PKF

# Newsletter

**Key Issue**

Tax Incentives for Electromobility

06|19

# Dear Readers,

According to a recent study, two-thirds of the German population see the future in electric cars. Nevertheless, there are still great misgivings about actually making a purchase because only around 30% of them want to buy an electric car in the next five years. Tax incentives for electromobility could help consumers to overcome their reluctance to buy. In the first contribution in our Tax section, as the Key Issue for this edition, you will find a summary of the most important points about the planned legislative changes and – for electrically mobile taxpayers – the pleasing opinion of the tax authorities **on so-called job bikes**.

The second article concerns **consolidated VAT groups**. After a systematic overview we take a close look at the implications of partnerships being on an equal footing in this regard since the start of the year. Subsequently, we report on the important need to **amend legacy profit transfer agreements** that will no longer be covered by the fairness rule.

In other tax-related articles you can read the latest news on **tax relief for income from business activities** (in particular, about the extent of the restrictions on the tax credits that can be offset). Moreover, we discuss the **description of items supplied that is shown on invoices** for goods in the low-price segment – you can potentially expect fewer formal requirements here.

The first report in the Legal section clarifies the issue for German private limited companies (GmbH) of the extent of management powers in the case of especially important business transactions and the legal consequences that arise if these powers are exceeded. Next up, there is an analysis of data protection and whistleblowing, which stand at the crossroads of conflicting employment law priorities, with a view to determining the extent to which employees may, in principle, request access to and a copy of the personal performance and behavioural data that is held about them. Finally, **we report on the consequences of unauthorised deposit-taking** under the German Banking Act, which can extend to personal liability for damages for a managing director.

With our best wishes for an interesting read.

Your Team at PKF

# Key Issue

Tax incentives for electromobility

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## Latest Reports

TAX

WP/StB [German public auditor/ tax consultant] André Jänichen

# Tax incentives for electromobility

Electromobility is considered to be one of the key elements for sustainable and climate-friendly transport based on renewable energies. On 8.5.2019, the Federal Ministry of Finance *(Bundesministerium der Finanzen, BMF)* published a draft bill for the proposed "Act to promote further tax incentives for electromobility and to amend other tax regulations". A short overview of the main contents of the draft bill is set out below. In this connection, there is also a discussion of the provision of (electric) bikes by employers that has been newly regulated with the identical decrees of the highest tax authorities of the federal states (Länder), from 13.3.2019.

## 1. Contents of the draft bill from 8.5.2019

Against the background of a significant reduction in the CO2 emissions and pollution caused by road traffic, the draft bill contains the following measures, in particular, with respect to fiscal incentives for promoting environment-friendly mobility:

- the tax exemption for the benefits granted by employers for the electric charging of electric or hybrid vehicles at the workplace of the employer or affiliated companies and for providing company charging devices for temporary private use would be extended until the end of 2030;
- a new flat-rate tax on season tickets at 25% paid by employers and without employees having to reduce their distance-related tax allowance;
- special depreciation on new all-electric delivery vehicles acquired after 31.12.2019 in the amount of 50% of the cost of acquisition in the year of purchase (Section 7c of the German Income Tax Act – Draft (*Einkommensteuergesetz-Entwurf, EStG-E)*);
- the halving of the assessment base for company car taxation for the private use of company electric vehicles or externally rechargeable hybrid electric vehicles has been extended to cover purchases made up to and including 31.12.2030;
- the introduction of a halving of trade tax add-backs of hiring or leasing expenses for electric vehicles or externally rechargeable hybrid electric vehicles as well as for bikes that are not deemed to be motor vehicles (Section 8 no. 1d clause 2 of the Trade Tax Act – Draft

*(Gewerbesteuergesetz-Entwurf, GewStG-E))*. The provision should only be applied to amounts that are based on contracts concluded after 31.12.2019 and would be valid for the last time for the 2030 reporting period (Section 36(3) GewStG-E);
- the tax exemption for the non-cash benefit of a(n electric) bike being provided by an employer, in addition to the remuneration that will in any case be due (Section 3 no. 37 EStG), would be extended until the end of 2030 as well as the
- corresponding extension of the parallel exemption provision in Section 6(1) no. 4 clause 6 EStG for the private use of a company (electric) bike.

