



FORUM JURIS

Special

**Raupach
& Wollert-Elmendorff**

Rechtsanwaltsgesellschaft mbH

Berlin Düsseldorf Frankfurt am Main Hamburg Hannover München Stuttgart

FORUM JURIS Special

Ladies and Gentlemen,
dear clients,

with this special edition of our Forum Juris we would like to inform you about the changes and new regulations brought about by the Act concerning Electronic Commercial Registers, Registers of Mutual Associations and Register of Undertakings (*EHUG*), which became effective on 1. January 2007. Our Forum Juris Special provides you with an overview of the new regulations and a practical guide for the handling of the new requirements.

We would be happy to answer your questions concerning this new legal situation.



A Practical Guide to the Changes/Alterations brought about by the Act concerning Electronic Commercial Registers, Registers of Mutual Associations and Register of Undertakings (EHUG)

According to a new Federal law, since the beginning of 2007 all correspondence with the German Commercial Registers shall be conducted exclusively in electronic form. At the same time, fundamental changes concerning the level of transparency of companies have become effective. We hereby provide you with an overview of the new regulations and a practical guide for the handling of the new requirements, in particular as regards the current introduction phase of the regulations of the respective Act concerning the Electronic Commercial Register, the Registers of Mutual Associations and Register of Undertakings (EHUG).

The most relevant changes that the EHUG has brought about can be summarized as follows:

The Commercial Registers are completely reorganized to an electronic operation mode. Submissions, lodgments, notifications and data requests are in principle conducted exclusively electronically.

As a consequence of the introduction of a new, common Register of Undertakings any important data of a company that is subject to disclosure (including accounting information) will in the future be collected centrally in the Electronic Federal Gazette and will in the future be retrievable from <http://www.unternehmensregister.de>.

This central homepage will facilitate the access to the former commercial, mutual association and partnership registers and any disclosed financial statements. In the future it will not be necessary anymore to use different sources of information to retrieve essential information subject to disclosure on any given company. However, centralization is not being achieved in such way that any and all publications have to be made within the Register of Undertakings. Rather than that, all publications made in the various registers are "mirrored" in the common and centralized Register of Undertakings. By way of such pooling of information, the Register of Undertakings functions as a portal that facilitates the access to the data filed with the various registers by way of certain index data. Financial statements and consolidated financial statements of com-

panies which are subject to disclosure will be accessible via the portal of the Register of Undertakings at any time and for anybody online and free of charge once they have been registered for access.

On the basis of new mechanisms for sanctions that will take effect for the first time in relation to annual accounts as of the accounting date December 31, 2006, the former common practice according to which non-compliance with legal obligations to disclose certain information has remained almost un-sanctioned will come to an end. Due to the changed legal environment the practical importance of exemption facilities and options provided for within the German Commercial Code (HGB) in relation to the disclosure of annual accounts will increase significantly. Raupach & Wollert-Elmendorff is happy to give you any advice in relation to existing models for such resolution.

Details:

The most important alterations concerning (i) the electronic communication and filings with the Registry Courts, (ii) the mandatory information within any business correspondence and (iii) the disclosure of annual accounts can be outlined as follows:

1. Electronic communication and filings with the Commercial Registers/Registry Courts

- 1.1. Since January 1, 2007, applications and submissions to the Commercial Register can in principle only be made in electronic form. Applications/Submissions in paper form are in principle insignificant, invalid and ineffective. However, some of the German *Länder* have provided for transitional periods (e.g. Berlin: one month; Lower Saxony: one year; Rhineland-Palatinate: six months; Saxony-Anhalt: three months).
- 1.2. Any submission has to be conducted via the so-called "Electronic Court and Administration Postbox" (elektronisches Gerichts- und Verwaltungspostfach, *EGVP*) of the Registry Courts. Since January 1, 2007, the following procedure needs to be followed:

a) With respect to applications to the Commercial Register (e.g. for the registration of the appointment or the removal of managing directors/executive officers, termination and issuance of special proxies (*Prokura*), changes of a company's Articles of Association such as relocation of statutory seat, change of corporate name, capital increases and capital decreases, any measures according to the German Reorganization Act (*Umwandlungsgesetz*), in particular legal mergers and spin-offs, etc.) the respective applications to the Commercial Register and any accompanying documents (e.g. notarial deeds, balance sheets) will first have to be provided with an electronic certificate by a notary public and, after that, will have to be filed and transferred to the new Electronic Court Postbox of the Commercial Register in electronic form. The same applies in relation to deeds that have been certified by foreign notaries public. In the introduction phase and beyond, Raupach & Wollert-Elmendorff with its in-house notaries public can provide you with any services that you may need in that context.

b) Documents which do not have to be executed as notarial deed and do not require the issuance of any notarial certificate (e.g. the list of the shareholders, list of the members of the supervisory board, certain resolutions of the shareholders' meeting) are submitted and transmitted to the local courts in electronic form as well. In order to do so, the respective document will have to be scanned and transmitted to the EGVP of the Registry Court. Insofar, it will not be necessary to use a qualified electronic signature. Also in this respect, Raupach & Wollert-Elmendorff can assist you with any future submissions to the EGVP.

c) As it was the case prior to the EHUG entering into effect, any questions concerning the status of a certain matter (e.g. status of registration) and any other notices to the Registry Court, such as for instance the change of the business address within the same municipality can and should be conducted in paper form (letter or fax) or – if the e-mail address of the respective competent judge or registrar is known – by way of a direct e-mail to the competent person.



1.3. Since the beginning of 2007, also with respect to the scope of the obligation to apply for registration and to submit documents to the Commercial Register certain changes have come into force:

a) The duty to deposit a notarially certified signature of special proxy holders (*Prokurist*), shareholders of an OHG/KG entitled to represent the company, managing directors, liquidators, members of the executive boards or any other liquidators, has been abolished. The said persons do no longer have to lodge their signatures with the Commercial Register in certified form. The respective provisions in the German Commercial Code, the Act on Limited Liability Companies and the German Stock Corporation Act have been abolished.

b) Since the introduction of the EHUG, if and to the extent a company has a supervisory board, a list of the members of such supervisory board (including personal data: name, pre-name, profession and residence) and, in the event of any changes, a new and updated list of the members of the supervisory board has to be submitted to the Commercial Register. The management of the company is competent for such submission. The submission needs to be conducted in electronic form via the EGVP (see above). The list will be published electronically *ex officio* (i.e. by the relevant Registry Court itself).

c) In the future any branches of domestic head offices will be registered with the court of the head

office, only; a separate registration of the branch with the Commercial Register at the location of the branch will no longer be necessary. This does not apply for branches of foreign-based legal entities.

2. Extension of the mandatory information in business letters to other forms of communication

Since January 1, 2007, the law requires that certain business information will be displayed/disclosed on any form of business correspondence "irrespective of their form". The legal provisions within the German Commercial Code (*HGB*), the Act concerning Limited Liability Companies (*GmbHG*), the German Stock Corporation Act (*AktG*) and the Act on Mutual Associations (*GenG*) have been amended accordingly.

Therefore, all merchants (*Kaufleute*) will from now on have to display/disclose the relevant information according to the respective applicable legal provisions (Sections 37a, 125a HGB, 35a GmbHG, 80 AktG, 25a GenG) not only on printed stationery but also in business e-mails. However, the new legal provisions are not applicable with respect to notices to an undefined number of recipients such as for instance promotional e-mails as well as any internal e-mail correspondence.

If mandatory information is not properly displayed/disclosed in business correspondence (including email-correspondence), the Commercial Register is entitled to constitute and fix a penalty payment up to EUR 5,000.00. Whether the omission to properly display/disclose the information can also justify an admonishment under German competition law (*Abmahnung*) has not been clarified, yet. Some are of the opinion, however, that this is the case.

