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Germany

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Germany*

I. Corporation Law

A. DEREGULATION OF THE GERMAN STOCK CORPORATION ACT

Upon an initiative of German industry associations in the mid-1980s, the German parliament has substantially amended the Stock Corporation Act¹ to deregulate some of the more rigid provisions concerning formation, shareholders' meetings, and employees' co-determination. Many observers believe that those restrictions are the cause of Germany having only some 3,200 stock corporations (*Aktiengesellschaften*), compared to approximately 550,000 companies with limited liability (*GmbH*).

Under the old law, all corporations had to announce notices of shareholders' meetings in certain publications, and had to observe certain limits. Under the revised law, management may give notice by means of a certified letter, provided that the shareholders and their addresses are known to the corporation. This change will chiefly apply to closely held corporations, but also will affect corporations with registered shares. Even if the terms and provisions for calling a meeting have not been complied with, votes may be cast if all shareholders are present and none object to the voting. Furthermore, the resolutions of the meeting no longer need to be notarized, unless the corporation is listed on a stock exchange or the vote concerns amendments of the articles of incorporation or other major matters.

Whereas under the old law formation required the participation of at least five shareholders, a single shareholder may now form a stock corporation. To reduce the number of costly and time-consuming elections, the first term of the employees-elected members of the supervisory board (*Aufsichtsrat*) has been extended.

Stock corporations registered after August 10, 1994, with a total number of fewer than 500 employees will not be subject to the German co-determination laws, which require a representation of the employees on the supervisory board.

Under German corporate law, shareholders have the right to subscribe to newly issued shares before such shares can be publicly offered (*Bezugsrecht*). The shareholders may waive this right, but some doubt exists about the prerequisites and extension of such waivers. The new law expressly states that listed corpora-

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1. Gesetz für kleine Aktiengesellschaften und zur Deregulierung des Aktiengesetzes of August 2, 1994, Bundesgesetzblatt, Teil I [BGBl. I] 1961. The amendments became effective on August 10, 1994.

tions may offer newly issued shares to the public without regard to these preemptive rights, provided that the offering price does not fall substantially short of the stock exchange quotation and the new shares are issued for an increase of the corporation's stock capital by 10 percent or less.

In a further attempt to improve the marketability of shares in German stock corporations, the legislature has lowered the minimum par value of such shares from DM 50 to DM 5.² According to a newspaper report,³ Schering AG of Berlin will be one of the first corporations to reduce the par value of the outstanding shares.

B. NEW NOTIFICATION REQUIREMENTS FOR ACQUISITIONS OR SALES OF STOCK

Until recently, only the acquisition of 25 percent or more of the outstanding shares of a stock corporation had to be notified to the corporation. From January 1, 1995, any individual, partnership, corporation, or other person buying or selling shares of stock in a German corporation listed on a stock exchange in the European Economic Area must notify the corporation as well as the new German Federal Securities Exchange Commission (*Bundesaufsichtsamt für den Wertpapierhandel*) as soon as the cumulative shareholding reaches or falls below 5, 10, 25, 50, or 75 percent of the voting rights.⁴ For the computation of the voting rights, the corporation must include certain shares held by third parties, like affiliates or fiduciaries. The corporation must publish such notifications immediately, but no later than nine months after receipt of the notification.

The *Bundesaufsichtsamt* may impose fines for failure to make the required notifications. If the corporation has not made the required notification, shares may not be voted.

II. Taxation

A. SOLIDARITY SURTAX

To finance the high costs of German unification, the parliament has introduced a surtax⁵ on income that will be effective January 1, 1995. The surtax will be levied at a rate of 7.5 percent of the personal or corporate income tax due, with certain reductions for low-income households.

2. Zweites Finanzmarktförderungsgesetz of July 26, 1994, art. 5, BGBl. I, 1749. This amendment came into force on August 1, 1994.

3. FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 26, 1994, at 17.

4. Wertpapierhandelsgesetz §§ 21 *et seq.*, Zweites Finanzmarktförderungsgesetz of July 26, *supra* note 3, art. 1.

5. "Solidaritätszuschlag" pursuant to the "Solidaritätszuschlagsgesetz 1995" of June 23, 1993, BGBl. I, at 944, 975.

B. REDUCED INCOME TAX ON BUSINESS INCOME

In addition to German income tax, individuals, partnerships, and corporations engaged in a trade or business in Germany must pay a trade tax (*Gewerbesteuer*) on business income and assets. In the past the aggregate tax burden for business income could exceed 65 percent, which was considered a severe disadvantage for German companies competing on international markets.