Furthermore, other concessionary or relief measures are planned that will provide, among other things, procedural simplifications for employers, support measures to ease the pressures on the housing market as well as tax relief for employees:
- the introduction of a new flat-rate allowance for commercial drivers,
- increase in the lump-sum allowances for subsistence expenses,
- income tax exemption for benefits in kind in the context of alternative housing options (e.g. "*Wohnen für Hilfe*" or "Homeshare"),
- the introduction of a valuation adjustment for staff housing and
- the introduction of a reduced VAT rate for e-books.

Furthermore, measures to combat tax structuring and safeguard the tax revenue as well as mandatory adaptations to EU law and ECJ case law have also been included. The latter essentially comprise the so-called quick fixes (measures urgently requiring national transposition that are related to the VAT system in the EU):
- direct deliveries to consignment warehouses,
- chain transactions and
- intra-Community supplies.

Finally, the clarification of outstanding issues as well as consequential amendments, the correction of errors and other editorial amendments constitute other elements of the draft bill.

**Please note:** The draft bill with the processing status as at 8.5.2019 has been published on the BMF website.

## 2. New BMF circular on the provision of (electric) bikes

Demand for so-called "job bikes" is growing steadily. Company bicycles have proven to be successful as innovative tools for employee recruitment and have opened up an opportunity for employers to provide an environmentally-friendly alternative to company cars. Furthermore, the German government is promoting the provision of (electric) bikes from a tax point of view (cf. section 1). On 13.3.2019, the BMF published an identical decree of the federal states on the provision of (electric) bikes. This replaces the previous identical decree of the federal states from 23.11.2012. The principles discussed below are applicable here (updates within the framework of the draft bill are pointed out in each case).

### 2.1 The type of provision is key

There are tax concessions available for the benefit that arises from the provision of a company bicycle that is attributable to an employer. The bicycle does not have to be owned by the employer but, in fact, it can also be one that has been hired or leased by the employer. However, the ownership may not be transferred to the employee; it would also be detrimental from a tax point of view if the employee were the beneficial owner (Section 39 of the German Fiscal Code). Such a case would be deemed to exist if, for example, internally, the employee had the main rights and obligations of a lessee and alone incurred the risk and liability for maintenance, material defects, destruction and damage.

**Please note:** The tax exemption applies to employees. To this end, the definition of an employee is the one used under German tax law and, accordingly, the exemption provision applies to mini jobbers or shareholding managing directors even if they are not classed as employees under social security law.

### 2.2 Cases without salary conversion

If bicycles or e-bikes are provided in addition to the remuneration that will in any case be due, i.e. 'on top', then this would constitute neither remuneration nor a gift for the purposes of the € 44 exemption limit and would also not be subject to social insurance. According to the BMF circular, the tax exemption is applicable for the first-time provision of bikes after 1.1.2019 until 31.12.2021 and, according to the draft bill from 8.5.2019, would even apply until the end of 2030 (Section 52(4) EStG-E). The intention is to acknowledge the fact that the employer is providing a genuine additional benefit.

**Please note:** The tax exemption can also be transferred to the self-employed and freelancers if the bicycle is a business asset. The 'withdrawal for private use' approach would not apply. Nevertheless, it remains to be seen

here if the non-recognition as a withdrawal will also be extended to VAT.

### 2.3 Cases with salary conversion

If (electric) bikes are provided via salary conversion, or if the bike in question is classed as a motor vehicle under transport guidelines, then providing such bikes gives rise to non-cash benefits that have to be valued on the basis of the so-called 1% rule. For the first-time provision of bikes in the period from 1.1.2019 until 31.12.2021, the value of the non-cash benefit has to be determined on the basis of 1% of the manufacturer's halved recommended retail price, rounded off to the nearest € 100 (the so-called "0.5% rule"). Here, the draft bill from 8.5.2019 also provides for an extension to this rule until the end of 2030 (Section 52(12) EStG). Moreover, in this case, no use is made of the € 44 exemption limit either.

If the company bicycle was already provided to an employee for private use prior to 1.1.2019 then the application of the full 1% rule will remain unchanged.

**Recommendation**

Non-cash benefits from providing (electric) bikes arise not only within the scope of provision for use by the employer but, in fact, could also occur in a potential subsequent discounted transfer of ownership of the (electric) bike (also in the case of transfer of ownership by third parties, such as any leasing companies). Flat-rate taxation could be possible here. The contract models should therefore be carefully scrutinised in order to avoid having to make additional payments subsequently.

