



# FORUM JURIS

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**Raupach  
& Wollert-Elmendorff**

Rechtsanwaltsgesellschaft mbH

Berlin Düsseldorf Frankfurt am Main Hamburg Hannover München Stuttgart



# FORUM JURIS

## Law coming to you.

Ladies and Gentlemen,  
Dear Clients,

We are happy to provide you with the second issue of our Forum Juris Newsletter in 2010 with which we would like to give you a concise insight on selected legal topics:

In May 2010, the German Federal High court of Justice (BGH) decided on the liability of subscribers of internet connections (e.g. for unlawful downloads). This ruling was extensively discussed and debated private subscribers. One of our articles illustrates the consequences of the ruling for operators of publicly accessible hotspots (as for instance found in hotels).

As well in May this year, the Federal Ministry of Finance presented a "discussion draft" for stronger regulation of open-end real estate funds. We have summarized the material aspects of this draft for you.

With the article "Current Problems in Genetic Diagnostics" we are happy to continue the presentation of our service line which focuses on "Life Sciences".

Further topics of this issue are:

- International mobility of corporations and the remaining significance of the corporate domicile theory of the German Federal Court of Justice
- Ruling of the European Court of Justice on the use of trademarks as Google AdWords
- Written form requirement for rental agreements

In our rubric "Internal Raupach News", we are happy to inform you about a further promotion to partner in our Hanover office.

Further, and in particular, we are delighted that the reputable Corporate International Magazine presented Raupach & Wollert-Elmendorff with the award of "**Mid-Market M&A Firm of the Year in Germany**" for excellent expertise and competence in M&A advice for medium-sized companies.

We hope that the aforementioned topics arouse your interest.

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

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## Editors

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### **Federal Cabinet Resolves Modification of Transformation Act**

On July 7, 2010, the federal cabinet resolved the bill to modify the Transformation Act (cf. Forum Juris 01/2010). The amending law primarily serves to transpose a directive which the EU Council of Ministers had resolved in July 2009 and which came into force on October 22, 2009. The German Transformation Act is partly based on stipulations in Community law and must therefore be modified by June 30, 2011.

The bill in particular foresees simplifying the preparation of the AGM in which a resolution on the transformation is to be passed. This covers submitting the documentation to inform the shareholders electronically and the possibility to waive a separate interim financial statement.

*Source: Federal Ministry of Justice Press Release dated July 7, 2010*

### **Cash Compensation After Squeeze-Out: Three-Month Reference Period Ends When Squeeze-Out is Announced** (BGH Ruling dated July 19, 2010; Case No. II ZB 18/09)

The Federal Court of Justice (*Bundesgerichtshof* – BGH) has modified its previous position on measuring the reference period for determining the share price which applies in a squeeze-out of minority shareholders. The share price must now be determined as a rule based on a weighted average price within a three-month reference period before the announcement of the squeeze-out which does not necessarily have to be an announcement in the sense of § 15 Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG).

*Source: BGH Press Release No. 157 dated July 27, 2010*

### **Jurisdiction of English Courts for Legal Proceedings Against Revocation as Managing Director of a Ltd. & Co KG**

(OLG Ruling (Frankfurt am Main) dated February 3, 2010, Case No. 21 U 54/09)

Pursuant to Art. 22 No. 2 of the Council Regulation (EC) No. 44/2001 dated December 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters the courts of the member state in which the company has its registered office have exclusive jurisdiction in proceedings which have as their object the validity of resolutions by the executive organs of a company. It is therefore the

English courts who have exclusive jurisdiction if a managing director takes legal action against his/her revocation by the Ltd. & Co KG.

*Source: Hessenrecht Landesrechtsprechungsdatenbank (State databank of court decisions for the Federal State of Hesse)*

### **Consequences of an Erroneous Invitation to an AGM for an AG (here: Deutsche Bank AG)**

(OLG Ruling (Frankfurt am Main) dated June 15, 2010; Case No. 5 U 144/09)

The resolutions which are passed in the AGM are null and void if the invitation to an AGM for an *Aktiengesellschaft* (AG – German public limited liability company) can be misunderstood to the effect that not only the shareholders themselves but also the proxies must be registered within a certain period if a power of attorney is given. Neither German law nor the articles of association provide a basis for such a period. It therefore constitutes an inadmissible and restrictive condition for participating in the AGM and exercising voting rights.

*Source: OLG (Oberlandesgericht – Higher Regional Court) in Frankfurt am Main, Press Release dated June 16, 2010*

### **Factually Justified Differentiation is Permitted in a Proceeding to Forfeit Shares**

(OLG Ruling (Hamm) dated February 25, 2010; Case No. 27 U 24/09)

Although the principle of equal treatment with respect to the individual shareholders must be observed in a proceeding to forfeit/redeem shares, factually justified differentiation is also permitted. It is therefore conceivable that the forfeiture of shares is carried out for one shareholder, legal action for payment is taken against another shareholder and no action is yet taken against a third shareholder while there is a factual reason therefor. However, random discrimination is, of course, inadmissible.

*Source: OLG in Hamm online*

## Community Directive on Doorstep Transactions Does Not Contradict Consumer Duties After Retirement from a Real Property Fund; Corporate Law has Priority Over Consumer Protection

(ECJ dated April 15, 2010; Case No. C-215/08)

The question arose for the Federal Court of Justice (*Bundesgerichtshof* – BGH) (and which it referred to the European Court of Justice (ECJ) for a preliminary ruling) whether a shareholder who as a consumer had joined a closed-end real property fund in the form of a GbR (*Gesellschaft bürgerlichen Rechts* – civil-law partnership) in a so-called doorstep transaction and had cancelled his membership of the closed-end real property fund years later based on the lack of explanatory advice could still remain obliged to performance in the GbR according to the principles of a “defective partnership” (*fehlerhafte Gesellschaft*).

The ECJ gave priority to corporate law. Although it is beyond doubt that the 85/577/EEC directive serves consumer protection, that does not mean that such protection is absolute. The directive does not therefore at all exclude the fact that the consumer can have obligations towards the company in certain particular cases and must if necessary bear certain consequences which result from exercising his right of cancellation.

The decision by the ECJ that the Council Directive 85/577/EEC of December 20, 1985, to protect the consumer in respect of contracts negotiated away from business premises (doorstep transaction directive) generally also applies to joining a partnership if the principal purpose of joining is not to become a member of the partnership but participation as a member is simply another means of capital investment and that the directive does not contradict restitution of an effectively cancelled membership of the partnership pursuant to the principles in German law of a defective partnership was directly implemented by the BGH in its ruling dated July 12, 2010 (Case No. II ZR 292/06). In the case before the court the consumer had to participate in the losses of the fund pursuant to the principles of a defective partnership despite the cancellation.

