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## Germany

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- (b) the law of one of the countries where the parties are at the time it is concluded.

In contracts concluded through an agent, the principal is deemed to be where the agent acts.<sup>16</sup>

## B. LAW OF THE COUNTRY MOST CLOSELY CONNECTED WITH THE CONTRACT

In the absence of an express choice of law, the contract is ruled by the law of the country with which it is most closely connected.<sup>17</sup> The Convention establishes the following presumptions regarding close connections:

- (a) the country of the party who must provide the most characteristic performance—for a juridical person the place of its central administration is taken into account;<sup>18</sup> and
- (b) the place where the real estate is situated when the object of the contract concerns a real right or a right to use real property.<sup>19</sup>

However, all such presumptions are set aside when it becomes clear from all the circumstances that the contract has closer ties with another country.<sup>20</sup> The Judgment of Versailles, on February 6, 1991, is one example.

Further, if one part of the contract is severable from the rest and it has closer ties with another country, such other law may be exceptionally applied to the severable part of the contract.<sup>21</sup>

# Germany\*

## I. East-West German Integration

### A. PRIVATIZATION

In fewer than four years after its formation the Berlin-based Treuhandanstalt (Treuhand) has almost completed its task of privatizing the formerly socialist Eastern German businesses. By the end of 1993, of an initial portfolio of approxi-

16. *Id.* art. 9-3, at 4.

17. *Id.* art. 4-1, at 2.

18. *Id.* art. 4-2, at 2.

19. *Id.* art. 4-3, at 2.

20. *Id.* art. 4-5, at 3.

21. *Id.* art. 4-1, at 2.

\*Prepared by lawyers of Bruckhaus Westrick Stegemann, Düsseldorf, Frankfurt am Main, Hamburg, Berlin, Brussels, Moscow, and Tokyo, and edited by Dr. Burkhard Bastuck, partner, New York and Düsseldorf. The report covers developments up until October 1993.

mately 13,200 businesses,<sup>1</sup> almost 13,000 privatization transactions had been concluded, leaving the Treuhand with fewer than 1,000 businesses and part of businesses, which for the most part are unmarketable.

The end of the Treuhand's regular business also marks a change in the institution's organizational structure. In the next few years the Treuhand will focus on four main areas of work:

- (1) contract management (monitoring of investors' obligations such as investment in new plant, creation of jobs, environmental clean-ups, contract renegotiations where necessary);
- (2) equity management (monitoring of Treuhand's remaining equity positions in companies);
- (3) management and sale of commercial and residential real estate (conducted through Treuhand Liegenschafts-Gesellschaft [TLG]); and
- (4) management and sale of agricultural and forest real estate (conducted through Bodenverwertungs- und Verwaltungs-Gesellschaft).

Still unclear at the time this report is written is whether all these activities will continue to be conducted by the Treuhandanstalt in its present form, that is by an independent agency, or whether one or the other activity will be transferred to and integrated into other governmental departments such as a particular federal ministry.

To attract international investors the Treuhand had opened a representative office in New York in 1991, but closed it down in the fall of 1993 along with other regional offices within Germany. According to Treuhand statistics more than 750 businesses, approximately 5 percent, went to foreign investors, primarily from other European countries, but also from the United States.

## B. COMPENSATION ACT ON HOLD

While the Act Concerning the Settlement of Open Property Issues (Property Act),<sup>2</sup> which defines the principles for the restitution of expropriated assets, already has undergone two major revisions, adoption of the Compensation Act has not made much progress in 1993. The Compensation Act's purpose is to regulate compensation in the event property is not returned for the reasons defined in the Property Act (such as change of use, bona fide acquisition by the current owner, and the like), a subject with which the Property Act does not deal.

After the Federal Ministry of Justice published a government draft of the Compensation Act in November 1992, opposition from many sides prompted the government several times to take the project off the agenda of pressing items to gain time for further deliberations. Opposition is fueled in particular by proposals to introduce relatively low caps for compensation and to impose a 30 percent

1. The initial number of approximately 8,000 businesses grew over the privatization process as sales of portions of businesses and restructurings of larger groups created new entities.