3. Disclosure of annual financial statements

3.1 By way of the EHUG the disclosure requirements with respect to the annual financial statements of companies subject to disclosure requirements have changed. Non-compliance with this obligation will be sanctioned more strictly. Already prior

to the EHUG entering into effect, there was a duty to submit the annual financial statements to the competent Commercial Register. In addition, larger corporations were obliged to disclose their annual financial statements in the print-edition of the German Federal Gazette to full extent whereas medium-sized and small corporations only had to publish a notification in the print-edition of the German Federal Gazette that they had submitted the annual financial statement to the Commercial Register. Breaches of these duties, however, usually remained un-sanctioned.

3.2 According to the new statutory provisions the annual financial statements and – if applicable – the consolidated financial statements of companies or corporations and certain partnerships having limited liability and therefore classed as being similar to corporations for publication purposes (in particular the GmbH & Co. KG) have to be submitted exclusively in electronic form (i.e. as electronic file) to the Electronic Federal Gazette for publication. The submission to the Commercial Register has been abolished. Therefore in the future, also the financial statements-related documents of small and medium-sized corporations and of certain partnerships will be accessible via the Electronic Federal Gazette. The annual accounts will be transmitted by the Electronic Federal Gazette to the Register of Undertakings and will be made available there as well. This will for the first time be applicable to annual financial statements for the period ending on December 31, 2006.

3.3 Further essential changes and regulations that have remained unchanged can be outlined as follows:

a) Companies subject to disclosure requirements:

The scope of the companies obliged to disclose their annual financial statements has not been changed by the EHUG. Therefore, the following companies will have a duty to disclose the annual accounts:

- all corporations, i.e. the AG, the KGaA and the GmbH;
- all registered mutual associations (*Genossenschaften*);
- all partnerships without any natural persons as personally liable and general partner (i.e. GmbH & Co. KG but also any OHG with only corporations as partners);
- all companies having a duty to disclose their annual accounts according to the Act concerning Transparency – including natural persons acting as merchants –, that in three consecutive business years fulfill two of the three of the following criteria: balance sheet total > EUR 65m, sales revenues > EUR 130m, and > 5000 employees in average and
- foreign legal entities (head offices) having their statutory seat within another EU-member state or a contracting state to the European Economic Free Trade Zone and having a registered domestic branch office, the annual account of which have been set up, audited and disclosed according to the respective applicable law of the foreign head office.

b) Scope of the accounting documents that have to be disclosed:

As regards the scope of the documents that have to be disclosed no changes have occurred. Small corporations will still have to submit and disclose only the balance sheet and the notes to the accounts. Large and medium-sized corporations will in addition have to disclose and publish any and all documents pertaining to the financial statements, i.e. the annual accounts, the management report, a report of the supervisory board, the resolution on the appropriation of the annual results, etc.

c) Terms for disclosure:

The term until which the company's annual financial statements have to be disclosed has remained unchanged and still is 12 months after



the balance date. In relation to all corporations that are oriented to the capital market a new and shorter term of disclosure applies, namely 4 months. Not only stock-listed companies are affected by that but also such companies that have issued other tradable securities (e.g. bonds or debts) that are traded at an organized market place.

d) Sanctions in case of a breach:

Breaches of the obligation to disclose the annual accounts will in the future be sanctioned by way of a penalty payment; the competent authority for such penalty payments is the Federal Office of Justice, with respect to credit institutions and financial services the Federal Agency for Supervising Financial Services (BaFin), will be the competent authority. The former requirement of an application for the initiation of penalty payments proceedings has been dropped; the penalty pay-

