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**Raupach
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Rechtsanwalts-gesellschaft mbH

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FORUM JURIS

Law coming to you.

Dear Clients,

We are happy to send you the English version of our Juris Forum Newsletter in which we have assembled current legal topics and important court decisions which we hope will be of interest to you.

Latest Modifications in the German Corporate Governance Code are the topic of our first article which will bring you up to date on the legal developments in this regard.

A second article describes the liability of the management in case of insolvency of a company with a special focus on a recent court decision.

The article called "Whistleblowing" gives you a concise overview of Internal Reporting Systems from a Data Protection and Labor Law Perspective.

Finally we like to provide an insight into Terminate Clauses in the Partnership Agreements in light of a recent judgment on the admissibility of "free termination clauses".

Should you have any questions on the articles in this edition, please do not hesitate to get in touch with your usual contact person.

We wish you a happy holiday season and all the best for a successful New Year.



Latest Modifications in the German Corporate Governance Code

I. Introduction

The German Federal Ministry of Justice announced the latest modifications in the German Corporate Governance Code (hereinafter: the "Code") on July 20, 2007. Apart from two new recommendations and a new suggestion the latest amendment of the Code also includes a number of modifications based on statutory revisions. It is mainly the sections concerning the board of management and supervisory board which are affected. These modifications are presented first below. There is therefore a need for clarification how to react to the new recommendations with respect to making the next compliance statement pursuant to § 161, German Stock Corporation Act (Aktiengesetz – AktG).

II. Cipher 4.2.1, Sentence 2: Areas of Responsibility and Majority Resolutions (New Recommendation)

The modification concerns how to organize the conflict between full responsibility and the distribution of responsibility in the board of management. In order to facilitate the work of the board of management and to make it more transparent the modification of the Code envisages rules of procedure to specify (1.) the areas of responsibility of the individual members of the board of management, (2.) the matters reserved for the entire board of management and (3.) the majorities required for the resolutions made by the board of management. Otherwise the statutory regulations which hardly enable the managerial duty of the board of management to be carried out feasibly and efficiently shall apply. The Code does not make any specifications regarding the detailed content of the work of the board of management. The authority to issue the rules of procedure for the board of management does not primarily lie with the board of management. The board of management is only authorized to issue its own rules of procedure if the articles of association do not include such a provision and the supervisory board has not assumed the decision-making authority.

III. Cipher 4.2.3: Severance Payments for Members of the Board of Management (New Proposal)

"A number of spectacular cases has brought the entire system into disrepute in the public discussion about severance payments for board members" said the Chairman of the German Corporate Governance Code Government Commission, Dr. G. Cromme. This year's amendment therefore focuses on the regulation of severance payments for members of the board of management. The new regulation stipulates in the case of new appointments or re-appointments to the board that attention is paid to the fact that severance payments to a member of the board of management do not exceed the amount of two years' remuneration, including ancillary payments, if the membership of the board is terminated prematurely without there being good cause. This is known as a so-called severance payment cap. It is intended to set the remuneration for no more than the remaining term of the employment agreement as an additional limit. With the new proposal the commission wishes to achieve that the severance payment never exceeds two years' remuneration irrespective of the length of the remaining period of appointment. The calculation should be based on the total remuneration of the previous business year and possibly also on the anticipated total remuneration for the current business year. The broadening of this calculation basis is associated with the typically unpredictable and hugely varying annual remuneration for members of the board of management.

Contractual payment guarantees made to a member of the board of management in the event of a departure from the company due to a change of control are also affected by the proposal. A limit to three years' remuneration is proposed in this case. The commission justifies the distinction by the fact that the departure from the company in the event of a change of control is not caused by the member of the board of management.

IV. Cipher 5.3.3: Nomination Committee of the Supervisory Board (New Recommendation)

In connection with the appointment of shareholder representatives to the supervisory board another focal point of the amendment envisages the establishment of nomination committees in order to improve the qualification of the candidates and the transparency of the selection process. This corre-



sponds to international practice and was also recommended by the EU Commission. The selection of new shareholder representatives has hitherto been rather obscure. Corporate governance can therefore be improved by a special nomination committee in the supervisory board with a clearly structured and transparent decision-making process. Since it is merely a question of selecting suitable shareholders, the committee should only be made up of shareholders.