Source: ECJ online; BGH Press Release No. 143 dated July 12, 2010

## BGH Specifies Uniform Legal Principles on the Resistance of Direct Debit to Insolvency

In two recently announced rulings which were also supported by the other senate for civil matters which was involved, the BGH's ninth senate for civil matters which has jurisdiction for insolvency law and the eleventh senate for civil matters which has jurisdiction for banking law developed uniform legal principles on the resistance to insolvency of a payment made by means of direct debit. Previously existing differences in the



decisions of both senates were thus settled without a referral being made to the grand senate for civil matters. The eleventh senate for civil matters decided that – unlike the previous legal situation – the credit services sector is now at liberty based on the new version of the law on payment transactions dated October 31, 2009, to make all payments made by direct debit resistant to insolvency in the future by designing their General Terms and Conditions of Business along the lines of the EU-wide SEPA (Single Euro Payments Area) direct debit system. The eleventh senate for civil matters continued in its ruling that, until this happens, tacit approval of the direct debit by the debtor can be considered under certain circumstances, thus making the direct debit resistant to insolvency.

Source: BGH Press Release No. 152 dated July 20, 2010

## BAG Overturns Principle of Labor Unity “One Business – One Collective Bargaining Agreement” No Longer Applies

(BAG Case No. 10 AS 2/10 and 10 AS 3/10)

As already stated in our 1/2010 issue, the Federal Labor Court (*Bundesarbeitsgericht* – BAG) has overturned labor unity. The decision by the BAG judges abandons the decade-long principle of “one business – one collective bargaining agreement” (*Ein Betrieb – ein Tarifvertrag*). In future several collective bargaining agreements can exist alongside each other in one company. The highest labor court judges state in their reasons that “there is no overriding principle that only uniform regulations can be applied to various employment relationships of the same type in one business”. The fourth BAG senate had already set the course for this at the end of January. The tenth senate has now also followed this legal opinion.

Source: BAG Press Release No. 46/10

# International Mobility of Corporations and the Remaining Significance of the Corporate Domicile Theory of the German Federal Court of Justice (BGH IX ZR 227/06)

The possibility of international mobility of companies in both directions between Germany and other countries has undergone a change in recent years, and has been substantially expanded, especially due to decisions rendered by the German Federal Court of Justice (*Bundesgerichtshof* or BGH), but also due to changes enacted by the German legislature. Full freedom of movement still does not yet exist (at least with regard to corporate forms existing outside of the European Union (EU) or European Economic Area (EEA)), as a recent decision by the BGH, dated 8 October 2009 (Ref.: IX ZR 227/06), confirms.

## I. Overview

What we mean when we speak of “international mobility” is a company’s ability to relocate its headquarters (administrative domicile) and/or the domicile stated in its bylaws or articles of association to a different country while maintaining its identity, that is, without engaging in the costly and time-consuming process of dissolving and reestablishing itself in the other country. Within this general category, a distinction should be drawn between the opportunity afforded to foreign companies to relocate their headquarters to Germany (relocation to Germany) and the opportunity for German companies to relocate their headquarters to another country (relocation out of Germany).

With regard to the relocation of foreign companies to Germany, it was formerly the case that, pursuant to established BGH decisions, the “corporate domicile theory” (*Sitztheorie*) applied in all cases. According to this theory, companies are subject to the body of laws that applies in the location in which the com-

pany has its administrative headquarters, regardless of what is stated in the company’s bylaws or articles of association. For corporations organized and existing under the laws of a foreign country, but with administrative headquarters in Germany, this means that they cannot be recognized as corporations (*Kapitalgesellschaften*) in Germany, since German law does not provide for any corporations in forms such as those of the Belgian limited liability company (*Besloten vennootschap met beperkte aansprake-lijkheid* (B.V.)) or the English private limited company (Ltd.), and, on the other hand, the prerequisites for establishment of the same entity as a German limited liability company (*Gesellschaft mit beschränkter Haftung* (GmbH)) or stock corporation (*Aktiengesellschaft* (AG)) are not generally met. The result is that these companies exist in Germany only as private partnerships, either in the form of the partnership provided for in the German Civil Code (*Gesellschaft bürgerlichen Rechts* (GbR)) or as a general partnership (*offene Handelsgesellschaft* (OHG)), which carries the severe consequence of unlimited liability on the part of the partners and limitations on the ability to employ outside managing directors.

## II. Mobility of corporations in the EU/EEA

The European Court of Justice has found that the application of corporate domicile theory as outlined above is a violation, for the area to which European law applies (companies domiciled in EU and EEA Member States), of the European freedom of establishment, holding that the relocation of companies from EU/EEA Member States to other EU/EEA Member States is necessarily permissible. The decision was followed by an EU directive and by decisions by the German legislature that also facilitate mergers between companies of different nationalities (international mergers) and the relocation of companies out of Germany.

Thereafter, the picture for the EU/EEA is now as follows:

- Companies domiciled in other EU/EEA Member States are permitted to relocate their domiciles to Germany. In terms of corporate law, they are subject to the law of the country in which they were founded.
- Corporations domiciled in EU/EEA Member States can also be merged with other EU/EEA corporations, whether such mergers represent a shift toward or away from Germany.
- German companies in the GmbH/AG form are permitted to relocate their administrative headquarters to other EU/EEA Member States while maintaining their identities.

The question remains of how to handle matters that do not cover companies or the physical territory of a Member State of the EU or the EEA.

Because the German Stock Corporation Act (*Aktiengesetz*) and Act on Limited Liability Companies (*GmbH-Gesetz*) permit a company to relocate its administrative headquarters to a foreign country as a basic principle (but the domicile stated in the bylaws or articles of association must remain in Germany), it is, in principle, also possible for a company to relocate to a country that is not an EU/EEA Member State, unless the country in question itself applies the “theory of corporate domiciles,” thereby preventing the German company in the AG or GmbH form that has moved there from being recognized under that country’s laws.



The question of whether a company that was established under the laws of a non-EU/EEA country is permitted to relocate its administrative headquarters to Germany was to be decided by the decision of the German Federal Court of Justice, which is mentioned above.