2. Gesetz zur Regelung offener Vermögensfragen.

one-time tax on claimants who receive their property back, which the government wants to use to finance the compensation claims. Former German citizens whose property was expropriated in the Nazi period, in particular Jewish citizens and their successors to whom the Compensation Act would apply as well, also opposed the one-time tax.

## II. Corporate Law: New TBB Decision Takes Steam out of "Piercing of the Corporate Veil" Debate

In the second half of the 1980s the Federal Supreme Court had handed down several decisions dealing with the concept of shareholder liability in a group of companies context.<sup>3</sup> These cases had caused some concern among corporate counsel, as they were seen as substantially broadening the piercing of the corporate veil doctrine, perhaps less so because of the facts presented in those cases than because of the rather broad wording used by the Court. However, a new decision<sup>4</sup> dealing with this area of the law has largely dispersed these fears.

The earlier decisions of the Court suggested that a shareholder might incur personal liability for the debts of a defunct company controlled by him if he engaged in a number of similar businesses all of which were centrally managed and guided by an overall group strategy. The new *TBB* decision more narrowly defines the "central management for an overall group purpose" test, imposing personal liability only in cases of unfair conduct to the detriment of the defunct company.

In the case at hand the defendant and his wife had owned and operated several construction companies that had fallen into bankruptcy. The defendant controlled some of the companies, his wife controlled others, and they controlled some jointly. When the whole group collapsed a creditor sued the husband for failure to perform a contract entered into with one of the companies, relying on the group liability test. The Federal Supreme Court reversed the lower court decisions finding in favor of the plaintiff creditor. According to the Court, its earlier decisions were not meant to create a new cause of action based merely on "the exercise of permanent and comprehensive control" of a group of companies, but liability remained predicated on the "misuse of control to the detriment of the controlled company's interests." The Court held that the burden of proof that some misuse of control has occurred remained with the plaintiff, except that in the appropriate circumstances a defendant who had intimate knowledge of internal group affairs might have to substantiate his defense in order not to be deemed to have admitted the accuracy of the plaintiff's allegations. As some of the facts remained unclear, the Court remanded the case back to the lower court for a continuation of the fact-finding process.

3. Judgment of Sept. 16, 1983, BGH, 95 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 330 (*Autokran*); Judgment of Sept. 23, 1991, BGH, 115 BGHZ 187 (*Video*).

4. Judgment of Mar. 29, 1993, BGH, 1993 Betriebs-Berater [BB] 814 (*TBB*).

Commentators have reviewed the new decision favorably.<sup>5</sup> While in *TBB* the Federal Supreme Court restores the shield of limited liability even in a group of companies context, special concepts such as central cash and debt management and pooling for a group of companies will continue to require careful planning and monitoring in order for shareholders to avoid the pitfalls of personal liability in a group context.<sup>6</sup>

### III. Tax Law

#### A. NEW LOCATION SECUREMENT ACT LOWERS CORPORATE TAX RATES

In July 1993 the German parliament passed the Act on the Improvement of Taxation Conditions to Secure the Position of Germany as a Location for Investment Within the European Single Market (Location Securement Act).<sup>7</sup> As its title indicates, the parliament intended the Act to improve the attractiveness of Germany as a place to do business by offering tax relief to business and industry in a number of areas.

While the Act introduces a host of changes in all areas of tax law, the most visible relief comes in the reduction of the corporate income tax rates. The Act lowers taxes for retained profits to 45 percent (down from 50 percent), and taxes for profits distributed as a dividend to 30 percent (down from 36 percent). Profits derived from German branches not incorporated as a company will in the future be subject to 42 percent income taxes (down from 46 percent).

#### B. NEW THIN CAPITALIZATION RULES

The Act contains various measures to help finance the loss of tax revenues resulting from the reduced income tax rates. In particular the Act establishes thin capitalization provisions limiting the tax benefits that may be derived from highly leveraged German subsidiaries. The Act introduced these thin capitalization provisions, which had been discussed since 1978, to ensure that German subsidiaries of German and foreign parent companies would be taxed equally without any distortion by arbitrary financial structures.