In conjunction with the lowering of the corporate income tax rates from 50 percent to 45 percent (and from 36 percent to 30 percent with respect to distributed profits),⁶ the Location Securement Act⁷ also provided for some relief for individuals and partnerships engaged in a trade or business in Germany. The new law has reduced the maximum income tax rate from 53 percent to 47 percent to the extent the income is effectively connected with the conduct of a trade or business within Germany. In most cases, however, the reduction does not completely offset the trade tax.

C. CAPITAL GAINS OF FOREIGN CORPORATIONS FROM SALES OF TAXABLE REAL ESTATE

Unlike under U.S. law, gains from the sale of German real estate are, in principle, taxable only in two cases: if the corporation acquired the real estate as a business asset or, in case of private investors, if the sale was consummated within two years after the acquisition. Until recently, non-German corporations were treated like private investors for tax purposes. As a result, real estate transactions by such entities could be structured so as to avoid taxation of capital gains.

A package of tax law amendments known as the Anti Tax-Evasion Bill,⁸ which became effective on December 30, 1993, includes an amendment of the pertinent provisions of the German Income Tax Code.⁹ The new law deems a foreign corporation's income from German sources as business income if the foreign corporation is similar to a German corporation (*GmbH*, *Aktiengesellschaft*, and the like). Any gains from the sale of German assets, notably real estate, will thus be fully taxable regardless of the time that elapses between the acquisition and the sale of the real estate.

D. TAX BREAKS FOR GERMAN HOLDING COMPANIES

Traditionally, German tax law was not regarded as favorable for holding companies. Although most double taxation treaties as well as German tax laws exempt

6. See Bruckhaus Westrick Stegeman, *Regional Developments: Germany*, 28 INT'L LAW. 155, 158 (1994) [hereinafter *Germany*].

7. Standortsicherungsgesetz of September 13, 1993, BGBl. I, 1569.

8. Gesetz zur Bekämpfung des Missbrauchs und zur Bereinigung des Steuerrechts, 1993, BGBl. I, 2310.

9. Einkommensteuergesetz § 49(1)(2)(f).

from taxation distributions from foreign subsidiaries to shareholders owning at least 10 percent of the stock, such distributions could not be channeled tax free to the German holding company's shareholders. On the contrary, the holding company had to pay corporate income tax on the distributed earnings as if the dividend received were normal, taxable income. The same disadvantages arose where a German corporation distributed income attributable to a foreign permanent establishment to a shareholder, in spite of the fact that under most double taxation treaties such income is exempt from German taxation. Such effects were often referred to as "deferred taxation."

To the extent distributions are made to corporations that are fully taxable in Germany, a recent amendment of the German Corporate Income Tax Code has abrogated the deferred taxation.¹⁰ Similarly, if a German holding company realizes capital gains by the sale of a foreign subsidiary, such gains can be distributed tax free to the German corporate shareholder. Distributions of income from tax-exempt dividends or capital gains to German noncorporate or foreign shareholders, however, are not exempt from taxation.

III. Banking and Financing Law

A. INSIDER TRADING NOW A CRIMINAL OFFENSE

To bring German securities regulation more in line with international standards, Germany recently established the Federal Securities Exchange Commission (*Bundesaufsichtsamt für den Wertpapierhandel*) to monitor trading in securities.¹¹ In addition, insider trading is now a criminal offense in Germany.

Following a European Union (EU) Directive, the Securities Trading Act has instituted a broad prohibition on insider trading.¹² Since August 1, 1994, insider trading in Germany may entail criminal sanctions of imprisonment up to five years or fines.¹³

The new rules outlaw dealing in certain publicly traded securities (Insider Sensitive Securities) based on certain "inside information" by anyone with such information, whether on his own or on a third party's behalf. In addition, "tipping" has been made a criminal offense, meaning that certain "insiders" may not use inside information to make recommendations for the sale or purchase of Insider Sensitive Securities or disclose inside information to any other person without authorization. "Inside information" as defined by the new law is any fact about any issuer of Insider Sensitive Securities or about those securities

10. Körperschaftsteuergesetz § 8b, amended by Standortsicherungsgesetz of September 13, 1993, BGBl. I, 1569. The new provisions apply, in general, to distributions of income of fiscal years ending after December 31, 1993.

11. Compare Germany, *supra* note 6, at 161.

12. Wertpapierhandelsgesetz, *supra* note 4, § 14.

13. *Id.* § 38.

themselves that is not publicly known and may, if disclosed, have a substantial impact on the market quotation of those securities.

