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Business Law Magazine: All you need to know on recent legal developments

Dear Reader,

The General Data Protection Regulation (GDPR) was enacted more than a year ago. Philip Schmidt and Christian Leuthner describe a very interesting aspect of the new law that has relevance to legal practice: How to disclose and/or transfer personal data in M&A transactions. It's a must read.

In January 2019, the German Trademark Modernization Act came into force, so it's about time to take a look at the advantages and limitations of the new law from a practitioner's point of view. Dr. Boris Uphoff has done this for you.

Have you ever wished for a one-stop-shop solution when dealing with multinational merger control rules? Well, here it is: "The Global Merger Control Handbook" covers the law of the world's 55 most important jurisdictions. Its 1,440 pages in three volumes are filled with first-class know-how from DLA practice groups around the globe — a "highly recommended" source, writes Dr. Sebastian Jungermann.

Yours sincerely,

Thomas Wegerich

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On your mark, get set, go:

How companies might accidentally jump the gun in the transactional race

By Dr. Michael Holzhäuser and Ansgar Hoffmann

The Cambridge Dictionary defines the phrase “jump the gun” as follows: “To do something too soon, especially without thinking carefully about it.” With its origin in track and field races, gun jumping in competition law refers to a violation of what is known as the standstill obligation – the implementation of a transaction before the required regulatory clearance is obtained.

For M&A transactions subject to a regulatory pre-closing merger review, in most jurisdictions a standstill obligation exists for the transaction parties that also requires them to continue acting as independent parties. An infringement of the standstill obligation constitutes gun jumping in the legal sense, which can have severe consequences.

The EU Merger Regulation (EUMR) contains two provisions on the subject of gun jumping. Article 4 (1) states that all transactions must be notified before they are implemented, which preserves the European Commission’s ability to detect transactions. Article 7 (1) states that



The wide-ranging variations of possible “gun jumping” conduct and the inhomogeneous decision practices of European authorities create a significant risk for companies’ transactional practice.

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transactions may not be implemented before they are cleared, which prevents potential harm to competition while the outcome of the Commission’s review is still pending. In the event of a viola-

tion – whether intentional or the result of negligence – the company concerned faces a fine of up to 10% of its aggregated global turnover. Fundamentally, it is never a good idea to start relevant processes

too soon, but if financial interests are at stake, utmost caution should be exercised. However, the EUMR does not define which measures constitute a premature “implementation” of the transaction. →

This leaves parties working to maintain a very difficult balance between preserving the value and independence of the target until closing and planning for the target's integration into the acquirer's activities to ensure a smooth start of the combined business.

In general, parties are conscious of the fact that closing the transaction before clearance can be penalized with a fine.



However, the EUMR does not define which measures constitute a premature “implementation” of the transaction



However, the risks of gun jumping when engaging in pre-clearance integration planning are far less obvious and have to be assessed carefully. The measures concerned can be grouped into three categories.

The first category of measures that are generally prohibited includes: the transfer of shares or assets, the reappointment of management bodies, the

organizational merger of business units, relocating employees, and other forms of implementing reporting or organizational structures, among others. Furthermore, the withdrawal of the target from certain business segments in anticipation of the closing of the acquisition, the coordination or adjustment of products, and joint marketing and distribution efforts are not permissible.

By contrast, there is a second category of measures that are generally permissible, such as: entering into an agreement (for example, the signing of an SPA), development of a joint business plan for the future, informing employees about the transaction, joint press releases, and meeting with customers to explain the intended transaction, among others.

In transactional practice, the main risks originate from the third area, which comprises a complex gray area of measures that have to be carefully assessed in each individual case, such as: the conditions for payment of the purchase price, financing of the target (by means of loans, for example) before closing, joint client visits and trade fair appearances. Particular care should be taken when drafting ordinary course of business clauses, material adverse effect clauses and warranties in the SPA.

Antitrust risks can also arise from the exchange of sensitive business information during due diligence and integration planning. The exchange of information without the necessary safeguards, provided it exceeds the limits of legitimate risk assessment and valuation of the target, might constitute a breach of the standstill obligation. Furthermore, provided the parties are competitors, such concerted practice is likely to be subject to a separate claim of infringement of the cartel prohibition of article 101 of the Treaty on the Functioning of the European Union.

Unfortunately, no official guidelines for integration planning and information exchange exist, which makes it difficult for companies to prepare for their businesses to combine. Major uncertainties have also arisen in recent years as a result of the increased enforcement activities of European competition authorities regarding gun jumping. On the other hand, analysis of the recent string of relevant decisions helps provide a better picture of the gun jumping do's and don'ts.