Under the old scheme, if the subsidiary was financed with equity, any dividends were subject to corporate income tax at the rate of 36 percent. When adding the 15-20 percent municipal trade tax on income, this resulted in a substantial income tax burden compared to tax levels elsewhere. While a German parent company would receive a corresponding tax credit for this dividend, such credit was not available to a foreign parent, which could only obtain a tax credit in its home

5. Kowalski, "*TBB*"—Rückkehr zu "Autokran"?—Korrektur der BGH-Rechtsprechung zur Haftung im qualifizierten faktischen GmbH-Konzern, 1993 GmbHR 253; Bauder, Note, 1993 BB 1103-04.

6. For detailed recommendations, see Kowalski, *supra* note 5, at 256-57.

7. Gesetz zur Verbesserung der steuerlichen Bedingungen zur Sicherung des Wirtschaftsstandorts Deutschland im Europäischen Binnenmarkt—Standortsicherungsgesetz.

country, but would usually end up paying the higher German tax rate. By contrast, if the German subsidiary was predominantly debt-financed, the interest payments on the debt were deductible as an expense and, thus, effectively exempt from German taxation. This provision had prompted many foreign parents to rely heavily on debt to finance their German subsidiaries.

While new section 8a of the Corporate Income Tax Code<sup>8</sup> introduced by the Location Securement Act, does not prevent companies from highly leveraging their German subsidiaries, it does place restrictions on the extent to which the more favorable tax treatment for interest payments applies. When subsidiaries make interest payments to a substantial foreign shareholder (that is, a foreign parent company), the payment will be considered a constructive dividend (a) if, in the event the payment is not calculated as a percentage of the principal amount of the loan (that is, is calculated as a percentage of profits<sup>9</sup>), the loan at any time during the fiscal year exceeded 50 percent of the shareholder's pro rata share in the company's equity or (b) if, in the event the payment is calculated as a percentage of the principal amount of the loan (that is, as interest), the loan at any time during the fiscal year exceeded three times the shareholder's pro rata share in the company's equity.

In short, profit distributions made on debt will now be recharacterized as dividends if the respective debt is 50 percent of equity (first alternative), and straight interest payments will be so recharacterized if debt is three times the amount of equity (second alternative).

The law goes on to define such concepts as "substantial shareholder" and "foreign company" and contains special rules on holding companies, temporary loss situations, and structures designed to circumvent the new rules. Foreign investors may be interested in the so-called holding privilege created by the law. If (a) a German corporation's main activity is the holding and financing of corporations or (b) more than 75 percent of the assets of a corporation consist of participations in other corporations, payments of interest on straight debt to its shareholder will be deductible to the extent that a shareholder loan does not exceed nine times the equity position of the respective shareholder in the holding company.

## IV. Banking and Financial Law

### A. MONEY LAUNDERING

On September 15, 1992, the Act to Fight Organized Crime<sup>10</sup> entered into effect and with it new section 261 of the Penal Code concerning money laundering. The new criminal provision ensures that criminal proceeds do not enter the legal flow

8. Körperschaftsteuergesetz.

9. The most common types of debt instruments used are silent partnerships (*stille Gesellschaft*) and participating loans (*partiarisches Darlehen*).

10. Gesetz zur Bekämpfung der organisierten Kriminalität of July 15, 1992, 1992 Bundesgesetzblatt, Teil I [BGBl. I] 1302.

of goods and moneys. To this end the law subjects to criminal prosecution any act suitable to conceal the true origin of money derived from crimes or to keep such proceeds away from the law enforcement process.