V. Ciphers 3.4, 4.1.3 and 5.3.2: Compliance

The “compliance” term is now explicitly stated in the Code. Cipher 4.1.3 of the Code had already clarified earlier that the board of management must ensure that the statutory stipulations are complied with and the board must also work towards the fact that they are complied with by the group companies. Due to the fact that compliance is becoming increasingly more important in the public perception the commission decided to extend the regulation in the Code by the rather self-evident obligation to comply with the company guidelines. The board of management has a wide scope for corporate assessment and organization when setting up a compliance system. Furthermore the Code also refrains from demanding that the companies set up explicit or specific compliance systems.

The topic of compliance also affects the supervisory board. It is clarified by an addition in Cipher 3.4, Subsection 2, that the board of management is to inform the supervisory board about relevant questions regarding compliance. According to Cipher 5.3.2 the treatment of compliance matters is supposed to be transferred to an audit committee within the supervisory board.

VI. Including the European Public Limited Liability Company (Societas Europaea or SE)

The updated Code refers explicitly to the SE in various places in order to include it among the intended addressees. The commission took explicit note of the growing importance of the SE as a new legal form in its preamble. For example, the DAX companies, Allianz, Fresenius and Porsche, have in the meantime all been converted into an SE. BASF and Klöckner & Co. are also currently being converted. Unless otherwise stated, the AktG regulations apply to an SE with its registered office in Germany. The Code recommendations are therefore relevant to the SE and must be complied with by its board of management and supervisory board within the compliance statement pursuant to the principle of “comply or explain”.

VII. Further Modifications Based on Statutory Revisions

The publication of financial statements and related documents was facilitated for all German public limited liability companies (Aktiengesellschaft – AG) by the law on electronic commercial registers and registers of cooperatives as well as the business register (Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister – EHUG). Other modifications result from the law to transpose the directive 2004/109/EC of the European Parliament and of the Council of December 15, 2004, on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (Transparenzrichtlinien-Umsetzungsgesetz – TUG) in the publication of financial reports and regarding the thresholds for voting rights announcements. The Code takes these new statutory regulations into consideration in the current version. Modifications were also made with regard to the Securities Trading Act (Wertpapierhandelsgesetz – WpHG). The Business Judgment Rule which has already been anchored in AktG since 2005 was included in the Code with respect to the liability of the board of management and supervisory board.

VIII. Conclusion

The latest modifications of the Code are intended to improve the organization of the board of management and of the supervisory board and to identify the joint responsibility in the area of compliance. The most significant modification is the proposal of so-called severance payment caps. With this the Code wishes to counter the extremes of the golden handshake for departing members of the board of management. The Code satisfies an actual legal development by explicitly including the SE.

Michael Hörtig, Rechtsanwalt

Liability of Management in Insolvency

The Federal Court of Justice (Bundesgerichtshof – BGH) has made another fundamental ruling in connection with the liability of management of a corporation (cf. also our articles in *Forum Juris 02/2007, page 23, page 28*). The judgment – II ZR 48/06 – clarifies the risks of liability which occur for the managing directors and/or board of management at the stage of insolvency and thus answers a hitherto controversially discussed question by covering many fields of law such as corporate law, insolvency law, social security law and criminal law. It eliminates the contradictory situation for management regarding which creditors have to be satisfied at the time of insolvency and shows that it is possible to avoid liability for the failure to file a petition or for a delay in filing a petition for insolvency if expert advice is sought.