Jumping the gun by means of a de facto change of control

Generally, change of control (CoC) over a target is achieved by obtaining the majority of votes. The EU General Court's (GC)

Marine Harvest/Morpol decision of 2017 shows that a CoC can also occur in de facto circumstances, thus constituting a potential gun jumping violation.

On October 26, 2017, the GC dismissed the appeal by Marine Harvest and confirmed the fine of €20 million for infringing the standstill obligation under the EUMR. Marine Harvest, a salmon farmer and processor, acquired its rival Morpol in three stages. In December 2012, Marine Harvest acquired a 48.5% stake in its competitor Morpol, thereby securing de facto control over the company. Marine Harvest gained a solid majority of the votes because the remaining shares were distributed very broadly and the attendance rate at shareholder meetings was persistently low. Subsequently, Marine Harvest acquired a further 38.6% stake in a public takeover bid in March 2013 and increased its total stake to 87.1%. Finally, the acquisition of the remaining shares was completed in November 2013.

However, the Commission was not formally notified of the transaction until August 2013. In July 2014, the Commission held that Marine Harvest had implemented the transaction by taking control in a de facto manner in December 2012, thereby violating both the notification requirement and the standstill →

obligation. The GC confirmed the Commission's view that a de facto CoC already took place in December 2012.

Significantly, the GC held that the exception to the standstill obligation under article 7 (2) of the EUMR was not applicable. This exception states, inter alia, that the standstill obligation shall not apply to a public bid if control is acquired "from various sellers." Marine Harvest claimed the scope of article 7 (2) of the EUMR should be extended, as the first two stages of the transaction in December 2012 and March 2013 should qualify as a "single concentration." The GC, however, did not follow this argumentation. Hence, the exception did not apply, as Marine Harvest acquired de facto sole control over the target as of December 2012. The GC added that if a company is able to exercise decisive influence, that alone is sufficient to count as a de facto assumption of control and thus a breach of the standstill obligation.

The judgment also confirmed the Commission's view that Marine Harvest's breaches of the notification and standstill obligations constituted two separate infringements, justifying two distinct fines in a single decision. This did not violate the *ne bis in idem* principle, as it was

issued by the same authority. An appeal against this decision is pending.

In 2018, in the Ernst & Young/KPMG DK case, the Court of Justice of the European



In principle, warehousing consists of a complex two-step transaction



Union (CJEU) also dealt with the conditions under which a de facto CoC constitutes gun jumping.

The CJEU handed down a highly anticipated judgment on the preliminary ruling request brought by the Danish Commercial Court. In the Court's view, the merger between Ernst & Young (EY) and KPMG DK did not constitute a breach of the EUMR's standstill obligation. Gun jumping, in the view of the CJEU, requires a CoC over the target. Ancillary or preparatory transactions that do not represent a direct functional link with the implementation of a concentration do not, in principle, fall under the scope of the standstill obligation.

Shortly after the signing of the merger agreement, KPMG DK announced that it intended to withdraw from the KPMG international network effective as of September 30, 2014, at the latest, acting in accordance with the terms of the SPA. This was considered to be a breach of the Danish standstill obligation by the Danish Competition Office (DCC). In the DCC's view, the termination of the cooperation agreement was, inter alia, transaction-specific, irreversible and likely to have market effects prior to regulatory clearance.

EY filed an appeal against the DCC's decision before the Danish Commercial Court, which, in turn, submitted a request to the CJEU for a preliminary ruling on the approach under the EUMR. The CJEU followed a more pragmatic approach, defining the scope of the standstill obligation in light of the concept of concentration as defined in article 3 of the EUMR.

The CJEU stated that only steps that "in whole or in part, in fact or in law contribute to the change in control of the target undertaking" can be considered as implementing a transaction. The Court did not evaluate the termination of the KPMG cooperation agreement by KPMG DK as an integration step within the scope of article 7 (1) of the EUMR, despite being

necessary for the transaction as such and having effects on the market. The termination of the cooperation agreement did not grant EY the possibility of exercising any influence over KPMG DK. Therefore, the termination was not regarded as a breach of the standstill obligation.

Gun jumping in connection with warehousing structures

The most recent decision issued by the Commission dealt with a breach of the standstill obligation in connection with a "warehousing" structure (Canon/Toshiba Medical Systems).

In principle, warehousing consists of a complex two-step transaction. In the first step, the shares of the target are acquired by a third company (an interim buyer). Following clearance, the shares are then transferred by the interim buyer to the final buyer in a second step. The potential gun-jumping risk of warehousing structures results from the premature assumption of the commercial risk of the target, which may be viewed as a CoC.