Even though the heading of the section refers only to money laundering, the scope of the new provision is much broader. It subjects to criminal punishment any person

who hides, conceals the origin, or impedes or jeopardizes findings on the origin or location, or impedes or jeopardizes the confiscation or securement of an object stemming from the felony of another, from the crime of another against drug legislation . . . or from a crime committed by a member of a criminal association.<sup>11</sup>

The crime is not limited to intentional conduct. Subsection 5 of the new provision also subjects to criminal punishment any of the above described acts if the person "due to his recklessness<sup>12</sup> did not know" that the object stemmed from a prior crime. This subsection imposes a positive duty on employees of financial institutions to ascertain the origin of moneys deposited or entrusted with them if they have a reasonable basis for a suspicion.

A new Act on the Tracking Down of Profits,<sup>13</sup> which as of now exists only in draft form, will complement the new criminal provision. This Act will require banks and financial institutions to investigate certain defined financial transactions, identify the persons involved in any such transactions, and keep records of their findings. At this time the size of the relevant transaction has not yet been determined. In addition the issue of how to protect information in attorney-client relationships awaits final resolution.

## B. AMENDMENT OF GERMAN BANKING ACT

After a long and controversial debate, an amendment of the German Banking Act<sup>14</sup> entered into effect on January 1, 1993. The amendment brought the German Banking Act in line with the Second European Community (EC) Banking Directive and the EC Own Funds Directive. Despite resistance from the Bundesbank and the German Banking Supervisory Authority, the German banking industry finally succeeded in convincing the legislature of the need to accept supplementary capital (tier 2 capital). In particular the parliament decided to recognize reserves arising from the revaluation of assets up to an amount of 1.4 percent of certain risk bearing assets, provided the respective bank has a core capital ratio of at least 4.4 percent. However, only 45 percent of the difference between the book value of assets and their current value in case of reserves on real estate and 35 percent in the case of reserves on securities will be recognized as supplementary capital.

Additionally, the parliament increased the main capital ratio required for capital

11. Strafgesetzbuch (Penal Code) § 261(1).

12. *Leichfert*, which may also mean due to naivete.

13. Gewinnaufspürungsgesetz.

14. Kreditwesengesetz.

adequacy purposes from 5.56 percent to 8 percent of the risk assets (calculated according to the risk weighing percentage attributed to each of them), consisting of 4 percent core capital and 4 percent supplementary capital.

Apart from a number of other amendments, the Act now makes it easier for banks from EC Member States to open branches in Germany. Until the end of 1992 the German Banking Supervisory Authority supervised such branches, which had to be supplied with an endowment capital of several million deutsche mark. These provisions no longer apply to EC Member State banks. Instead, the Act introduces the principle of home country supervision.

The minister of finance may by regulation extend the scope of the amendment to banks of a non-EC Member State if the non-Member State ensures reciprocity, if the banks of the respective non-EC Member State are supervised according to internationally accepted standards, if branches of German banks are treated in such non-EC Member State in the same way as branches of domestic banks, and if the competent authorities of the non-EC Member State cooperate with the German Banking Supervisory Authority on the basis of a bilateral treaty.

#### C. NEW SUPERVISORY AUTHORITY TO MONITOR INSIDER TRADING

At the beginning of 1993 the Federal Government decided to implement the EC Directives on insider dealing and takeovers by means of a new Securities Trading Act.<sup>15</sup> The Act provides for the establishment of a Federal Authority for the Supervision of the Securities Markets by January 1994.

To meet international supervisory standards the task of the new authority will be to prevent, uncover, and prosecute insider dealing, to establish and supervise rules of conduct for security traders, to supervise compliance with notification duties relating to the acquisition of significant interests in stock corporations listed on a stock exchange, and to cooperate with foreign authorities, particularly by concluding memoranda of understanding.

The supervision of the stock exchanges will remain within the competence of the federal states. While the states will continue to control stockbrokers, they will also be in charge of making sure that trading and settlement on the stock exchanges are conducted properly. Furthermore, the states will have power in emergencies to take steps against insider dealing and noncompliance with the rules of proper trading. The stock exchanges themselves will also establish an independent supervisory department designed to prohibit and detect irregularities.

#### D. AMENDMENT OF GENERAL BANKING TERMS AND CONDITIONS

As of January 1993 the General Terms and Conditions of Private Banks were amended in their entirety, replacing the old terms originally introduced in 1937 and amended many times since then.