### III. Federal Court of Justice on non-EU/EEA companies

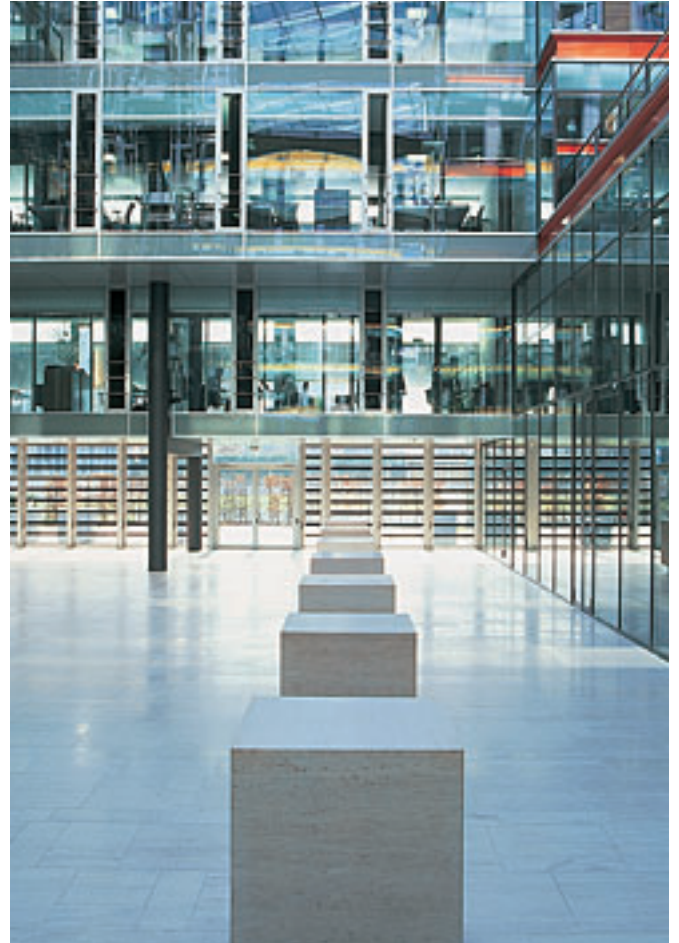
In its decision, the German Federal Court of Justice made it clear that the theory of corporate domiciles (*Sitztheorie*) continues to apply to those companies to which the freedom of establishment in Germany does not apply. In the specific case being addressed, a company that was established under the laws of Singapore, but had its administrative headquarters in Germany, was consequently denied recognition as a legal entity in Germany. As a result, the shareholders (*Gesellschafter*) in the company became liable without limitation for the company’s obligations.

In its decision, the BGH did, however, also clarify that the freedom of establishment is not necessarily limited to companies from the EU/EEA, holding that it also applies to all companies from countries to which unlimited freedom of establishment has been promised bilaterally based on international treaties and conventions between Germany and those nations. This is not, however, the case for Singapore. The court further held

that the fact that a company in the legal form of a private limited company organized and existing under the laws of Singapore is essentially equivalent to a company in the legal form of a private limited company as such form exists in England (for which there is indeed freedom of establishment) is irrelevant.

#### IV. Outlook

At present, when we consider the issue of the mobility of companies, a distinction must be drawn not only between the various types of movement (relocation out of Germany, relocation to Germany, forms of conversion), but also in terms of the jurisdiction to which the specific company is subject (EU/EEA Member State or "third country"). The answer to the question of the possibilities of mobility for a company is, therefore, still highly dependent on the circumstances of the specific case. These issues could be simplified and harmonized further if the proposed "*Gesetz zum Internationalen Privatrecht der Gesellschaften, Vereine und juristischen Personen*" (Act on Private International Law of Companies, Associations, and Legal Entities), which has currently been present in draft bill form since 1 January 2008, is implemented. According to the draft version of the legislation, a company should always be subject to the laws of the country in which it is registered in the commercial register or under whose laws it is organized.



The theory of corporate domiciles based on the administrative headquarters would thus cease to apply in Germany, effective for all corporate forms and irrespective of the jurisdictions under which the respective companies are organized. The draft bill also provides for the possibility of converting a company into a form pursuant to the laws of another country, while the company retains its identity, provided that the laws of the second country also permit such conversion.

*Rechtsanwalt Bastian Oliver Grimm,  
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# Legal Risks for Investors in Open-End Real Estate Funds

## I. Initial Economic Situation of Open-End Real Estate Funds

Numerous open-end real estate funds were forced to close during the financial market crisis. This contradicts the character of an open-end real estate fund since its aim is to make the asset category of real estate investments available on the stock exchange for investors on a daily basis. Since the current legal situation means that shares in an open-end real estate fund can be given back to the fund at any time as a general rule, open-end real estate funds have to possess sufficient liquidity. Currently § 80 Subsection 1 German Financial Investment Law (*Investmentgesetz – InvG*) states that the liquidity reserve of a fund must amount to at least 5% of the fund's assets and can rise to max. 49%.

Doubt emerged with the beginning of the financial market crisis whether the open-end real estate funds had placed too high a value on their objects and whether they would still be in a position in future to finance the return of the shares at the previous value. This fear will probably transpire to be economically true in many cases. The value of the real estate is set by sales values which have been determined by experts and which can differentiate extensively from market values. If the share prices

of real estate funds are compared with the performance of shares of real estate companies which are traded on stock exchanges, it becomes apparent that the stock exchange price of real estate companies is much more volatile than the share prices of open-end real estate funds. An explanation for this could be that the market assesses the vacancy and reletting risks much higher than is usually the case when the experts determine the sales values. This results in the fact that the values of the open-end real estate funds are evened out in a manner which is not driven by the market.

After the breakout of the financial market crisis both institutional and private investors returned their shares in large numbers so that numerous open-end real estate funds were forced to close.

If the shares of open-end real estate funds are traded on the stock exchanges, it becomes apparent that after the closure of an open-end real estate fund the value of the shares is reduced considerably.

## II. Reaction of Legislation to the Problems of Open-End Real Estate Funds

On May 3, 2010, the Federal Ministry of Finance presented a "discussion draft" for stronger regulation of open-end real estate funds. The parliamentary process for the "bill to strengthen investor protection and improve the functionality of the capital market" (*Gesetzesentwurf zur Stärkung des Anlegerschutzes und Verbesserung der Funktionsfähigkeit des Kapitalmarktes*) is currently scheduled to be completed by February 2011.

## 1. New Regulations for Determining the Value of Shares

§ 79 Subsection 1 Sentence 2 of the 2010 discussion draft (*InvG-Entwurf* – InvG-E) foresees that a reduction of 10% is to be made when determining the value of shares. The transitional regulation for determining the value of the shares stipulates that the reduction in the full amount may only be made for the first time in the fifth full business year after the law came into force for assets which were already in the fund in the business year beginning before July 1, 2010. The 10% reduction in the value of the share should therefore be built up in appropriate steps over five business years. § 79 Subsection 1 Sentence 3 InvG-E (2010) also foresees that the experts must determine the values of the assets after six months rather than as now after twelve months. The minimum liquidity which the fund must possess for returned shares shall be increased from 5% to 15% pursuant to § 80 InvG-E (2010). Pursuant to § 80c Subsection 2 Sentence 1 InvG-E (2010) shares can only be returned on certain return dates, at the most once every six months and at least once a year.