I. General Aspects

The management of a corporation whether it is the management of a limited liability company (Gesellschaft mit beschränkter Haftung – GmbH) (Sec. 64 para. 2, German Limited Liability Companies Act (GmbH-Gesetz – GmbHG)) or the board of management of a German stock corporation (Aktiengesellschaft – AG) (Sec. 93 para. 3, no. 6, German Stock Corporation Act (Aktiengesetz – AktG)) is generally not allowed to make any more payments at the stage of insolvency unless it can prove that such payments are consistent with the diligence of a prudent businessman and/or the action could reasonably be assumed for the benefit of the company. The insolvency stage which activates the prohibition of payments exists when the company is overindebted or unable to make payments. The management has a maximum period of three weeks to examine the potential for remedial action and, if necessary, to file the petition for insolvency.

At the stage of insolvency the conflict existed for the management between the requirement in (insolvency) law, on the one hand, to preserve and secure the assets and the resulting liability for damages towards the company with the management's personal assets if this is not complied with. On the other hand, the management had the obligation to pay the employee contributions to the social insurance funds and income tax to the tax authorities which not only provide the grounds for the obligation to pay damages if these payments are not made but could even result in large fines for the manager pursuant to Sec. 266a German Penal Code (Strafgesetzbuch – StGB), and Sec. 34, Sec. 69 German Fiscal Code (Abgabenordnung – AO).



II. Previous Court Decisions

The previous high-court decisions regarding this contradictory situation were inconsistent since the state creditors (social insurance funds and tax authorities) and thus the laws envisaging penalties were, on the one hand, given a higher priority while the concept of the principle of equal treatment among creditors and compliance with the regulations in insolvency law was, on the other hand, to apply. The result was unacceptable for the managers taking the action since the economic status of the company meant that the only choice left to them was between the respective creditors; a decision to the detriment of the state creditors would also have led to a potential (custodial) sentence. This was not acceptable against the background that the legal system must be consistent and without contradiction since it is generally recognized that an action which is necessary under criminal law cannot at the same time lead to liability under civil law.

1. Second BGH Senate for Civil Matters

In its ruling – II ZR 61/03 – the second BGH senate for civil matters focused on the objective in insolvency law and consequently on the overriding requirement to preserve the assets. This was in the interest of all the creditors of the company in crisis. The higher priority of the claim by the state creditors (Sec. 266a StGB) in insolvency was therefore rejected and the personal liability of the managing directors vis-à-vis the company for payments which are made was emphasized when

management does not pay the employee contributions to the health insurance funds due to a lack of financial funds in the three months before the petition for insolvency is filed. The judges were of the opinion that the culpability of the managers and the tortious liability did not apply based on conflicting duties and/or a lack of fault.

2. Fifth BGH Senate for Criminal Matters and Federal Finance Court

The fifth BGH senate for criminal matters considered the interest of society in securing the payment of the funds for social insurance as the highest priority (5 StR 263/05 ruling). This was also the opinion of the Federal Finance Court (Bundesfinanzhof – BFH) at the beginning of 2007. In its appellate ruling – VII R 67/05 – due to the failure to pay income tax it provided the grounds for giving the claims by the “social funds” and the tax authorities a higher priority with the argument that the assessment benchmarks of insolvency law which were applied by the second senate for civil matters were only valid in the insolvency proceeding, but could not provide the grounds for a ranking order beyond the matter which was contended in that court. Furthermore both senates were of the opinion that the conflicting duties which were relevant for determining who was at fault only applied for a period of three weeks in which the potential for remedial action is to be examined; the obligation to pay the social contributions is only suspended within this period. For the rest the responsible person could also avoid the conflicting interests at any time by filing a petition for insolvency.

III. New Court Decisions

The current ruling by the second senate for civil matters now ends the hitherto inconsistent (high-court) decisions.

1. General Aspects

The second senate which again dealt with a case of similar content was confronted with the principal question whether the managing director of a corporation – the former member of the board of management of a “start-up company” which developed and distributed digital signature software – is still allowed to make the employee payments which social insurance and fiscal laws impose on him in spite of his company being insolvent.

Departing from its legal opinion of what is considered to be “proper” conduct, the court generally still adheres to its interpretation of the obligation of equal treatment for all creditors. However, in the interest of management weighed down by insecurity the judges emphasize that it can no longer be demanded of the members of executive bodies to adhere to the duty to preserve the assets by not paying social insurance contributions and taxes which are due while this action exposes them to prosecution under criminal law. A manager acting in this manner who follows requirements under social and fiscal law thus acts diligently and/or reasonably.