Interestingly, the trading in securities on markets in the European Economic Area is considered tantamount to the trading in German securities, and a violation of any foreign insider trading rules can also be a criminal offense under the German Securities Trading Act.

The new insider trading rules are complemented by enhanced publication requirements imposed on issuers of securities traded on a German securities exchange. Such issuers must make public any fact related to his activities that affect the earnings, assets, or operations of the issuer and are capable of having a substantial impact on the market quotation of the securities. A violation of these rules may result in fines.

B. RELIEF FOR GERMAN BRANCHES OF U.S. BANKS

Since May 4, 1994, German branches of banks incorporated in the United States and subject to control by the Board of Governors of the Federal Reserve System or the Office of the Comptroller of the Currency are for most purposes treated like branches of banks incorporated in a Member State of the European Union.¹⁴ Most importantly, operating restrictions imposed on German branches of U.S. banks with regard to the limitation of large loans are now based on the consolidated capital of the U.S. bank. The relief granted to the branches of U.S. banks also extends to the restrictions, supervision, and reports that relate to capital adequacy standards for limiting overall credit volume and price risks. As before, German branches of U.S. banks need a license by the German Federal Banking Authority (*Bundesaufsichtsamt für das Kreditwesen*).

IV. Environmental Law

A. GENERAL RECYCLING AND WASTE MANAGEMENT ACT

In July of 1994 a federal statute on the prevention, management, and disposal of waste¹⁵ was enacted. The new law's thrust is the prevention of waste, with the reuse and recycling of waste as the second best solution, and the treatment and disposal of waste being the last resort. A summary of the bill, which passed the legislative procedure largely unchanged, is contained in last year's report.¹⁶ The comprehensive Act will come into force in July 1996 and will replace the

14. Erste Verordnung über die Freistellung von Unternehmen mit Sitz außerhalb der Europäischen Gemeinschaft von Vorschriften des Gesetzes über das Kreditwesen of April 21, 1994, BGBl. I, 887.

15. Kreislaufwirtschafts- und Abfallgesetz of September 27, 1994, BGBl. I, at 2705. As to the genesis of the law, see *Germany*, *supra* note 6, at 164.

16. *Germany*, *supra* note 6, at 164; cf. Burkhard Bastuck, *Regional Developments: Germany*, 27 INT'L LAW. 218, 225 (1993).

current Waste Recycling Act. The Act already provides for government regulations to pave the way for its implementation in two years.

B. FREEDOM OF INFORMATION ON ENVIRONMENTAL DATA

Since July 16, 1994, every person has the right of free access to environmental data in Germany under the new Environmental Information Act.¹⁷ Environmental data, as defined by the new law, comprise information about water, air, and soil pollution; vegetation and animals; activities harming the environment like noise or other emissions; and environmental protection programs. Any person, without limitation, may request access to environmental data contained in documents, pictures, databases, or other formats from federal, state, or local authorities (except courts and district attorneys' offices) responsible for the enforcement of environmental laws, as well as from private persons or entities that handle environmental affairs under the control of public authorities. Such request may be denied only for specific reasons listed in the Environmental Information Act. Most notably, the protection of business secrets, intellectual property rights, and privacy can, depending on the facts and circumstances, justify the denial of information requests.

C. LOCAL TAX ON DISPOSABLE CONTAINERS UPHELD BY COURT

In a move that affects all fast-food chains and many other small restaurants, the city of Kassel imposed a tax in 1991 on disposable containers, cans, paper plates, and plastic cups and cutlery. For instance, the tax rate is DM 0.50 per paper plate and DM 0.40 per plastic cup. The thrust of the tax ordinance clearly is to avoid refuse. As some restaurants saw the basis of their low price business vanishing, they took the city ordinance to court, contending that local communities do not have the authority to impose such taxes and that the tax is akin to a confiscation, given that the retail price of a plastic cup, for example, is only DM 0.02. The city of Kassel argued that the amount of waste collected in Kassel decreased by 500 metric tons per year as a result of the new tax and the adoption of new packaging techniques, like reusable metal pitchers, returnable bottles, and edible wafer plates.

The German Federal Administrative Court, the supreme court in administrative law proceedings, dismissed the plaintiffs' arguments.¹⁸ The case is now before the Hesse State Constitutional Court, which has to decide whether the tax ordinance is in line with the constitution of the State of Hesse.