StBin [German tax consultant] Elena Müller

# Consolidated VAT groups with a partnership as a subsidiary company as of 1.1.2019

Between 2015 and 2017, the European Court of Justice and the Federal Fiscal Court subjected to a judicial review several VAT regulations in relation to consolidated VAT groups. The Federal Ministry of Finance *(Bundesministerium der Finanzen, BMF)*, in its circular from 26.5.2017, responded to the amendments in case law concerning the establishment of a consolidated VAT group and has applied this bindingly since 1.1.2019.

### 1. General information

If a legal entity, as a subsidiary company, is integrated financially, economically and organisationally into the parent company within the actual overall circumstances of a business then this automatically gives rise to a consolidated VAT group. The subsidiary company loses its autonomy and thus its commercial status. The result is that the parent company then has to report all the transactions and input tax for the group that has been consolidated for tax purposes and it also becomes the sole party that is liable to pay the VAT. The legal form of the parent company does not matter here.

**Please note:** You will find more information on the subject of consolidated VAT groups in the PKF Newsletter 7+8/2017. The BMF circular from 26.5.2017 can be downloaded at www.bundesfinanzministerium.de. (German version only).

### 2. Important changes as of 1.1.2019

Previously, while companies with all kinds of legal forms could indeed be parent companies, in the case of subsidiary companies this was limited to legal entities. As of 1.1.2019, partnerships can now also be subsidiary companies if they are integrated financially, economically and organisationally. This applies not only to a GmbH & Co. KG [a German limited partnership with a limited liability company as a general partner] but also to a KG *[German limited partnership*], an OHG *[German ordinary partnership]* and a GbR *[company under German civil law]*. If the conditions are met then this automatically gives rise to a consolidated VAT group.

### 3. The specific integration criteria

**(1) Financial integration** shall be deemed to exist if the parent company is able to enforce its will in the subsidiary company by majority decisions. For the financial integration of corporations this criterion would be fulfilled in the case of more than 50% of the voting rights of the subsidiary company (absolute majority). By contrast, in the

case of a partnership it would be necessary for the parent company to have an indirect or direct 100%-shareholding in the partnership. This is because this is the only way to secure the possibility of intervention that is required even if the unanimity principle is applied.

**(2) Organisational integration** shall be deemed to exist if the parent company is actually able to enforce its will in the company through organisational measures. It is no longer sufficient for decision-making in the subsidiary company that is at variance with the wishes of the parent company to be excluded. Furthermore, the management personnel have to be shared between the parent company and the subsidiary company. However, if the managing directors at the parent company and the subsidiary company are not the same people then, as of 1.1.2019, organisational integration can be achieved through an agreement (management rules, group corporate guidelines or an employment contract). Moreover, in the case of corporations, organisational integration would be deemed to exist if a control and profit transfer agreement were to be available. Generally, in a deviation from the previous regulation, a consolidated VAT group shall cease to exist upon the opening of insolvency proceedings pertaining to the assets of the parent company as well as of the subsidiary company.

**(3) Economic integration,** whereby an enterprise is affiliated with another and is thus a subsidiary company, is deemed to exist if, according to the will of the parent company, the enterprise is economically active throughout the corporation. There has been no change here as a result of the above-mentioned new rules.

## Please note

The existence of a consolidated VAT group can entail both advantages as well as disadvantages. For example, in the case of a consolidated tax group that is not recognised, considerable risks under tax law and criminal law could arise in the company in relation to the tax liability, the right to deduct input tax, tax responsibility, tax evasion as tax avoidance and the tax declaration obligations. Therefore, for newly assumed VAT group cases the organisational basis has to be created in good time. Retroactive restructuring for the purpose of eliminating a consolidated VAT group is however not possible.

StBin [German tax consultant] Sabine Rössler

# An end to the fairness rule for legacy profit transfer agreements

According to a new Federal Ministry of Finance *(Bundesministerium der Finanzen, BMF)* circular, from 3.4.2019, profit transfer agreements that have hitherto included no reference to the application of Section 302(4) of the Stock Corporation Act *(Aktiengesetz, AktG)* (statute of limitations clause) will no longer be protected by the BMF's fairness rule in its circular from 16.12.2005. The profit transfer agreement in legacy contracts without such a reference will have to be amended by including a dynamic reference to Section 302 AktG and this will have to be entered in the commercial register by 31.12.2019.