On June 27, 2019, the Commission issued a fine of €28 million against the Japanese camera manufacturer Canon. The Commission accused Canon of "partial implementation" of the acquisi-



tion of Toshiba Medical Systems (TMSC) without the required notification and clearance. Canon has already announced it is appealing the decision.

In August 2016, Canon notified the Commission of its intended acquisition of TMSC. The transaction was approved by the Commission in September 2016. Prior to the notification, the interim buyer had already acquired 95% of TMSC's shares for €800 in step one. At the same time, Canon paid €5.25 billion for the remaining 5% and the purchase option for the interim buyer's share package in step two. The Commission held that these steps form one single notifiable transaction, as step one was essential and necessary for Canon to gain control over TMSC. In the Commission's view, step one constituted a "partial implementation" of the transaction. Even though the purchase option did not formally lead to a CoC prior to stage two, the payment of the full purchase price meant that Canon effectively assumed all TMSC's commercial risk. The case was also aggravated by a few other facts, namely that the interim buyer served solely as a transaction vehicle, that Canon had already paid the full purchase price in the first step and that the transaction was cleared unconditionally.

It remains to be seen whether the Commission will take an equally restrictive view cases of less extreme warehousing. For example, the interim buyer may continue to hold the target's shares after clearance is denied, or the final buyer may not assume the target's commercial risk in the first step. In any case, parties should carefully consider at which step the final buyer might assume commercial risk, and they should exercise utmost caution in using transaction vehicles for the sole purpose of warehousing.

Veto rights and access to sensitive information

On April 24, 2018, the Commission issued a fine of €124.5 million against Altice, a multinational cable and telecommunications company headquartered in the Netherlands. Altice allegedly gained control over PT Portugal prior to clearance by obtaining veto rights and access to sensitive business data.

Altice notified the Commission in February 2015 of its intended acquisition of PT Portugal. The transaction was conditionally cleared by the Commission on April 20, 2015, subject to the divestment of Altice's businesses in Portugal. In May 2017, the Commission sent a statement of objections to Altice, alleging that Altice

had implemented its acquisition of PT Portugal before obtaining clearance. The Commission claimed that Altice had already gained decisive influence over PT Portugal's business activities, for example by granting Altice veto rights over day-to-day business proceedings. Altice had been enabled to exercise significant influence over PT Portugal's business beyond the necessary influence to preserve the value of the target. For instance, Altice gave PT Portugal specific instructions on how to carry out a marketing campaign. Altice also received detailed commercially sensitive information outside of the framework of a confidentiality agreement and without providing necessary safeguards, such as "clean teams." A clean team generally consists of an impartial third party, typically a consulting firm or external lawyers, that is bound by strict impartiality and confidentiality protocols. It protects the merging parties' competitively sensitive and confidential information and ensures the information can be shared in accordance with applicable antitrust laws, while simultaneously allowing the parties to complete due diligence and plan for integration.

Altice has already filed an appeal before the GC. This decision is eagerly awaited, especially in the light of the CJEU's judgment regarding EY/KPMG DK.

Enforcement trends of national competition authorities in the EU

At the national level, too, competition authorities in the EU have recently increased their focus on compliance with merger control procedural rules. Despite the existence of a relatively coherent statutory framework, the administrative practice of national authorities varies and further complicates planning a cross-border transaction subject to merger control in various jurisdictions:

- Germany: In the Edeka/Tengelmann case, the German Federal Court of Justice confirmed that independent of a CoC, preparatory measures that relate to a merger and anticipate its effects infringe the standstill obligation. This rather broad approach by the German authorities means even more caution is required when doing business in Germany.
- France: In the Altice/SFR OTL case, the French Competition Authority held that Altice's involvement in the operational management of SFR and OTL before the closing of the acquisition was a breach of the standstill obligation, leading to a fine of €80 million. In particular, Altice had intervened in strategic decisions and the definition of business policies.

- The UK: In the Electro Rent case, the Court upheld the first-ever fine issued for a breach of the standstill obligation by the UK Competition and Markets Authority (CMA), pointing out that gun jumping is not merely a theoretical risk under UK law. Following the CMA's approach, it appears that a CoC is not a necessary condition for gun jumping sanctions. This will be of particular interest in a post-Brexit world.
- Spain: In the Gestamp/Essa Bonmor case, the High Spanish Court annulled the relevant authority's decision regarding a breach of the standstill obligation resulting from a two-step acquisition. Contrary to the authority's opinion, the scope of the veto rights granted by the first stage and the 10% shareholding did not establish a CoC, while the second stage did respect the standstill obligation.