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15. Wertpapierhandelsgesetz.



In Germany parties still conduct commercial lending largely on the basis of very scarce documentation often comprising no more than a one- or two-page letter by the bank and confirmed by the customer. This practice is primarily attributable to the widespread use of standardized terms as codified in the General Terms and Conditions of Private Banks (Conditions), which are incorporated into the short loan agreements by reference. While these Conditions are not law as such, they have been drafted by representatives of the German banking industry and approved by its members. Thus, they have taken on the character of a quasi-statute. This evolution has of course not prevented the courts from reviewing and often invalidating parts of the Conditions that were not in line with applicable legislation, in particular in the area of consumer protection.

While the substance of the Conditions has by and large remained unchanged, some of the terms will in the future be contained in other forms such as those used for the opening of accounts. Otherwise the terms have been reorganized into sections dealing with general principles of the bank-customer relationship, account management, customers' duties to cooperate, costs of services, security rights of the bank, and termination and deposit protection.

The banking industry hopes that the new Conditions will facilitate the further computerization of banking services and at the same time make the bank-customer relationship more transparent for the customer.

## V. Courts

### A. DECISION ON RESTRICTIVE EXERCISE OF INTERNATIONAL JURISDICTION

According to section 23 of the German Code of Civil Procedure,<sup>16</sup> the German courts have jurisdiction over persons not residing in Germany at any location where assets owned by such persons are located. Thus, according to the wording of this section, a foreign-based person (which may include a corporation) may be sued in Germany wherever it owns any assets.

In a case decided in 1991<sup>17</sup> the Federal Supreme Court narrowed the scope of asset jurisdiction by requiring that in addition to the mere location of assets in Germany, a sufficient nexus between the litigation and Germany must exist. To date no clear guidelines have been established as to what constitutes a sufficient nexus, yet a case decided in 1992 by the Munich court of appeals<sup>18</sup> may add some substance to this new theory.

In that case the defendant, a U.S. airline, had enlisted the Saudi-Arabian plaintiff's assistance in obtaining landing rights in Saudi-Arabia and for this purpose had entered into several agreements with the plaintiff. When the defendant termi-

16. Zivilprozessordnung.

17. Judgment of July 2, 1991, BGH, 1991 Neue Juristische Wochenschrift [NJW] 3092.

18. Judgment of Oct. 7, 1992, OLG München, 1993 Recht der internationalen Wirtschaft [RIW] 66.

nated the cooperation prior to the expiration of the contractual term, stating that it was no longer interested in plaintiff's services, the plaintiff sued the defendant for damages, first before an ICC arbitration panel, which restricted its award to one of the agreements, and subsequently before the courts in Munich, claiming that the defendant owned property in Germany. The Munich district court denied jurisdiction, and the court of appeals affirmed.

According to the court of appeals, none of the parties had its seat in Germany, and the subject of the contractual relations between the parties had no connection with Germany. Germany also was not the only jurisdiction where the plaintiff could obtain a judgment that could be subsequently enforced in Germany, as the U.S. courts had jurisdiction, and their judgments would be enforced in Germany. Therefore, the entirely unrelated fact that the plaintiff had assets in Germany was not sufficient to establish the jurisdiction of the German courts.

The reasoning of the decision suggests that the German courts might have jurisdiction where either the parties or the subject matter has some relationship with Germany, or where a forum in Germany might be the only forum available to obtain a judgment that later will be enforceable in Germany against assets located there.

#### B. SERVICE OF U.S. COMPLAINT SEEKING PUNITIVE DAMAGES

United States judgments awarding exemplary and punitive damages have been the subject in Germany of both litigation and academic debate. In a decision handed down in 1992 the Federal Supreme Court refused to fully recognize a California judgment awarding \$750,260 in damages, not recognizing the \$400,000 portion awarded for pain and suffering.<sup>19</sup> Recently defendants have attacked earlier in the litigation process and tried to block the service of complaints asking for punitive damages, but without success.