## 1. Previous reference to Section 302 AktG

According to Section 17 clause 2 no. 2 of the Corporation Tax Act (Körperschaftsteuergesetz, KStG), a particular prerequisite for the recognition of a consolidated tax group for tax purposes is an explicit agreement on loss absorption with reference to the provisions of Section 302 AktG. A new statute of limitations rule was added to Section 302 in para. 4 AktG on 9.12.2004. Subsequently, profit transfer agreements that had been concluded prior to 1.1.2006 were recognised for tax purposes by the German tax authorities in a BMF circular from 16.12.2005 (case reference: IV B 7 S 2270-30/35) even if they did not include a reference to this Section 302(4) AktG. According to the view of the BMF, these legacy contracts did not have to be adjusted.

## 2. New versions of profit transfer agreements and the dynamic reference

However, according to this BMF circular from 2005, new agreements had to be structured in such a way that they either referred generally to Section 302 AktG or included useful citations from paragraph 4 of the Act.

In 2013, Section 17(1) clause 2 KStG was supplemented with the phrase "as amended" (dynamic reference). It was possible to subsequently add this dynamic reference to existing profit transfer agreements until 1.1.2015. This subsequent addition did not result in the "conclusion of a new contract" so that the five-year limit for the recognition of contracts for tax purposes did not have to start once again.

From the point of view of the tax authorities, legacy contracts from the period prior to 1.1.2006 were spared this adjustment period.

### 3. Federal Fiscal Court clarified legacy cases, too

The Federal Fiscal Court *(Bundesfinanzhof, BFH),* in it ruling from 10.5.2017 (case reference: I R 93/15) then reiterated that there was an obligation to refer to the statute of limitations clause in a profit transfer agreement and, where necessary, to insert this subsequently. The supreme court expressly rejected the application of the BMF circular from 16.12.2005. The BFH has explicitly excluded recognising a consolidated tax group in spite of the missing reference.

### 4. The BMF's new application rules

The BMF responded to the new ruling in its circular from 3.4.2019 (case reference: IV C 2 – S 2770/08/1000). According to this, the tax authorities will no longer tolerate contracts without the correct reference. By the end of 31.12.2019, a dynamic reference will have to be added to all existing legacy contracts that were previously covered by the fairness rule in the BMF circular from 16.12.2005. These adjustments will not constitute newly concluded contracts either. Adjustments will no longer have to be made solely in the case of tax group relationships that will cease to exist prior to 1.1.2020

**Recommendation**

If you have not already done so then by 31.12.2019, at the very latest, you will have to add a dynamic reference to Section 302 AktG to profit transfer agreements that were concluded before 1.1.2006.

StB [German tax consultant] Steffen Heft

# Update on tax relief for income from business activities

The provision under Section 35 of the Income Tax Act *(Einkommenssteuergesetz, EStG)* makes it possible to partially offset trade tax credits against income tax in order to reduce the double burden of taxation of commercial income with respect to income tax and trade tax. Nevertheless, there are restrictions on the tax credits that can be offset that should be taken into account.

### 1. Restrictions on tax credits that can be offset

Under Section 35(1) EStG the offsetting of tax credits is limited to

- a maximum amount of reduction –
- 3.8 times the trade tax base value and
- the actual amount of trade tax that has to be paid –

whereby the lowest value will be applicable in each case. To-date, if a taxpayer owned several business enterprises or held commercial partnership stakes or a stake in a multi-level commercial partnership it was disputed whether or not the comparison between the actual amount of trade tax that had to be paid and 3.8 times the trade tax base value (and thus the corresponding limit to the amount that could be offset) had to be determined

- separately for each enterprise (business-related approach), or
- jointly for all the taxpayer's enterprises and partnership stakes (company-specific approach). This question is particularly important if the taxpayer owns several enterprises or holds partnerships stakes that are based partly in municipalities where the trade tax multiplier is < 400% and partly in municipalities where the trade tax multiplier is > 400%.