17. Umweltinformationsgesetz of July 8, 1994, BGBl. I, 1490.

18. Judgment of August 19, 1994, Bundesverwaltungsgericht [BVerwG], Case No. 8 N 1/93.

V. Labor Law

A. DRAFT EU DIRECTIVE ON EUROPEAN WORKS COUNCIL

The Council of the European Union has prepared a directive¹⁹ on the European Works Council²⁰ that will most likely be adopted in the second half of 1994. The directive mandates the current twelve EU Member States²¹ except Great Britain, within two years after its adoption, to enact laws on measures for the information and consultation of employees in European enterprises or groups of enterprises. The directive aims at companies with plants or subsidiaries in at least two EU Member States and 1,000 or more employees in the European Union, of which at least 100 are employed in each of two different Member States.

Since the national laws of the EU Member States differ significantly with respect to works councils and other means of business codetermination, the guideline leaves, first, the definition of the structure and rights of the European Works Council to the negotiation of representatives of the head management and the employees. The statutory provisions on the European Works Council apply, second, only if management denies the workers' request for negotiations on the formation of a European Works Council or if such negotiations exceed three years. According to these provisions, such council would have between three and thirty members, with the right to call at least one meeting with the head management per year. At this meeting, management must inform the council on the financial state of the business, its operations, new production techniques, plans for restructuring or major lay-offs, and the like.

B. SEXUAL HARASSMENT: EMPLOYEES' PROTECTION ACT

Parliament enacted a new law for the protection of employees against sexual harassment on the job in May of 1994.²² The law mandates all employers, including private businesses as well as federal, state, or other public authorities, to protect their employees against sexual harassment and take precautionary measures to prevent such conduct. Any employee who believes she or he has been sexually harassed on the job by the employer, a superior, a colleague, or any other person may file a complaint with the employer. Under the new law, the employer is required to investigate the matter and to take appropriate action against an offender. As the Employees' Protection Act expressly provides that sexual harassment is a breach of the employment contract, the employer's action may include the termination of the offender's employment.

19. By the time of the editing of this article, there was only a draft directive. 1994 O.J. (C 199) 10.

20. *Europäischer Ausschuss*.

21. Austria, Sweden, Norway, and Finland are scheduled to join the European Union effective January 1, 1995.

22. *Beschäftigtenschutzgesetz*, enacted by *Zweites Gleichberechtigungsgesetz* dated June 24, 1994, art. 10, BGBl. I, 1406.

C. STATUTORY DAMAGES FOR JOB DISCRIMINATION

Concurrently with the Employees' Protection Act, the German parliament has enacted provisions regulating the legal consequences of discrimination based on the gender of a job applicant or employee.²³ An employer who turns down an application or fails to promote an employee based on the gender of that person may be liable for damages up to three months' salary. A request for such compensation must be filed with the employer in writing and within two months after the rejection of an application, and if the employer fails to comply with such request, a complaint must be filed with the labor courts within another three months after the request for compensation was received by the employer. If the employee can show that the employer's decision was probably based on gender-related discrimination, the employer must prove that the decision was just and reasonable. Nevertheless the new law explicitly denies the discriminated applicant an enforceable right to an employment contract.

VI. Intellectual Property Rights

A. NEW TRADEMARK LAW

The recently enacted new German Trademark Act²⁴ introduces a number of important changes into German trademark law. The lawmakers did not only translate an EU Directive into national law, but seized the opportunity to thoroughly revise and modernize the old law which, for the most part, dated back from 1894.

The new law broadens the scope of words, numbers, symbols, or designs that may qualify for registration as a trademark. A trademark can now also consist of three-dimensional designs and acoustic marks, as long as it can be described in a graphic and operates to distinguish goods or services from those of competitors.

The new Act also amends the procedure and the substantive law of the registration of trademarks with the German Patent Office in Munich. A trademark may now be registered without examination of conflicts with existing trademarks. Nevertheless, the owners of the existing marks may file an objection to the registration within three months after its public announcement. If the objecting party prevails, the registration of the new trademark will be deleted. Contrary to the old law, a trademark need no longer be registered for an existing business. Consequently, everyone, including marketing agents and attorneys, may register trademarks in their own names.

The new Trademark Act conveys comprehensive rights to the owner of (i) a

23. German Civil Code (BGB) § 611(a), amended by Zweites Gleichberechtigungsgesetz art. 7.

24. Markenrechtsreformgesetz of October 25, 1994, BGBl. I, at 3028. The new law became effective on January 1, 1995. The German term "*Marke*" has been substituted for the older term "*Warenzeichen*."

trademark registered in Germany or in another state that is a party to the Madrid Convention, (ii) a nonregistered trademark that is regularly used and well-known among the group of consumers concerned, or (iii) a trademark that has attained notoriety within the meaning of the Paris Convention. However, if goods or services enter the stream of commerce in the European Economic Area with the consent of the trademark owner, the exhaustion principle applies. According to this principle, the owner loses the right to prevent others from using goods or services bearing the trademark. In addition, failure to use the trademark after the end of a waiting period of five years may result in the deletion of the trademark.