§ 80c Subsection 3 Sentence 1 InvG-E (2010) determines that returned shares can only be returned after a holding period of 24 months. Pursuant to § 80c Subsection 5 Sentence 1 InvG-E (2010) the investment company is obliged to procure the permit for the investment shares to be traded on an organized market or on the open market at a stock exchange.

Representatives of open-end real estate funds have expressed the hope that the 10% reduction in the share value will be abandoned in the legislation procedure. Whether the representatives of the open-end real estate funds say this just to protect the open-end real estate funds from further financial outflows or whether the bill will actually be modified cannot be predicted with certainty.

## 2. Lumpsum Reductions Are Inappropriate as a Precaution

It is probably appropriate not to devalue all real estate funds with a lumpsum reduction of 10% “as a precaution”. Open-end real estate funds are too varied for such action. Instead it should be insured that the market drives the value of open-end real estate funds which are so different in their structure.

## 3. Recommendation

Already now it can be assumed that open-end real estate funds will be subject to stricter regulation in the future. They will lose their legal character as an asset category where shares can be returned at any time. This is already the case for roughly 30% of the equity tied up in open-end real estate funds. It is to be feared that more investors will return their shares. Investors who already invested in open-end real estate funds should review whether it might not be a better idea to return their shares. It is advisable to pay close attention to the materializing legal modifications.

*Rechtsanwalt Eckhard von Voigt, MBA, Berlin*

# Current Problems of Genetic Diagnostics

*After many years of debating, the German Genetic Diagnostics Act, the principal portion of which entered into force on 1 February 2010, is the first act to govern the modalities of genetic testing in a binding and comprehensive way. But the issue of "genetic diagnostics" and its details continue to be discussed very controversially by experts and by the public. At the center of these discussions are mainly two issues, namely pre-implantation diagnostics, which is not covered by the scope of the Genetic Diagnostics Act, and the handling of biobanks, which is also still unregulated by law.*

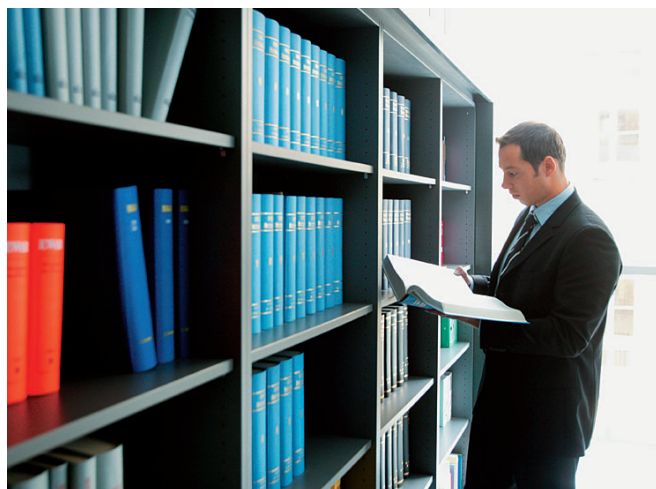
## German Genetic Diagnostics Act

The purpose of the German Genetic Diagnostics Act is to prevent the possible risks associated with the testing of human genetic characteristics due to the great amount of data obtained in the process as well as to prevent genetic discrimination, while at the same time the opportunities of genetic testing for individuals are to be preserved. This is based on the government's obligation that is anchored in the German Constitution to respect and protect human dignity and the right to informal self-determination.

The most important aspect, on which the entire Genetic Diagnostics Act is based, is the prohibition of discrimination directly addressed by the Act, according to which it is absolutely forbidden to discriminate the person tested and his or her genetic relatives due to genetic characteristics or (non-)performance of a genetic test.

The German Genetic Diagnostics Act distinguishes between diagnostic genetic testing and predictive genetic testing. Diagnostic genetic tests are tests that are aimed at determining an already existing disease or medical condition. Predictive genetic testing, on the other hand, is aimed at determining a disease or medical condition that will develop sometime in the future.

The qualification of the physicians who are approved to carry out the respective tests and the content and scope of the duty to inform and advise the patient depends on which of the two groups the respective genetic test has been assigned.



The German Genetic Diagnostics Act provides in detail that genetic testing may be carried out only if the person affected has actively consented to the test being performed. Genetic testing with individuals who are not capable of consenting must have a health benefit for the tested person. Only in exceptional cases – and only under strict requirements – may such tests be approved also if they are beneficial to a family member.

All genetic testing for medical purposes is subject to a physician being able to ensure qualified genetic tests and consulting. Before a genetic test can be performed, the physician in charge must inform the patient about the nature, meaning and consequences of the genetic test. Predictive genetic testing must be performed by a human geneticist who will also be responsible for informing the patient about the test beforehand.

Another key element of the Genetic Diagnostics Act is genetic consulting by the physician in charge which is mandatory under the Act. Consulting must be provided in a way that is generally comprehensible, and it must not predict any results. In the case of diagnostic genetic testing, consulting is to be performed only after the test results become available, while in the case of predictive and prenatal genetic testing consulting is to be performed both before and after the test results become available.

Prenatal genetic testing is restricted to medical purposes only. Prenatal genetic testing for diseases that may develop only in adulthood is forbidden. This includes, e.g., genetic testing for Chorea Huntington, which is an incurable brain disease.

Under the German Genetic Diagnostics Act, genetic testing for determining paternity (paternity tests) is also permitted only after prior approval and consulting. This is also in line with the case law, according to which paternity tests that have been obtained secretly are illegal and cannot be used in court.

Finally, in order to protect those affected, the German Genetic Diagnostics Act provides that neither employers nor insurers may request a genetic test and/or information about tests already performed.

### **Pre-implantation Diagnostics**

The admissibility of pre-implantation tests is currently being intensively discussed in the public. The German Genetic Diagnostics Act applies only to embryos in uterus and not to the genetic testing of embryos that have been conceived and exist outside the mother's body. Here, the German Federal Supreme Court has ruled on 6 July 2010 that pre-implantation diagnostics do not violate the Embryo Protection Act if cells are genetically tested for severe genetic disorders in order to prevent abortion at a later stage. But the German Federal Supreme Court has also expressly stated in its decision that this is not to open the path to an unrestricted selection of embryos based on genetic characteristics and hence to a selection of embryos in order to effect the birth of a "designer baby". It is only meant to determine very concrete genetic disorders, especially in couples with genetic defects.