The Federal Fiscal Court *(Bundesfinanzhof, BFH)*, in two rulings from 20.3.2017 (case references: X 12/15 and X R 62/14) decided in favour of the business-related approach. As a consequence of this the tax authority updated the Federal Ministry of Finance *(Bundesministerium der Finanzen, BMF)* circular on tax relief for income from business activities, from 3.12.2016, (published in the German Federal Tax Gazette *(Bundessteuerblatt, BStBl)* I p. 1187) in the BMF circular from 17.4.2019, where it took account of the above rulings that are unfavourable for taxpayers.

**Please note:** By contrast, the maximum amount of reduction under Section 35(1) clause 2 EStG is not a business-related factor but instead a personal one (cf. BFH ruling from 23.6.2015, case reference: III R 7/14).

### 2. Business-related approach in the case of multi-level partnerships

In the case of multi-level partnerships, the reduction in the amount of tax is restricted to the actual amount of trade tax that has to be paid as determined under the business-related approach and separately for the controlling company and each controlled company.

**Example:** A holds a 100%-stake in A-KG *[German limited partnership]* and, in turn, it holds a 100%-stake in B-KG. The latter generates a trade tax base value of 100 and pays trade tax of 350 (multiplier: 350%). A-KG likewise generates a trade tax base value of 100 and pays trade tax of 450 (multiplier: 450%). This means that,

- at the level of B-KG, 3.8 times the trade tax base value is 380, which is greater than the 350 of trade tax that was actually incurred. The amount that can be offset is 350.
- At the level of A-KG, 3.8 times the trade tax base value is likewise 380, which is less than the 450 of trade tax that was actually incurred. The amount that can be offset is 380.
- The total amount that A is able to offset will thus be 730.

**Please note:** Under the company-specific approach, 3.8 times the cumulative trade tax base value of 200 (100 + 100) would thus be 760 compared with the cumulative trade tax of 800 (350 + 450). Consequently, the amount that could be offset here would be 760 and would thus be greater than the amount calculated under the business-related approach.

### 3. Procedure for multi-level partnerships

Procedurally, the trade tax base values and the actual amount of trade tax that has to be paid have to be determined separately at each shareholding level as well in a standard way and have to pass through to the top to the ultimate shareholder. In the course of this, the amounts that originate from the subordinated shareholdings have to be included in the amounts that have to be determined at each next level. In the above example, for A, at the level of A-KG a (cumulative) trade tax base value of 200 and trade tax of 800 would have been bindingly determined. The amounts, determined in a standard way, only then have to be split up again into their individual elements within the scope of a tax assessment for A.

*Please note*

The BMF circular from 17.4.2019 should generally be applied as of the 2020 assessment period, although it was not clear from the previous BMF circular, from 3.12.2016, whether or not the business-related approach for multi-level partnerships had already constituted the administrative opinion up to now. At any rate, in the case of several commercial units “side by side” (e.g. direct stakes in two partnerships) the tax authorities had hitherto advocated a business-related approach.

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

# The description of items supplied that is shown on invoices for goods in the low-price segment

The question as to whether for input tax deductions from invoices in the low-price segment it is necessary to provide information on the type of items that were supplied using the usual commercial descriptions, or whether it is sufficient to state the category of goods, was recently a focus for The Federal Fiscal Court *(Bundesfinanzhof, BFH)*. The Munich-based judges, in their decision from 14.3.2019 (case reference: V B 3/19), expressed serious doubts about whether or not it was possible to request more than the category of the goods.

### 1. A case from the wholesaling industry

A wholesaling company operating in the low-price textiles

segment had claimed deductions of input tax amounts from invoices where the items were described using only terms such as t-shirts, dresses, tops, etc. The tax authority did not permit the company to deduct the input tax because merely providing the product category does not constitute using the usual commercial description and thus does not satisfy the requirements for a properly prepared invoice. Following the failure of the appeal process, the company applied for a suspension of enforcement. The tax court rejected the application for a suspension and, in turn, the company lodged a complaint against this. In its ruling, the BFH seriously called into question the lawfulness of disallowing the input tax deduction and annulled the decision of the tax court.

### 2. Fewer requirements for the description of items supplied in the low-price segment and the violation of EU law

In the view of the BFH, the fact that no supreme court rulings on requirements for the description of items supplied in the low-price segment are yet available already gave rise to serious doubts about the lawfulness of the notices of VAT assessment. Moreover, in the past, tax courts had provided various answers to this question. In a ruling from 29.11.2002 (case reference: V B 119/02), the BFH had held the view that in the case of expensive clocks and watches merely stating the category would not be sufficient.