In a case decided by the Munich court of appeals<sup>20</sup> a U.S. plaintiff sued BMW and its U.S. subsidiary for \$4,000 compensatory damages and \$4,000,000 punitive damages for allegedly selling a car as new even though the car had been painted over. German BMW filed an application with the court contesting the service of the complaint under the Hague Convention. In denying the relief the Munich court of appeals stated that the main effect of the service of a complaint pending in a foreign court was that the defendant, if the complaint turned out to be successful, might have to suffer execution of the judgment against its foreign assets, that the service of the complaint as such did not yet grant a remedy that could be used against the defendant in Germany, and that the protection of German law against the recognition of a punitive damages judgment in Germany remained

19. Judgment of June 4, 1992, BGH, 1992 NJW 3096. For a detailed analysis of this decision, see Hartwin Bungert, *Enforcing U.S. Excessive and Punitive Damages Awards in Germany*, 27 INT'L LAW. 1075 (1993).

20. Judgment of July 15, 1992, OLG München, 1993 RIW 70.

available. Consequently, the Court allowed service of the complaint in Germany.

The case demonstrates the disbelief of German industry when faced with certain phenomena of the U.S. legal system. First, German law knows no punitive damages at all, and damages for pain and suffering are available only in cases of personal injury and defamation. Theoretically, even if a complaint such as the one filed in the Alabama court were brought in Germany, the plaintiff would run a very high cost risk, as in the event he loses the case he might have to pay more than \$100,000 in attorneys' and court fees under the German "loser pays" rule.

## VI. Environmental Law: Draft Comprehensive Recycling Act on Hold

In March 1993 the Federal Cabinet voted in favor of the adoption of a new General Recycling and Waste Management Act.<sup>21</sup> Somewhat emphatically, the Minister for the Environment, the Protection of Nature and for Nuclear Safety called it "another step towards the creation of an ecological and social market economy."<sup>22</sup> The Act establishes a general policy of waste avoidance, waste reduction, recycling, reuse, and waste disposal for all economic activities.

The Act defines four main policies. It starts from the assumption that the manufacture and marketing of products entail certain responsibilities for the environmentally friendly reuse or disposal of residues and waste stemming from such products. Accordingly, the Act establishes a principle of responsibility at the source. Second, the policy of waste avoidance must receive top priority. In accordance with the principle of responsibility at the source the obligation to avoid waste must rest primarily with those in charge of production and those capable of reuse. Usable product residues constitute secondary raw materials. Third, wherever possible the reuse of such secondary raw materials must be given priority over waste disposal. Finally, unavoidable residues that cannot be reused must be disposed of in such a way as to not present any dangers to the environment.

To a large extent these policies would be implemented through regulations promulgated in accordance with the general guidelines of the Act. Specific measures would include an obligation of manufacturers of consumer products to establish Materials Balance Sheets (*Stoffbilanzen*). These charts would also describe the materials used, indicate the amount of reusable materials and waste produced, and report on the efforts undertaken and planned in these areas. The measures adopted must be in accordance with the above described policies of the Act. Manufacturers and distributors of consumer products would be directly responsible for material and waste management, but may delegate this responsibility to associations and industry organizations (such as the chambers of commerce or the chambers of crafts). This responsibility may include obligations to accept returned residues and waste. Regulations will govern the details. Waste could

21. Kreislaufwirtschafts- und Abfallgesetz.

22. Official press release of Mar. 30, 1993.

only be disposed of within Germany, subject to certain qualifications for border areas. Secondary raw materials, on the other hand, could be exported into other countries in accordance with United Nations and EC regulations and subject to strict international controls.

While industry generally received the draft Act with caution rather than hostility, the Act has now stalled in the legislative process as the government reassesses its already ambitious recycling and waste policy in other areas.

## VII. Intellectual Property Law: New Act to Improve Software Protection

In May 1993 the German legislators finally adopted a law implementing the terms of the 1991 EC Council Directive on the Protection of Computer Programs.<sup>23</sup> Prior to adoption of the Act software had enjoyed only limited protection in Germany, as the courts had required a certain degree of ingenuity to grant protection to computer programs. As a result, only 5 to 10 percent of all software products marketed in Germany had been protected, making it easy for predators to produce and market cheap copies.