### **Biobanks**

Another issue that has not been addressed by legislation so far is the issue of biobanks. Biobanks are collections of samples of human bodily substances used for medical research purposes that contain human genetic material and are linked to personal data. Since Germany, too, has a large number of such biobanks, a clear-cut legal regulation would be imperative to cover this largely unlegislated area. Such a regulation was initially even included in the original Genetic Diagnostics Act draft. In June of 2010, the German Ethics Council made yet another advance in that direction by making recommendations on how to handle biobanks. At the core of these recommendations is a five-pillar concept for biobank regulation. The most important recommendation is to introduce biobank secrecy. The second important recommendation refers to utilization of the samples. The Ethics Council proposes a consent concept where donors should have the possibility of making their samples and data available for future research projects. And it should also be possible to exclude certain research institutes. Moreover, those affected should also have the right to withdraw their consent and/or sample at any time. The other pillars of the recommendations refer to extensive documentation and quality assurance mechanisms, involvement of ethics commissions and transparency requirements.

### **Conclusion**

Even though the German Genetic Diagnostics Act means an important step towards more legal security in the area of genetic diagnostics, many issues remain unsolved. The legislator will have to continue to carefully weigh the opportunities and risks associated with genetic diagnostics and to come up with balanced legal provisions.

*Rechtsanwältin Dr. Stefanie Greifeneder, Frankfurt am Main*

# European Court of Justice on the Use of Trademarks as Google AdWords

## I. Introduction

In the spring of 2010 the European Court of Justice (ECJ) ruled on various issues referred to it by individual EU member states and dealt several times in its rulings with the interpretation of the term “use as a trademark” pursuant to Art. 5 Subsection 1 lit. a of the trademark directive (89/104 EEC) with reference to the use of third-party trademarks as key words in Google’s service AdWords. In a preliminary ruling dated March 26, 2010 (Case No. C-91/09), the ECJ also reviewed the decision made by the German Federal Court of Justice (*Bundesgerichtshof* – BGH – Case No. Az I ZR 125/07; BGH ruling dated January 22, 2009) in the matter of “*BananaBay*” which was already discussed in *Forum Juris* 2/2009.

A keyword is generally chosen in Google’s AdWords with the intention that when a user enters a corresponding search word in a search engine, an advertisement of the third party with a link to its webpage appears in an advertisement block which is placed separately from the search results.

The ruling by the ECJ (ruling dated March 26, 2010 – Case No. C-91/09) is therefore very interesting because § 14 Subsection 2 No. 1 German Trademark Act (*Markengesetz* – MarkenG) does not require any risk of confusion if identical trademarks are used for identical products and services as in the decided case. This generally leads to the fact that there is always an infringement when an identical trademark is used for identical products and services if the use is also a use as a trademark in the sense of the trademark directive.



The ECJ avoided the ensuing dilemma that the use of a third-party trademark as a keyword for identical products and services would automatically result in an infringement without any possibility for evaluation by the fact that it defined the term “use as a trademark” in its decision to the effect that a use of the trademark in the sense of the trademark directive can only be assumed if the specific use as a keyword also affects protected trademark functions, i. e. the function of the trademark as an indication of origin or its advertising function.

## II. Substance of the ECJ Ruling

As already stated the ECJ answered the question which the BGH referred to it – *whether there is use as a trademark if a third party uses the trademark as a keyword for a service such as AdWords in Google in order to have an advertisement appear for identical products and services in an advertisement block which is placed separately from the search results* – to the effect that there is use as a trademark if a protected function of the trademark is affected.

Firstly, the ECJ generally considers infringement of the main function as an indication of origin and the advertising function of the trademark when a third-party trademark is used as a keyword in a referencing service such as Google AdWords. The ECJ thus assumes the trademark is used with commercial

purpose and points out that the trademark is used for the products and services of the advertising company irrespective of whether the designation which was used as a keyword also appears in the advertisement itself. The owner could, however, only prohibit such use of its own trademark if the specific use in question affects a function of the trademark.

Referring to the advertising function of the trademark the ECJ continues to assume that the use of the trademark in a referencing service such as Google AdWords is unsuitable for affecting the advertising function of the trademark. The reasons stated herefor by the ECJ are indeed contentious since it is stated that the advertising function is not affected because the visibility of the products and services of the trademark owner is guaranteed by the fact that the trademark owner usually appears near the top of the list of the regular search results of the search engine.

Whether the function of the trademark as an indication of origin is affected by the use as a keyword depends according to the ECJ on the specific form of the advertisement appearing next to the search list. The ECJ thus points out that an infringement of the function of the trademark as an indication of origin must be evaluated by the respective national court on a case-by-case basis so that a decision on the decisive issue of definition will also be made in future at the national level. The ECJ still

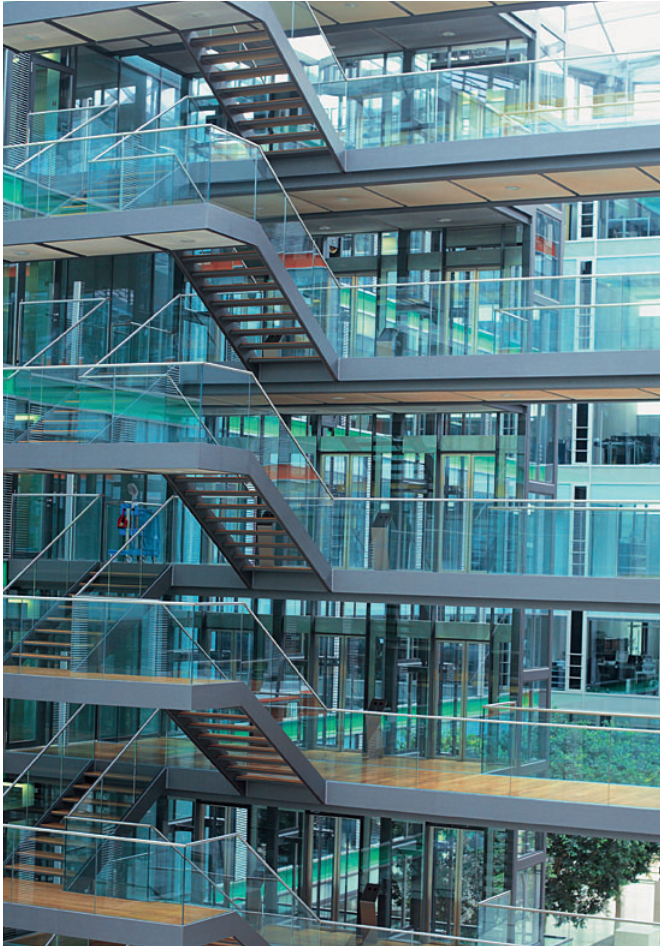
supplies the scope where infringement is possible when using third-party trademarks as keywords when it deems the function of the trademark as an indication of origin to have been affected in the following two cases:

- The advertisement by the advertising company suggests that there is a business connection between the advertising company and the trademark owner; or
- The advertisement is so vague that the internet user cannot ascertain from the advertisement link and the accompanying advertisement slogan whether the advertising company has a business connection with the trademark owner or whether it is an independent third party.