2. (Scope of) Duties and Liability

The senate also ruled that management can avoid possible liability regarding the duty to file the petition for insolvency under certain strict preconditions. If the member of the executive body – who frequently has no accounting knowledge himself/herself – seeks external specialist advice (e.g. from an auditor) in order to examine the degree of insolvency, the duty of examination which is incumbent on him is fulfilled. It is necessary here, however, that the consultant is chosen carefully and that he/she is thoroughly informed in good time. He/she must be fully informed of the business conditions and have full access to any required documentation. The BGH is of the opinion that the manager who then reviews the expert opinion for completeness and plausibility is a member of the executive body who acts diligently and can therefore be discharged from liability.

IV. Conclusion

The ruling by the second senate for civil matters eliminates the uncertainty for management and follows the legal opinion of the fifth senate for criminal matters; court decisions are therefore standardized. The current BGH ruling should be welcomed by management of corporations. It solves the hitherto existing conflict and thus improves liability in insolvency by now clearly defining what can be demanded of members of the executive body when the company is in crisis. Management is released from the duty to preserve the assets if the obligations under social insurance and fiscal laws are met since the conduct was insofar “proper” and “conscientious” and to the benefit of the company. The insolvency administrator is therefore not in a position to assert claims for damages in this respect at a later time.

Faced with (looming) insolvency and/or overindebtedness corporate management which has to decide whether a petition for insolvency should be filed can avoid liability for itself by seeking external specialist and qualified advice.

Matthias Sierig, Rechtsanwalt

“Whistleblowing” – Internal Reporting Systems from a Data Protection and Labor Law Perspective

Under the “Whistleblowing” concept data protection and labor law questions in connection with internal reporting schemes are discussed. More and more companies in Germany are proceeding with the establishment of schemes to enable employees to report the misconduct of other employees. This is often done via telephone hotlines or e-mail platforms as part of a code on ethics or compliance management which is introduced in the company. Such systems partly have their origin in the US-Sarbanes-Oxley Act which requires companies listed on the US-stock exchanges and their (foreign) subsidiaries to establish compliance systems which identify certain misconduct (audit, finance, fraud) by employees at an early stage. German companies are thus increasingly confronted with the demands of their US-parent companies to introduce systems which in particular have to be admissible from the data protection and labor law point of view. With a view to whistleblowing cases, a distinction has to be made regarding the status of the reporting person, the type of reported misconduct (criminal/other), the status of the addressee (internal/external reporting centers) and the originator of the reported misconduct (employer/colleagues).

Data Protection Law

The information which is reported via the whistleblowing systems usually concerns the personal misconduct of individual employees and is thus personal data in the sense of Sec. 3 Federal Data Protection Act (Bundesdatenschutzgesetz – BDSG), which also qualifies as data collection and data utilization due to its storage and use. Since in such cases there is no consent of the incriminated person and such consent cannot be obtained for understandable reasons, the admissibility is determined by Sec. 28 BDSG. Nor will the employment agreements usually include a regulation on the use of data in whistleblowing systems. Therefore, the admissibility whether the company has a justified interest in the introduction of the system and whether the protectable interests of the incriminated person are not prevailing.

In order to determine such justified interest and to balance the interests, the data protection officers of then 25 EU-member states have teamed up in the so-called Article 29 Data Protec-



tion Working Group and adopted an opinion including recommendations on February 1, 2006, whereby whistleblowing systems are compatible with European and also German data protection law as long as they conform with the following criteria, inter alia:

- Possible limitation on the number of persons entitled to report alleged irregularities or misconduct;
- Possible limitation on the number of persons who may be incriminated through a whistleblowing systems;
- Promotion of identified and confidential reports as against anonymous reports;
- Balance and accuracy of data collected and processed;
- Compliance with strict data retention terms;
- Provision of clear and complete information about the whistleblowing system;
- Information rights of the incriminated persons as well as rights of access, correction and deletion.