In accordance with the EC Directive the new Act will grant copyright to a much broader range of software products, as the Act no longer requires that the software have a minimum level of technical or aesthetic quality. The Act also introduces criminal liability for certain violations of copyrights.

## VIII. Antitrust—1993 Federal Cartel Office Report

In June 1993 the Federal Cartel Office (the Office) submitted to the government the Report on its work in 1991 and 1992.<sup>24</sup> The Report gives an overview of general developments in the area of competition law in Germany and summarizes the most important cases decided during that period.

### A. MERGER CONTROL

In the area of merger control<sup>25</sup> the Report states that in 1991 and 1992 an aggregate of 3,750 mergers were notified with the Office. The Office attributes the high number, which peaked in 1991, to the privatization wave in Eastern Germany even though merger and acquisition activities also continued strongly in the west. Foreign companies were involved, either directly or indirectly, in about 40 percent of the cases notified. In the opinion of the Office this high percentage of foreign companies indicates the close ties the German economy has with the economies of other countries.

23. Council Directive 91/250, 1991 O.J. (L 122) 42. For a discussion of the EC Directive, see Paul G. Hidalgo, Comment, *Copyright Protection of Computer Software in the European Community: Current Protection and the Effect of the Adopted Directive*, 27 INT'L LAW. 113 (1993).

24. Bundestags-Drucksache 12/5200, of June 24, 1993 [hereinafter Report].

25. *Id.* at III, 7 *et seq.*

The bulk of the mergers involved acquisitions of small or medium-sized businesses by large companies, while the number of large takeovers was small. This pattern, too, is indicative of the structure of German industry with its many family-owned businesses that have outgrown their postwar founders and are looking for new, often international, affiliations.

## B. GERMAN AND EC MERGER CONTROL

Since the EC Merger Control Regulation entered into effect many international mergers with German participation are no longer governed by German, but by EC, merger control law.<sup>26</sup> According to the Report many companies have tried to structure their mergers in such a way as to bring the transaction within the scope of EC merger control law and practice, perceived by many as being more lenient than in Germany. On several occasions companies formed joint ventures to reach the higher thresholds of EC merger control law.

The Office anticipates that German merger practice may look increasingly to EC practice to avoid discrepancies between the two systems. In one case the Office took EC law into consideration in connection with an issue involving a presumption of market domination. However, such instances remain rare, as EC law in many areas uses different criteria than does German merger control law.

## C. VERTICAL PRICE FIXING

The Office continues its practice of rigid enforcement of the prohibition of vertical price fixing.<sup>27</sup> In one case the Office imposed fines of DM125,000 against German Hitachi and its managing director for violating the prohibition. Hitachi had coerced a major retail group to comply with its recommended prices. The means employed included forced new advertisements (with the recommended rather than the resellers' own prices), discontinuation of supplies, and purchases by Hitachi of the cheaper priced goods, all of which was proven primarily through witness testimony. The Berlin court of appeals confirmed the orders assessing the fines.

# IX. Labor Law

## A. WORK HOUR ACT TO LIBERALIZE LABOR CONDITIONS

In an attempt to deregulate the German labor market and ensure Germany's attractiveness to investors the Federal Government has introduced legislation to liberalize work hour rules. The Act will primarily affect three areas:

- (1) Saturday and Sunday work will be possible under less restrictive circumstances than in the past, but will continue to require the approval of the labor authorities. Saturday and Sunday work may be permitted if necessary

26. *Id.* at 25 *et seq.*

27. *Id.* at 41.

for certain defined operational or business reasons, which may include a competitive disadvantage as compared to foreign competitors.