### III. Conclusion/Outlook

The answer to the question whether the use of a third-party trademark as a keyword in a referencing service such as Google AdWords can be prohibited thus depends on how the competent court evaluates the specific advertisement in the individual case. Infringement can only be assumed if the specific form of an advertisement affects the function of the trademark as an indication of origin and therefore leads at least to confusion on the part of the user.

Following the ECJ ruling regarding the interpretation of the “use as a trademark” under trademark law and the clarification that an infringement assumes that the trademark function has been affected the BGH can now maintain its liberal attitude taken in its two rulings dated January 22, 2009 “PCB” (Case No. I ZR 139/07) and “Beta Layout” (Case No. I ZR 30/07) with regard to the use of third-party trademarks as keywords in Google AdWords. However, the difference is that contrary to previous legal practice it is no longer only to be considered in the element of the risk of confusion in § 14 Subsection 2 No. 2 MarkenG whether the user can become confused. This already plays a role in the first element of § 14 Subsection 2 No. 2 MarkenG with respect to the question whether the third-party designation is used as a trademark. Therefore, a potential “risk of confusion” has also to be taken into account indirectly in case of the use of identical trade marks for identical goods and services pursuant to § 14 Subsection 2 No. 1 MarkenG.



Advertising companies should therefore particularly observe the following criteria in future:

- The advertising company should avoid the third-party trademark appearing in the text of the advertisement since its use tends to increase the risk of confusion.
- The third-party trademark should also not be included in the advertisement URL in order to reduce the risk of confusion.
- The advertisement should include a short and concise text stating the name of the advertising company and which trademark products are being advertised.

If the above criteria are observed, it should be possible in the majority of cases where a third-party trademark is used as a keyword to avoid affecting and infringing the function of the trademark as an indication of origin. It should still be pointed out, however, that using a third-party trademark as a keyword for one's own advertisements currently bears the risk of infringement and disputes with the trademark owner are thus foreseeable. It is therefore to be recommended to have a legal review undertaken in advance and at any rate if it is intended to use third-party trademarks as keywords for one's own advertising campaign.

*Rechtsanwalt Dr. Christoph Claus, LL.M., Düsseldorf*

The BGH now therefore has the task of developing the criteria and guidelines by which the advertising company can with sufficient security prevent the specific form of an advertisement affecting the functions of a trademark as an indication of origin. It should, however, also be possible based on the scope supplied by the ECJ to prevent an appropriately attentive and informed internet user from any confusion with regard to a business connection and that the user does not become unsure as to the origin of the advertisement.

# Beginning of the End of Hotspots? Liability of the Subscriber for Legal Violations by Third Parties on the Internet

This article deals with the possible effects of a decision in May of this year by the Federal Court of Justice (*Bundesgerichtshof* – BGH) which attracted a lot of attention (ruling dated May 12, 2010; Case No. I ZR 121/08, “Summer of our Life”) on the liability of subscribers of internet connections. The lively public debate on this ruling was hitherto limited to the consequences for private subscribers. The effects for the operators of publicly accessible hotspots as found in the waiting areas of many companies, cafés and fast-food restaurants were hitherto not the focus of the discussions.

The BGH had dealt with the following case: a private subscriber had – as is often the case today – linked his internet connection to a WLAN router and thus equipped his private flat with wireless access to the internet. The communication line was encrypted as a standard feature from the manufacturer but only with the identical standard router password foreseen by the manufacturer. While the subscriber was away on vacation, an unknown third party used the internet access and offered the song “summer of our life” in MP3 format to download in a file-sharing network on the internet. Unlike the previous instance the BGH sentenced the subscriber as a so-called “interferer” to desist and reimburse the costs for the warning which had been issued. The BGH refused the compensation which the owner of the copyright also requested because the subscriber did not carry out the violation himself.

## I. Legal Certainty for Private Subscribers

It is thus clarified that in future private owners of WLAN routers must protect them against use by unknown third parties. The level of encryption (WPA 2) and a sufficiently secure password will be considered appropriate and also adequate here. The BGH’s requirements are also fulfilled if the manufacturer issues an individual password for the particular router. This has now become a standard feature for the devices which are currently on the market. The ruling thus resulted in a higher level of legal certainty for private subscribers.



## II. Unclear Consequences for Commercial Open Networks

Unclearer than ever, however, are the consequences from the ruling for cases where there is a deliberate decision to operate an open network as an additional customer service, for example, for companies, airlines, cafés, hotels, libraries, universities, etc. The BGH has not issued any statement in this regard. The following should be considered here, however:

The protection of a private WLAN network which the BGH requires initially seems to contradict the sense and purpose of an open network which is deliberately operated as such and the disclosure of passwords to customers and guests.

Yet on the other hand it is obvious that the provider of an open network makes a considerably more direct contribution towards the fact that it is possible to carry out legal violations such as, e. g. illegally downloading music, from the network which it operates.

The operator of an open network cannot therefore shirk from the duty which the BGH imposed without restriction to examine at least how the risk of legal violations can be reduced by appropriate security measures.

There were some opinions in legal literature in the past that it was not generally possible to request security measures for open networks since due diligence and monitoring duties usually resulted in corresponding procedures or a business model being set up. It will probably no longer be possible to maintain this opinion in its generality based on the decision by the BGH. In its decision the BGH stresses with noticeable intensity that security measures and/or corresponding checks are also necessary in private situations. This can be understood by implication that commercial subscribers are even more likely to have corresponding duties. The operators of open networks should therefore also take appropriate measures to prevent legal violations and carry out corresponding checks. The BGH leaves it open whether commercial subscribers will perhaps be able to benefit from the privileged position for mere access providers as to liability which is foreseen in § 8 of the German Broadcast Media Act (*Telemediengesetz* – TMG).

The decision by the BGH cannot be applied directly to commercial operators of open networks. It must be assumed, however, that courts will in future also consider possible liability of the (commercial) subscriber for legal violations carried out from open networks and will make it depend on whether technical security measures were contemplated and/or implemented. It can thus be expected that commercial operators of open networks will also be requested to take measures which actively respond to possible legal violations.

### III. Possible Security Measures

It is therefore to be recommended that commercial operators develop and implement a preventive security concept for their open networks. The following technical/organizational measures seem particularly appropriate here:

- Blocking certain ports in the firewall and/or using special software prevents users of the open network obtaining access to so-called P2P networks (peer to peer = computer to computer connections). In particular violations of copyright law by illegally sharing files of music and films which are protected by copyright law can be hindered in this manner;

- Using standard commercial filter software which blocks access to pages with specified content and/or certain subject matter;
- Time limits for access and/or restrictions in the bandwidth which is available for downloads – it is therefore possible to hinder and/or prevent downloading large amounts of data (e.g. illegally sharing files of films).