Briefly, it can be said that such whistleblowing systems which allow anonymous reports on any misconduct in the company will not be admissible under data protection regulations pursuant to Sec. 28 BDSG. This will usually be the case if companies attempt to adopt codes of conduct along the lines of the schemes used in the US (with a significantly lower standard of data protection). The whistleblowing systems should be closely aligned to the recommendations of the Article 29 Data Protection Working Group. Otherwise, it will only be legally possible to achieve admissibility for the scheme under data protection regulations by obtaining the explicit consent of the incriminated person. It should also be pointed out that the whistleblowing system should preferably be operated by the company itself since there are higher demands if the data is processed by

third parties – group companies are also considered to be third parties in the sense of the data protection regulations – due to the fact that an additional transfer of data becomes necessary.

Labor Law

If an employee learns of legal violation in his company, he must take into account in his reaction thereto that considering the business interests of the employer forms also part of his secondary obligations. This generally includes maintaining confidentiality with respect to company procedures and not giving any information to third parties which may damage the employer's reputation or standing. This duty of loyalty covers all procedures and facts which the employee becomes aware of in connection with his position in the company. Personal circumstances and possible criminal conduct by the employer form also part of the above. The question whether the employee has violated his general obligation to be loyal must be decided on a case-by-case-basis. However, any balancing of interests leads to a lack of legal certainty.

If the employee complies with the statutory duty to report pursuant to Sec. 138 German Penal Code (Strafgesetzbuch – StGB), with respect to the listed criminal offenses if he makes use of statutory reporting rights, this must be taken into account. Examples:

- Sec. 158 German Code of Criminal Procedure (Strafprozessordnung – StPO): Right to report a criminal offense;
- Sec. 84 Sec. 85 Works Council Constitution Act (Betriebsverfassungsgesetz – BetrVG): Right to inform the competent department in the company or to the works council;
- Sec. 17 para. 2, Act on Working Place Protection (Arbeitsschutzgesetz – ArbSchG): Right to call in the competent authority in the event of grievances.

However, the employee will primarily have to request internal remedies.

Disclosure to internal reporting centers is generally admissible if covered by Sec. 85 BetrVG. Furthermore, disclosure to the works council, inter alia, may only take place if the employee is entitled to assume violation of law, while not being motivated to abuse the law and he has requested a remedy from the employer without success. If there is a statutory right to report (cf. in particular, Sec. 17 para. 2, ArbSchG; Sec. 216 (Gef-StoffV); Sec. 30 (StörfallV)), disclosure vis-à-vis authorities is generally permitted. When reporting a criminal offense, it has to be analysed whether any significant employer's interests conflict with the disclosure. The same applies, if the employee actively supports the investigation by public prosecution. Otherwise, disclosure is generally admissible when violation of law

is likely and the employee's personal rights are violated and/or it is a question of serious criminal offenses. Disclosing violation of law to associations, via the media or internet generally infringe the duty of confidentiality since this behavior can easily cause serious change to the employer's reputation.

Possible reactions by the employer range from preventative measures, such as contractually securing the duty of confidentiality together with a contractual penalty, ordinary and extraordinary termination of the employment relationship through to asserting claims for damages. While the evidence for such damages will be difficult to produce.

To summarize, the permissibility of disclosure and the employer's reaction, have to be determined on a case-by-case-basis. If the employee is able to activate internal remedies, disclosing these violations vis-à-vis third parties shall at any rate be considered inadmissible. Therefore, it is recommendable to specify consistent procedures throughout the company which meet the high demands of German/European data protection regulations while taking the labor law aspects into account.

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Admissible Termination Clauses in the Partnership Agreement of a Limited Partnership

I. Introduction

Regulations for partnerships and limited liability companies (Gesellschaft mit beschränkter Haftung – GmbH) which grant a shareholder the right to exclude co-shareholders from the company without a factual reason (so-called free termination clauses) are generally contrary to public policy and thus invalid according to established practice of the courts. The courts base their assumption of the clauses being contrary to public policy on the fact that the shareholders concerned could see the possibility of being able to exclude them at any time as a disciplinary measure which could deter them from independently carrying out their membership rights in the company.