Although, according to the recently issued ruling, there is a need to clarify the extent to which fewer requirements should be applied to the description of items supplied in the low-price segment. In the case of large purchases of various goods at low unit prices the effort involved in specifying the description of the items supplied could be disproportionate.

Furthermore, the BFH pointed out that, in the case in question, the relevant national rules could potentially be contrary to EU law. The German VAT Act requires that the "usual commercial description" of the item has to be shown on the invoice, while EU law stipulates that this merely has to be the "type of items that have been supplied".

**Recommendation**

The case in question was merely a complaint against the suspension of enforcement and was thus not suitable for definitively clarifying the legal issues that were raised. It thus remains to be seen what the ruling will be in the main proceedings. In order to avoid problems with the tax authorities, when verifying invoices importance should be attached to the specific usual commercial description of the goods.

## LEGAL

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

# The GmbH (private limited company) – Approval when selling all of the assets

To-date, the extent of management powers in the case of especially important business transactions and, in particular, the legal consequences that arise under Limited Liability Company Law (GmbH law) have been disputed. In this respect, the Federal Court of Justice (*Bundesgerichtshof, BGH)* recently stated its opinion in a landmark decision and clarified the most important legal issues (ruling from 8.1.2019, case reference: II ZR 364/18).

### 1. Stock corporation law is not analogously applicable

Under Section 179a of the Stock Corporation Act *(Aktiengesetz, AktG)*, the mandatory requirement for a contract for the transfer of the entirety of a stock corporation's assets is a resolution by the general meeting that then has to be certified by a notary. If there is no such resolution then the contract that has been concluded by the executive board would be invalid. It was frequently assumed that under analogous application this would also be valid for a GmbH.

However, the BGH has rejected this. Given that there is a lesser need to protect GmbH-shareholders, this – in any case anomalous – provision is not transferable to a GmbH. A contract for the entire assets of a GmbH that has been concluded by its management would therefore not be invalid from the outset.

### 2. The need for approval under GmbH law

Nevertheless, under GmbH law the management is also obliged to bring about an affirmative resolution by the shareholders' meeting for especially important transactions. The transfer of a company's entire assets undoubtedly constitutes such a transaction. Incidentally, this will also apply if the respective right to reserve approval is not regulated in the company agreement.

### 3. Legal consequences if there is a lack of approval

Limitations of the powers of representation of the management body generally have no implications for the external relationship. If a managing director thus acts within the scope of his/her powers as recorded in the commercial register then, in principle, a legal transaction would be valid even if the approval requirements had been disregarded. The managing director would then potentially become liable to pay compensation to the GmbH.

This would not apply only if the contractual partner had known or ought to have simply recognised that the managing director was abusing his/her power of representation. The contractual partner would then not be worthy of protection and would not be able to derive any contractual rights or defences from the transaction. In this respect, it can be sufficient if the contractual partner had known that the transaction encompassed the company's entire business assets.

**Recommendation**

Particular caution is required with respect to legal transactions with a GmbH if a transfer can comprise its entire assets. Under certain circumstances, this could mean a single asset (e.g. property, shareholding). In such a case, reassurance should be sought that the shareholders have approved the transaction.

RA [German lawyer] Johannes Springorum

# Data protection and whistleblowing at the crossroads of conflicting employment law priorities

According to a ruling of the state labour court *(Landesarbeitsgericht, LAG)* of Baden-Wuerttemberg, from 20.12.2018 (case reference: 17 Sa 11/18), employees may, in principle, request access to and a copy of the personal performance and behavioural data that employers hold about them. This shall also apply even if the identity of a whistleblower, who has been anonymous until then, is uncovered in this way.

### 1. The case in question – A request for information about informants

An employer in the automotive sector had wanted to get rid of a legal staff member in the legal department since 2014. Despite unsuccessful performance reviews, written warnings, notices of termination (pending a change of contract) and mediation, the employee had insisted on the continuation of the employment relationship. Moreover, he attempted to find out the source of incriminating information about him in the employer's internal whistleblower system. The employer refused to hand over this information and made reference to the protection of the legitimate interests (preserving the anonymity) of the whistleblowers.