As before, trademarks may be assigned with or without the business for which they are used. For the first time, the Trademark Act includes provisions on the licensing of trademarks.

VII. Antitrust

A. U.S.-EUROPEAN AGREEMENT ON COOPERATION IN ANTITRUST PROCEDURES OVERTURNED BY EUROPEAN COURT

In a surprising decision, the European Court of Justice (ECJ) declared void the agreement²⁵ concluded in 1991 between the European Union and the United States on cooperation in the field of antitrust enforcement.²⁶ France, Spain, and the Netherlands had launched a court action, arguing that the European Commission lacked the power to sign such an international agreement. The ECJ agreed with that reasoning, holding that the Council of Ministers, which represents the Member States, should have concluded the agreement.

B. EEA ANTITRUST LAW

January 1, 1994, marked the creation of the world's biggest single market,²⁷ comprising the twelve EU Member States and almost all European Free Trade Association (EFTA) states, namely Austria, Norway, Sweden, Finland, and Iceland, with Liechtenstein to join later. Given that EU membership of Austria, Norway, Sweden, and Finland is in the offing, the European Economic Area is generally viewed as a merely transitory association. For the time being, the EEA Agreement has added one supranational antitrust enforcement authority to those already existing, and from now on a new set of antitrust laws will govern competition within the EEA territory.

25. Agreement between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws, September 23, 1991, *reprinted in* 61 *Antitrust & Trade Reg. Rep. (BNA)* 382 (1991); *see, e.g.*, James F. Rill & Virginia R. Metallo, *Convergence of Premerger Notification and Review: A Case Study*, 28 *WAKE FOREST L. REV.* 35 (1993).

26. Decision of August 9, 1994.

27. Agreement on the European Economic Area, May 2, 1992, *amended by* The Protocol Adjusting the Agreement on the European Economic Area, May 7, 1993.

To avoid confusion and contradicting decisions, the antitrust law provisions of the EEA Agreement have been copied literally from the EC Treaty and the Merger Control Regulation. By the same token, the regulations and guidelines issued by the EFTA Surveillance Authority (ESA) must be in line with the respective EU regulations and guidelines, and the ECJ's decisions on antitrust matters serve as precedents in the application of the new laws.

Far more complex is the allocation of jurisdiction between the Commission, the ESA, and the antitrust enforcement authorities of the EU and EFTA Member States. For all practical purposes the ESA is seldom expected to have sole jurisdiction over antitrust matters and mergers; rather the Commission will have to consult with the ESA in most proceedings. While the jurisdiction of the Commission is, with certain exceptions, exclusive, the competence of the ESA does not preempt the national antitrust enforcement authorities.

C. PLANNED REVISION OF EUROPEAN MERGER CONTROL REGULATION POSTPONED

When the Merger Control Regulation was adopted in 1989, it was agreed that after four years the turnover thresholds governing the allocation of jurisdiction between the European Commission and the national antitrust enforcement authorities should be reviewed, and most likely lowered.²⁸ Citing differences between the Member States over the objectives of merger control and insufficient experience, the Commission withdrew a proposed reduction of the turnover thresholds and recommended another review in 1996.²⁹

VIII. Courts, Litigation

A. TV COVERAGE OF TRIALS

Unlike in the United States, TV cameras are by law not admitted to German courtrooms. In a recent decision,³⁰ the German Constitutional Court carved out an exception from that rule. The highest German court had to decide on a complaint by several TV stations that were not admitted to the courtrooms where the trial against Erich Honecker, the former president of the German Democratic Republic accused of murder, and others was held. In a final decision affirming a prior preliminary injunction, the court upheld the general ban of sound and motion recordings from court sessions. However, in view of the preeminent political and historic importance of the Honecker trial, the court recognized an

28. Merger Control Regulation (Council Regulation EEC No. 4046/89 of 21 December 1989, O.J. (L 395) 1 (Dec. 30, 1989)), art. 1, subsec. 3.

29. Report from the Commission to the Council on the Implementation of the Merger Regulation, of July 28, 1993, COM(93)385.

30. Judgment of July 21, 1994, Bundesverfassungsgericht [BVerfG], Cases No. 1 BVerfG 1595/92 and 1606/92.