This principle that free termination clauses are invalid does not, however, apply invariably. Instead free termination clauses can be permitted when they are justified by particular factual circumstances. Accepted grounds for justification concern cases where it is intended after bringing a new shareholder into a freelance private practice, for example, to give the old shareholders the opportunity to examine the possibility of a successful working relationship with the new shareholder. If it is not possible to establish a trusting relationship with the new shareholder, it is permitted to terminate the working relationship with the new shareholder without giving any other reasons. The factual justification for the free termination in such cases lies in the fact that the courts recognize the necessity for freelance private practices to bring in the new shareholder in order to examine his/her suitability for a working relationship and that there is a need if the new shareholder turns out to be unsuitable to exclude him/her from the company. With its decision presented here the Federal Court of Justice (Bundesgerichtshof – BGH) allowed a further exception to the prohibition of free termination clauses.

II. BGH Ruling

In the case underlying the BGH ruling dated March 19, 2007 (AZ II ZR 300/05), the owner of a sole proprietorship had dictated to his heirs by testation to convert the business after his death into a limited partnership (Kommanditgesellschaft – KG) which was to be established for this reason. The testator had also stipulated the partnership agreement for this KG in a testamentary instruction. It was intended for his wife and son to be general partners and his daughter a limited partner. Following the death of his wife the testator's children changed the partnership agreement – in accordance with his further testamentary instructions – so that both were entitled to terminate the KG after a ten-year period whereby the testator's son should at any rate continue the business. After the ten years the son articulated the termination vis-à-vis the daughter without giving any reasons.

The BGH believed the termination clause to be admissible in this case. The justification that the termination clause is admissible can be found here in the testator's testamentary freedom. If the heirs establish a company with the right to free termination according to the testamentary instructions of the testator himself, the position of shareholder is encumbered by a right to free termination from the very beginning. This is legally permitted since the testator's testamentary freedom would even have legally granted him the position to exclude individual statutory heirs from the succession completely or at least from the succession in the business. The right of termination is therefore based on the testator's testamentary instructions and the heirs are legally bound to the testator's wishes.

III. Practical Significance

The BGH decision will probably be hugely significant when organizing the succession in family businesses.

If the owner and future testator wishes that the family business is not continued by all his/her heirs, the question will frequently be posed how to compensate the family members who have a right of inheritance but who are not to remain in the business – the so-called yielding family members – without placing them at a complete disadvantage. On the other hand the capital which the business requires for its continuation should not be removed to compensate the yielding family members with a potentially high entitlement to a compulsory portion of the testator's estate since they will not participate in the business which is usually the testator's main asset. Conversely it often becomes a problem for the heirs who remain in the business

how to proceed with the yielding family members if they become “troublesome” and do not wish to leave the business voluntarily.

If the specifications in the ruling are observed, it is now possible to regulate the involvement in the business of the yielding family members in an objective manner. Yielding family members can now be compensated in such a way that although they participate in the profits of the business as limited partners, this membership in the business is encumbered by a right of termination. The family members who are to remain in the business as heirs can use this right of termination to exclude the yielding family members from the company if they believe this necessary.

Attention should be paid in practice to observing the further specifications in the ruling:

For example, the partnership agreement should only foresee the termination after a considerable period of time in order to protect the interests of the yielding family member. In the instant case the daughter's involvement in the business lasted for a total of 35 years which the BGH believed to be a sufficient time period. The BGH did not therefore have any reason to comment on the minimum period for a membership in such cases. Ultimately this point thus still requires clarification by the courts.

Moreover it would probably also make sense for the testator to express why he chooses a free right of termination. The testator should therefore state that the termination clause serves to give yielding family members appropriate financial compensation through a temporary involvement in the business and in order to be able finally to assign the business to the desired family members in return. It would also be beneficial if this objective were explicitly stated in the will.

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