### 2. Reasons for the decision on the right of access

The court essentially allowed the action for unfair dismissal, as it was not able to identify viable justifications for the employment law-related measures.

The court's guidelines on an employee's right of access to his or her personnel file about internal investigations and/or the handing over of copies were of considerable interest for compliance practice. Here, the court's definition of a personnel file was "any collection of documents that have an internal connection to the employee, regardless of the form, material, designation or classification as a special file or a subsidiary file" and was thus very broad and comprehensive. In addition, it was expressly established that:

- employees are able to base their right of access on Article 15(1) GDPR;
- specific reasons, pointers or triggers for this right are not required;
- for the right of access it is sufficient that the employer stores personal data.

However, according to the court, there could be a conflict with the legitimate interests of third parties within

the meaning of Section 34(1) in conjunction with Section 29(1) clause 2 of the Federal Data Protection Act. According to the court, under Article 15(4) GDPR, the right to obtain a copy is usually limited by the rights and freedoms of others; although, if grounds for secrecy do exist then these would not necessarily result in the right to refuse the requested access.

The blanket reference by the defendant employer to the need to protect informants (for example, anonymity) was however too general to restrict the respective right of the employee.

### 3. Recommendations for action for employers

In practice, employers should introduce measures to protect whistleblowers and informants that make it possible to create a reasonable balance between confidentiality for the whistleblowers and the resolution of operational misconduct. In the case of information from staff about the operational misconduct of other employees, if an informant is granted anonymity by the employer then the latter may not disclose data that could allow any conclusions to be drawn as to the person of the informant. Secret files are nevertheless not permissible, instead these sections in the personnel files would have to be omitted, redacted or otherwise technically obliterated.

## Outlook

The EU is steadily driving forward its whistleblower protection and a new directive is still expected in this respect in 2019. At the beginning of 2019, the German Trade Secrets Act was passed according to which it is legitimate to uncover illegal activity or professional misconduct if the general public interest would be protected by the information of an employee. In the problem area of data protection vs. whistleblower protection there are still numerous unresolved issues and, therefore, the viewpoint of the Federal Labour Court is likely to be highly anticipated. In any case, the LAG Baden-Wuerttemberg has permitted an appeal.

RAin/StBin [German lawyer/tax consultant] Dany Eidecker

# Does accepting a loan constitute unauthorised deposit-taking under the German Banking Act?

A loan agreement can be rapidly concluded, however, it is often not known that when accepting a loan it is possible that this could be deemed to be unauthorised deposit-taking within the meaning of the German Banking Act *(Kreditwesengesetz, KWG).* This could however have far reaching consequences. You should therefore check what is deemed to be deposit-taking and/or how this can be avoided.

### 1. Deposit-taking – Definition and avoidance

Deposit-taking within the meaning of the KWG exists if funds from others are accepted as deposits or other unconditionally repayable funds are accepted from the public, unless the claim to repayment is securitised in the form of bearer or order bonds. The public is broadly defined here and refers to the source of the funds that are accepted and generally means all funds that are provided by third parties. These do not include loans from shareholders that are granted on account of fiduciary duties or subordination. Nevertheless, from the point of view of the German Federal Financial Services Supervisory Authority *(Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin),* not all financing instruments and types of company are innocuous. In the case of public corporations, for example, the shareholders are simply capital providers. There-

fore, shareholder loans to a public corporation could constitute deposit-taking.

Lending transactions between affiliated companies do not generally constitute deposit-taking. However, this does not apply to loans extended between sister companies if they are not connected under company law. In such cases, the provision of appropriate collaterals or a qualified subordination agreement can prevent the occurrence of the conditions for deposit taking.

### 2. Consequences of unauthorised deposit-taking

Deposit-taking needs the authorisation of BaFin when it is conducted commercially or requires a commercial business organisation. If companies conduct unauthorised deposit-taking then BaFin can order the immediate cessation of the business. Unauthorised deposit-taking carries a penalty of up to five years in prison. Furthermore, unauthorised deposit-taking can result in personal liability for damages for a managing director if the lender drops out in the course of the insolvency of the borrower (so-called *Winzergeldentscheidung* [ruling on wine growers funds] by the Federal Court of Justice).