ment proceedings will in the future be initiated and conducted ex officio, i.e. without any application by a third party being necessary. The German Federal Gazette will in cooperation with the Register of Undertakings verify whether any and all documents to be submitted according to the law have in fact been completely disclosed and within the periods stipulated. In the course of such verification also a systematic control of the factual performance of the disclosure will be conducted by the Federal Gazette. Any companies being in default with their disclosure obligations will be requested to submit the necessary documents within a time limit of six weeks accompanied by a simultaneous threat of a penalty payment. If the documents are submitted with the said time limit, the company will only have to bear the costs of the proceedings. If, however, the submission should remain undone, a penalty payment in the amount and range of EUR 2,500.00 to EUR 25,000.00 against the managing director in person and – and that's new– also against the company being subject to the disclosure obligations will be issued. The request to submit the required documents will be pronounced accompanied by a (further) simultaneous threat of a further penalty payment. Such procedure will be repeated as long as and until the necessary documents will have been submitted. The penalty payment will not be dropped if the aggrieved party will submit the requested and necessary documents after the time limit has expired. The new provisions are applicable for all accounting periods that have begun after December 31, 2005, so that the annual financial statements for 2006 will already be affected by the new provisions. It can be expected that the authorities will make active use of the extended options and facilities to issue sanctions especially because on the basis of the electronic operation mode of the Commercial and Register of Undertakings it will be possible to verify and compare the registered information without any large effort with the annual financial statements that have been disclosed within the Electronic Federal Gazette.



It goes without saying that Raupach & Wollert-Elmendorff will be more than happy to support you in the process of ensuring compliance with the new provisions within your company, in particular with respect to the electronic submission and disclosure of documents or annual financial statements via our electronic court postbox at the Commercial Register and the Electronic Federal Gazette.

Heike Richter
Attorney at Law

Schwannstrasse 6
D-40476 Düsseldorf
Tel. +49 (0) 211 87 72 38 91
Fax. +49 (0) 211 87 72 23 79
E-Mail hrichter@raupach-we.de
Web www.raupach-we.de

Contact

Berlin office

Neues Kranzler Eck
Kurfürstendamm 23
10719 Berlin
Tel: (+49-30) 2 54 68-04
Fax: (+49-30) 2 54 68-136

Contact:
RA/Notar Torsten Bloch
Email: tbloch@raupach-we.de

Düsseldorf office

Schwannstrasse 6
40476 Düsseldorf
Tel: (+49-211) 87 72-04
Fax: (+49-211) 87 72-2537

Contact:
RA Dr. Gregor Bender
Email: gbender@raupach-we.de

Frankfurt am Main office

Franklinstrasse 48
60486 Frankfurt am Main
Tel: (+49-69) 71 91 884-0
Fax: (+49-69) 71 91 884-4

Contact:
RA Dr. Michael H. Meissner, LL.M.
Email: mmeissner@raupach-we.de

Hamburg office

Hanse-Forum
Axel-Springer-Platz 3
20355 Hamburg
Tel: (+49-40) 37 85 38-0
Fax: (+49-40) 37 85 38-11

Contact:
RA Dr. Matthias Mielke
Email: mmielke@raupach-we.de

Munich office

Rosenheimer Platz 6
81669 München
Tel: (+49-89) 2 90 36 89-01
Fax: (+49-89) 2 90 36 89-11

Contact:
RA Dr. Martin Imbeck
Email: mimbeck@raupach-we.de

Hanover office

Georgstrasse 52
30159 Hannover
Tel: (+49-511) 30 75 59-3
Fax: (+49-511) 30 75 59-50

Contact:
RA/StB Dr. Harald Stang
Email: hstang@raupach-we.de

Stuttgart office

Löffelstrasse 427
70597 Stuttgart
Tel: (49-711) 6 69 62-0
Fax: (49-711) 6 69 62-62

Contact:
RA Dr. Peter Maser
Email: pmaser@raupach-we.de

www.raupach-we.de

This newsletter only contains general information which is not suitable for the special circumstances of individual cases. It is not intended to be a basis for economical or other decisions. In particular, our newsletter cannot substitute individual consultancy.