The introduction of such measures can reduce the risk of a claim against the commercial operator of an open network that it is an “interferer” for copyright violations by third parties since the operator can thus demonstrate that it took appropriate up-to-date measures to limit the possibility of a legal violation. The character and thus the “business model” of an open network which can be used equally by guests and clients, etc., is still maintained. It will at any rate be necessary, however, to pay particular attention to the further development of court decisions on open networks. If the BGH were to transfer without restriction the duties of private users to take up-to-date security measures to commercial operators of open networks, it will no longer be sufficient to block the access of users to potentially illegal content. Further measures will then have to be taken where necessary which would lead to more or less intensive control and identification of the users of open networks. However, this would not only create a whole set of new problems for the operators (such as data protection) but would ultimately mean the foreseeable end for open WLAN networks in the currently familiar form.

*Rechtsanwalt Jörg Staudenmayer, Stuttgart*

# Written Form Requirement is Not Infringed if Acceptance Period for Rental Agreements is Exceeded (BGH Ruling XII ZR 120/06 dated February 24, 2010)



One of the most important and economically significant issues in commercial tenancy law is adhering to the written form requirement when concluding long-term rental agreements. Pursuant to § 578 Subsection 2 and § 550 as well as §126 German Civil Code (*Bürgerliches Gesetzbuch* – BGB) rental agreements which are concluded for a period which is longer than one year and which infringe the written form requirement then run for an indefinite period. This results in it being possible to articulate a premature termination within the statutory notice periods for long-term rental agreements which do not conform to the written form requirement, i.e. the termination can be articulated on the third working day of a calendar quarter to become effective at the end of the next calendar quarter (§ 580a Subsection 2 BGB). Adhering to the written form requirement is therefore decisive for the continued existence of commercial rental relationships and thus for the value of the associated real estate.

Pursuant to § 550 BGB the written form requirement is observed when the rental agreement and its addenda are personally signed by the contractual parties or they have been notarized pursuant to § 126 et seq. BGB. Furthermore the contractual deed must include agreement on all the essential contractual conditions, i.e. particularly with respect to the par-

ties to the rental agreement, the rental object, the term of the lease and the amount of rent. Such agreement is necessary for the rental agreement to be concluded.

In the past few years the Federal Court of Justice (*Bundesgerichtshof* – BGH) has used its so-called “power of relaxation in court decisions” to relax the hitherto very strict requirements for adhering to the written form requirement in § 550 BGB. It is not universal, however, so that there is now an amount of legal uncertainty for a number of cases. There is a more recent important decision by the BGH following its power of relaxation in court decisions whereby exceeding the acceptance period when concluding a rental agreement pursuant to § 147 Subsection 2 and § 148 BGB does not result in an infringement of the written form requirement in § 550 BGB (BGH ruling dated February 24, 2010; Case No. XII ZR 120/06, *New Periodical for Tenancy and Housing Law (Neue Zeitschrift für Miet- und Wohnungsrecht* – NZM) 2010, page 319 et seq.). Opinions on the question whether there is an infringement of the written form requirement in such a case were not consistent in decisions by the higher regional courts (*Oberlandesgericht* OLG) and in the literature on tenancy law (BGH, loc. cit., page 320). There are probably many rental agreements still in existence, however, where the acceptance period in § 147 Subsection 2 and § 148 BGB was exceeded when the agreement was concluded. The inconsistent decisions by the higher regional courts thus led to considerable “unease” among commercial landlords and tenants. However, the BGH has now produced the legal certainty which has been required for a long time with respect to adhering to the written form requirement for cases where the acceptance period was exceeded. This problem of the written form requirement and the related BGH decision are thus briefly described below:

## I. Acceptance Period of a Rental Agreement Offer Pursuant to § 147 Subsection 2 and § 148 BGB

When concluding a rental agreement for business premises it is often in practice either the future landlord or tenant who signs the contractual deed with the previously agreed content in the absence of the other future contractual party with that party then signing the agreement later (sometimes just a few days later or even a number of weeks later). The copy of the agreement which is meant for the other party is then sent to that party. This is often because the contractual parties are located in different places.

As for any other agreement it is also true in the above cases that the rental agreement is only effectively concluded if the offer of the agreement is accepted in due time (§ 146 through § 149 BGB). If the offering party set a time limit for accepting the offer when the offer was made, such time limit determines whether the offer is accepted in due time (§ 148 BGB). An offer to conclude a rental agreement between absentees, for which an acceptance period has not been set, can in contrast only be accepted within the "statutory acceptance period" in § 147 Subsection 2, BGB (which amounts to two to three weeks for commercial rental agreements according to prevailing opinions).

If the written offer to conclude the agreement is therefore not accepted in due time pursuant to § 147 Subsection 2 and § 148 BGB despite a countersignature on the contractual deed, this leads to the fact that the original offer expires (§ 146 BGB). However, the belated written declaration of acceptance constitutes a new written offer to conclude the rental agreement pursuant to § 150 Subsection 1 BGB. Contractual parties who do not have attorneys advising them are not usually aware of this situation. Instead the new written offer is often accepted through the rental premises being handed over to the tenant. The negotiated rental agreement thus becomes effective by coherent action (and implication) but the declaration of acceptance was only made in this case by handing over the rental premises and therefore not in writing.

## **II. Adhering to the Written Form Requirement in § 550 BGB with an Infringement of the Acceptance Periods in § 147 Subsection 2 and § 148 BGB**

If the contractually agreed term of the tenancy amounted to more than one year for these rental agreements which were concluded by implication, it was hitherto debatable whether such a rental agreement infringed the statutory written form requirement in § 550 BGB and could therefore be terminated prematurely.

The supporters of this opinion argued that the required written form in § 126 Subsection 2 BGB was missing. The rental agreement had been signed by both parties but did not become effective through a written offer and a written declaration of acceptance but merely through an implied and therefore unwritten declaration of acceptance.

In contrast the BGH assumes that the written form requirement has been observed. In its ruling the BGH states that pursuant to § 126 Subsection 2 BGB a rental agreement conforms to the statutory written form requirement if the same uniform contractual deed has been signed by both parties. This adheres to the required external form. The question whether the rental agreement has become effective, however, should be separated from the question whether the external form has been observed. Whether the rental agreement has become effective depends on the general stipulations in § 145 et seq. and § 130 BGB. However, the written form requirement in § 550 BGB does not require, beyond adhering to the external form, that the rental agreement becomes effective by written declarations. A rental agreement is thus still sufficient for the written form requirement in § 550 BGB if it has only been concluded by implication with the same content as the contractual conditions laid down in the external written form in § 126 BGB (BGH, loc. cit., page 320 et seq.).