- (2) Daily work hours may be handled in a more flexible way. The maximum number of regular hours allowed per day will be increased to ten, with certain requirements for breaks and compensation as specified in the law. As the law considers Saturday a work day, the new rule means that, if necessary, employees may be allowed to work up to sixty hours per week. Of course, unions and management may agree on the details of work hours and pay.
- (3) Currently the law generally prohibits women from working during night hours (except for a limited list of exceptions, such as medical professions). These prohibitions will be abolished, allowing women to compete better for jobs and training with their male coworkers.

## B. ACT TO HARMONIZE EMPLOYEES' NOTICE PERIODS

Up to now the regular notice period for white-collar and blue-collar employees was different. While white-collar employees enjoyed a statutory period of six weeks, with notice to take effect at the end of any calendar quarter, the period for blue-collar workers was two weeks.<sup>28</sup> Under a new act these rules will now be harmonized to call for a four-week notice period to the end of any month, applicable for both white-collar and blue-collar employees.

The Act does not deal with the substantive requirements for ordinary termination, which employment protection legislation covers. According to the Act Against Unfair Dismissals,<sup>29</sup> in businesses with six or more permanent employees any ordinary notice of termination given to an employee covered by the Act is valid only if the termination is socially justified. Social justification will be found to exist if reasons relating to the person to be terminated or business reasons support the notice. Personal reasons may be based on conduct, performance, physical condition, or other personal circumstances. Typical business reasons are reduction of staff, lack of work, and change of job description due to technological or other developments.

## X. Attorneys

### A. FEDERAL SUPREME COURT ON MULTICITY LAW FIRMS

After a major reshuffling of the entire legal profession in the last five years the German bar and courts are now finishing the redefinition of rules governing the legal profession, in particular as regards the issues of multicity firms and lawyer advertising.

28. Bürgerliches Gesetzbuch [BGB] § 622(1).

29. Kündigungsschutzgesetz.

In a case decided in 1992,<sup>30</sup> the Federal Supreme Court dealt at length with the legality of the multicity firm and the requirements for the composition of its letterhead. A lawyer from Munich had formed a partnership with a Nürnberg firm. The new firm used a letterhead with a joint firm name at the top and then listed the attorneys in separate columns underneath the city in which they practiced. The local Chamber of Attorneys objected to the formation of the partnership and the use of the letterhead.

The Federal Supreme Court confirmed its view as already stated in several prior decisions that German law did not prohibit the formation of multicity firms. Such prohibition was not part of preconstitutional customary law; nor could it be based on the old ethical rules, which in 1987 the Federal Constitutional Court had upheld only to the extent that they were indispensable for the proper functioning of the judicial system; nor did a prohibition follow from the principle that German attorneys have to be admitted before one particular court.

However, the Court did prescribe certain minimum substantive standards for a multicity firm. In particular a true partnership must exist in the sense that all members of the firm must have power to accept and reject new matters on behalf of the entire partnership and incur the joint and several, unlimited liability of all firm members. Furthermore, the firm must avoid any misleading statements or appearances in public, in particular as regards its letterhead. The firm is not required to list all partners on its letterhead. If it does list them, however, it must make clear where their offices are so as to avoid the incorrect impression that any one of them maintains more than one office.

The decision seems to suggest that foreign-based law firms with offices in Germany may not list only their German lawyers on their German letterhead; rather they must list all partners, together with their place of admission, or no partners at all. However, it is still unclear whether different rules may apply to international firms.

## B. COURT RULINGS ON LAWYER ADVERTISING DEMONSTRATE LIBERAL TENDENCY

In a 1993 decision,<sup>31</sup> the Federal Supreme Court has continued its course of cautious liberalization of the rules of lawyer advertising. In that decision a German firm had entered into an agreement with a Dutch firm according to which the two firms would cooperate exclusively with each other in the two jurisdictions. On its letterhead the German firm mentioned the name of the Dutch firm as its cooperation partner. In upholding the lower court decision that had found nothing objectionable with this, the Federal Supreme Court stated that lawyers could advertise their services as long as the information provided was objective and

30. Judgment of Sept. 23, 1992, BGH, 1993 BB 85.

31. Judgment of Jan. 21, 1993, BGH, 1993 BRAK-Mitteilungen 109.