effort on the part of the streaming service companies when higher prices are supposed to be pushed through. It is likely that this ruling will be important for other sectors, too, where similar GT&C clauses are used.

Government funding and tax breaks for electric vehicles from 2024 – an overview

In 2024, the German government will continue to make funds available for electromobility, although the level of the funding will be below that of previous years. Moreover, it will still be possible to save tax with electric motor vehicles. The graphic provides an overview of the rules that will apply in 2024.

Previous funding for plug-in hybrids and expensive new vehicles has thus been completely eliminated. Moreover, since 10.9.2023, only private individuals have still been able to apply for funding. Enterprises, trusts, corporate entities and clubs will no longer receive an environmental bonus for their company cars.

Please note: In the future, all electric cars that are registered for the first time by 31.12.2030 will also be exempt from motor vehicle tax for ten years. Moreover, even if there is a change in the vehicle's registered keeper this exemption will not expire. For example, anyone who acquires an electric car that has been registered for three years will be exempt from paying motor vehicle tax for another seven years.

	2024	
Vehicle type	Net list price	Environmental bonus
purely battery electric vehicles & fuel cell vehicles (Minimum holding period 12 months) **& leased vehicles** with a term from 24 months	< €40.000	€3.000 *from the state* + €1.500 *from the manufacturer*
Leased vehicles with terms 12-23 months	< €40.000	€1.500 *from the state* + €750 *from the manufacturer*
Nearly new cars		€2.400 *from the state* + €1.200 *from the manufacturer*

EU Commission presents SME Relief Package

Small and medium-sized enterprises (SMEs) are a key driver of Europe's green and digital transitions. For this reason, the EU Commission wants to relieve the burden on SMEs and it thus presented proposals, firstly, on late payments in commercial transactions and, secondly, on simplified VAT rules for cross-border activities.

The aim of the new Regulation on combating late payment in commercial transactions (cf. EU Commission press release of 12.9.2023) is to curb the widespread practice of delaying payments because these then compromise the cash flow of SMEs and, moreover, deplete competitiveness and the resilience of supply chains. That is why a stricter maximum payment limit of 30 days will be introduced. Furthermore, an automatic payment of accrued interest and compensation fees would also be ensured. In addition, new enforcement and redress measures will be introduced to protect companies against bad payers.

The new Directive on simplified VAT rules is intended for SMEs that are involved in cross-border activities. It will ensure that SMEs will be able to calculate the tax assessment basis of their permanent establishments in other Member States in accordance with the provisions of their home Member State. Once most of the Member States have agreed, the new provisions will apply from 1.1.2025.

Please note: The EU Commission is planning further, non-legislative measures, such as reducing the reporting obligations, simplifying access for SMEs to funding as well as enabling a skilled workforce for SMEs by continuing to support training actions.

AND FINALLY...

“AI will probably most likely lead to the end of the world, but in the meantime, there‘ll be great companies.“

Samuel H. Altman (born on 22.4.1985), US American entrepreneur, investor and programmer. He is the CEO of OpenAI. In May 2023, Altman remarked at a US Senate hearing that AI generators such as Open AI entail huge risks. He suggested that a regulatory body should be set up. The possibilities of the new technology are however far greater than the risks.

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