## **III. Conclusion**

Pursuant to the latest decisions by the BGH such rental agreements do not infringe the written form requirement in § 550 BGB if they were completed after exceeding the acceptance periods in § 147 Subsection 2 and § 148 BGB and thus became effective by implication. The BGH has therefore provided for the fact that a large number of rental agreements which ran the risk of infringing the written form requirement following the inconsistent decisions by the higher regional courts now adhere to the written form requirement and thus cannot be terminated prematurely based on the acceptance period having been exceeded.

*Rechtsanwalt Dr. Benedikt Hartl, Berlin*

## Internal Raupach News

### **Raupach is “Mid-Market M&A Firm of the Year in Germany”**

The reputable Corporate International Magazine presented Raupach & Wollert-Elmendorff with the award of “Mid-Market M&A Firm of the Year in Germany” for excellent expertise and competence in M&A advice for medium-sized companies.



The international business and legal magazine presents an award every year in six categories to law firms which have excelled to a notable extent in their legal area in the past twelve months. Extensive research on a variety of law firms in different countries is first carried out. An independent editorial team then nominates six of these law firms for an award. An expert panel finally selects the winner. Criteria for selecting the winner include particularly outstanding performance and high-quality client services as well as the scope of advice and specialist knowledge especially when there is a difficult economic situation throughout the world. Pöllath + Partners received the prize last year.

We are delighted to receive this award which reflects the constant awareness and growing visibility which Raupach enjoys in the M&A market.

### **New Partner in Hanover: Sandra Laves**

Sandra Laves, Rechtsanwältin and graduate in business administration (*Wirtschafts-Diplom Betriebswirtin (VWA)*), has been promoted to partner with effect from July 1, 2010. Sandra Laves has been working as a Rechtsanwältin for Raupach & Wollert-Elmendorff since 2004, initially in our Düsseldorf office and then in Hanover since 2005.

Sandra Laves has extensive experience in advising companies of various sizes and industries in the areas of corporate law, particularly stock corporation law and the law of corporate succession. Another focus of her work lies in advising strategic and private equity investors on corporate transactions and legal due diligence investigations. She also advises companies with regard to restructuring measures, transformation procedures and compliance issues.

### **Japanese Client Seminar 2010**

For the fifth consecutive year the Japanese Client Seminar takes place in Dusseldorf, Frankfurt am Main and Munich in 2010 again and is hosted by Raupach & Wollert-Elmendorff in cooperation with Deloitte.

During the seminar which is particularly tailored to our diverse Japanese clients our attorneys Georg Lehmann, Peter Homberg, Klaus Heeke, Andreas Jentgens, Dr. Tim Goro Luthra and Vanessa Julia Nieporte will hold lectures on legal topics of practical relevance while experts from Deloitte will cover fiscal and financial statement issues.

The seminar dates are:

- **Dusseldorf, September 27, 2010**
- **Frankfurt, September 29, 2010**
- **Munich, October 21, 2010**

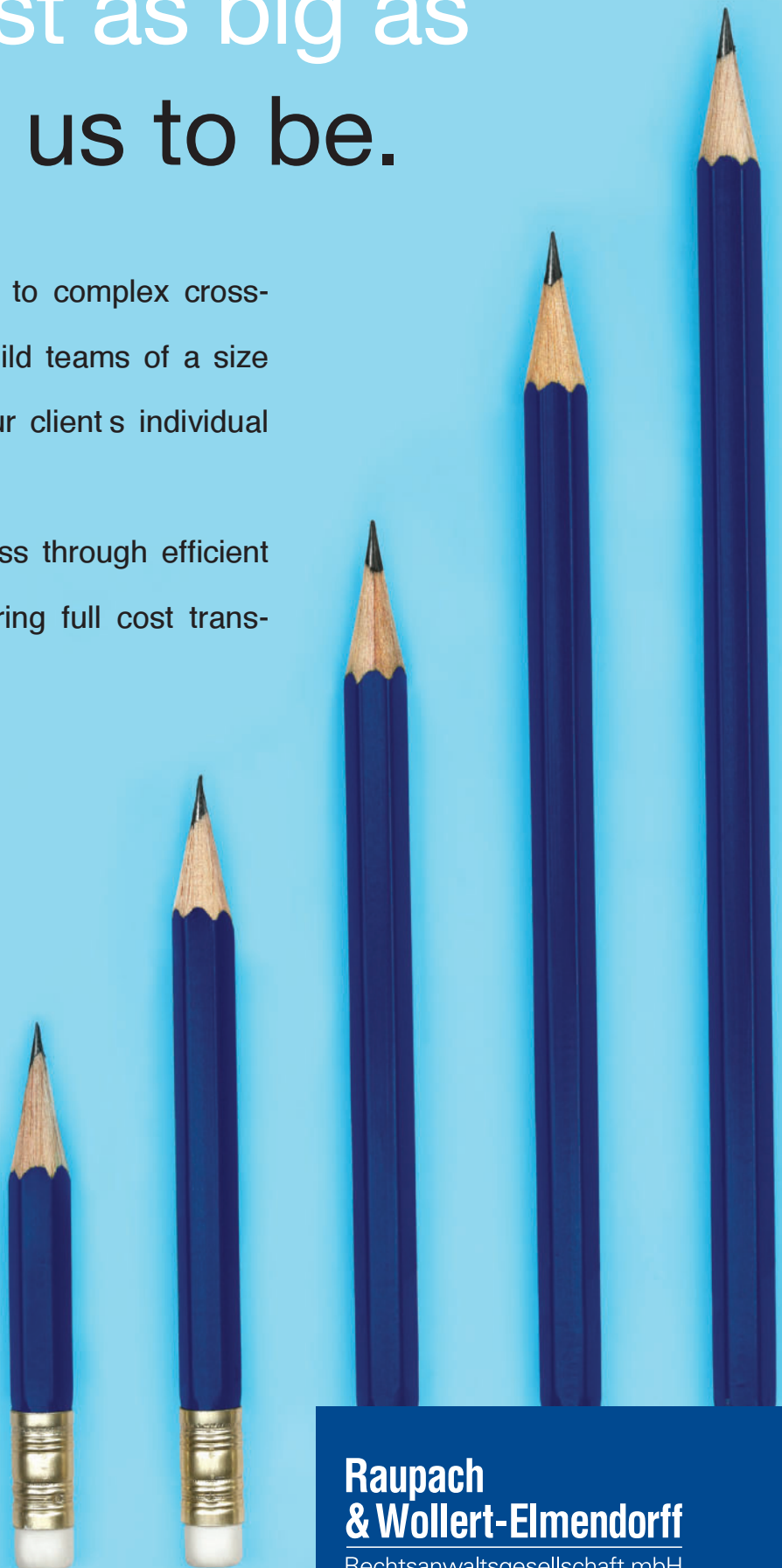
You can find more details at [www.raupach.de/veranstaltungen](http://www.raupach.de/veranstaltungen)

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