**Recommendation**

Prior to accepting a loan, managing directors should check if the lending transaction constitutes deposit-taking within the meaning of the KWG. For your assessment you can download the BaFin fact sheet, from 11.3.2014, *Hinweise zum Tatbestand des Einlagengeschäfts* (Indications which point to deposit-taking) at www.bafin.de.

## LATEST REPORTS

RAin [German lawyer] Yvonne Sinram

# Payroll tax liability – Recourse claims against employees

Employers are obliged to withhold and transfer payroll tax. If it subsequently transpires (e.g. in the course of a payroll tax audit) that the employer had transferred too little payroll tax then the employer would be liable for the deficit vis-à-vis the tax office.

However, the employee would still be the sole party that is liable for the tax, which is why employers are able to claim exemptions and refunds from employees for the payroll tax that is subsequently paid. Nevertheless, according to the Federal Labour Court in its ruling from 14.11.2018 (case reference: 5 AZR 301/17), the claim only becomes due once the tax has been paid or the notice of liability has become final. Therefore, prior to that, neither a contractual or collective preclusive period can come into effect nor can the claim lapse.

**Please note:** Employers then also have a genuine chance of obtaining a refund if an employee has already left the company and offsetting the amount from the regular salary payments has been ruled out.

StB [German tax consultant] Kai Vörckel

# Restriction to child benefit entitlement in the case of vocational training and employment

Recently, the Federal Fiscal Court *(Bundesfinanzhof, BFH)*, in its ruling from 11.12.2018 (case reference: III R 26/18) clarified whether or not entitlement to child benefit still exists if the (adult) child is in employment. The case concerned a daughter who was not yet 25 years old, and, having completed a "dual course" of study, had commenced a master's degree programme that would last five semesters. Moreover, one month after starting the master's degree programme, she entered into a full-time employment relationship with the company where

she had previously done her vocational training. The BFH stipulated that a distinction needed to be made between the initial vocational training as well as the employment pursued alongside that and any work-related further training that is undertaken (second course of vocational training). If the employment already constitutes the principal activity then further training is deemed to exist and not initial vocational training as a whole. For an overall assessment of the situation the BFH used the following particular indicators:

- agreed duration of the employment relationship,
- the extent of the agreed working time,
- the ratio between the time spent working and on training measures.

**Please note:** Furthermore, according to the BFH, there should be a review to determine if the professional activity that is being carried out on the basis of the qualification obtained from completing the initial training course actually requires the training measures and to what extent. Moreover, there should be a check to see whether or not these measures are mutually compatible with the professional activity in terms of time/contents.

RAin [German lawyer] Sonja Blümel

# New obligations for employers with respect to the recording of working time – is the return of the punch clock looming?

The ECJ recently made a decision on the recording of working time that will radically affect employers and obliges EU member states to draw up appropriate guidelines.

The ECJ judgement from 14.5.2019 (C-55/18 Federación de Servicios de Comisiones Obreras (CCOO) / Deutsche Bank) concerned a Spanish employer. It was decided that the latter has to set up a system to record the number of hours worked by employees and to register all the working time in it. A trade union had brought an action against a Deutsche Bank subsidiary with the aim of obliging it to introduce such a time recording system. Imposing such an obligation on the employer is the only way to be able to check whether or not the maximum permissible working hours have been exceeded and rest periods have been adhered to. Moreover, only such regular checking will guarantee the workers' rights that have been assured under EU law.

The specific case did indeed relate to Spain. However, the legal situation in Germany is similar. Over here, it is only the working hours over and above the daily maximum permissible number of eight hours that have to be recorded and not the overall number of working hours. Therefore, it cannot be ruled out that this ruling will be implemented in Germany. In such a case, companies that do not yet systematically record the hours worked would be at risk of far reaching consequences, such as, a considerable increase in administrative expenses, costs of a time recording system and the additional costs for the overtime that would then be documented and for which compensation would be required. The advantages of the popular system of trust-based working hours would disappear.

**Please note:** The extent to which this ruling will be implemented in Germany remains to be seen. This judgement was aimed at EU states first of all and not directly at employers.

## AND FINALLY...

*"Given the level of drivers' salaries these days, as an American I'd have probably sued my mother for giving birth to me far too soon."*

**Andreas Nikolaus "Niki" Lauda,** 22.2.1949 – 20.5.2019, Austrian race car driver and pilot. Between 1971 and 1985, he started in Formula 1 and was a three-time world champion.

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