Lessons learned from recent enforcement activities

The Ernst & Young/KPMG Denmark decision has helped clarify the red line for parties' integration planning efforts in a transaction: Any integration steps before clearance that, in whole or in part, in fact or in law, lead to a CoC over the target will be considered gun jumping. Practices such as the acquisition of a company

through warehousing, the attainment of a de facto CoC despite minority shareholding, the granting of veto rights, and the exchange of sensitive business data prior to clearance should be treated with particular caution. The Commission's Altice/PT Portugal decision shows that veto rights granted to the buyer may constitute a gun jumping infringement if they are either not necessary for safeguarding the target's value during the interim period or they are too extensive without having the purpose of preventing material changes in the business.

Furthermore, the decision clarified that the exchange of detailed commercially sensitive information may enable the buyer to gain decisive influence. Besides information exchange during the due diligence, parties to a M&A transaction should exchange such information for the purpose of integration planning on a need-to-know basis through clean team structures.

The wide variety of conduct that might constitute gun jumping and the inhomogeneous decision practices of the European authorities together create a significant risk for companies' transactional practice. In light of increasing enforcement activities, the integration planning approach with the lowest risk should

be chosen. As parties currently often operate in a legal gray zone, it would be helpful if the authorities were to publish detailed official guidelines for integration planning and information exchange. For the time being, however, it is of utmost importance for parties to involve competition experts at the earliest stages of the transaction. ←



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The next step after the deal is signed

How to disclose personal data in the course of an asset deal

By Dr. Philip Schmidt, LL.B. (Corporate), and Christian Leuthner

More than a year has passed since the General Data Protection Regulation (GDPR) set the framework for the processing of personal data within the European Union (EU). The GDPR obliges controllers (“controller”: the natural or legal person, public authority, agency or other body, which, alone or jointly with others, determines the purposes and means of the processing of personal data) and processors (“processor”: a natural or legal person, public authority, agency or other body that processes personal data on behalf of the controller) to comply with a variety of obligations whenever personal data (“personal data”: any information relating to an identified or identifiable natural person, a.k.a. “data subject”) is involved. (An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.) The processing of personal data as governed

by the GDPR includes the disclosure and/or transfer of personal data in connection with M&A transactions and related processes.

Considering this fact, conducting company acquisitions by means of asset deals may involve considerable difficulties. Share deals, however, are a different story. In the case of a share deal, the company shares are sold and transferred such that the target’s ownership structure changes. This, however, does not generally lead to a change in the controller according to article 4 number 7 of the GDPR, as the target’s customer data remains with the target. Since no data is transferred and no other action is taken with respect to the data involved (including personal data), generally a share deal does not lead to any issues related to personal data.

In the case of an asset deal, on the other hand, individual assets are sold and transferred. If a business is acquired by means of an asset deal, the personal data of customers is likely to be one of the assets transferred to the buyer. In a digitalized



The GDPR extends its reach to M&A transactions.

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and globalized world, the reach of marketing activities and customer networks is crucial for company success, thus customer data is a core asset. As a result, if an asset deal is conducted, personal data is often disclosed and transferred to a new owner (or controller under the GDPR).

Non-compliance with and violation of data protection rules under the GDPR may be sanctioned with high fines. Not only does this lead to financial difficulties, but it can also result in severe damage to a company’s reputation. In order to avoid such an impact, parties to a transaction should deliberately ensure compliance with data protection law. →

The association of German data protection authorities (*Datenschutzkonferenz* or *DSK*) recently published guidance on personal data processing in the course of an asset deal. The resolution provides a brief overview of the requirements and difficulties connected with the disclosure of personal data in an asset deal from a data protection law perspective. It also offers some practical guidance as to how to ensure compliance with data protection law in the course of such a transaction (see the relevant subsection below for details).

Admissibility of data transmission

Under the GDPR, the processing of personal data is prohibited unless explicitly permitted by law. Processing of personal data pursuant to article 4 number 2 of the GDPR includes any operation or set of operations performed on personal data or sets of personal data, such as collection and use of personal data, but also disclosure of personal data from one controller to another.

Legal grounds for permitted processing of personal data are set out in article 6 of the GDPR. These are, inter alia, the necessity of disclosure in order to perform contractual obligations, a legitimate

interest of the controller in certain cases and consent.

Performance of a contract

The processing of personal data is permitted if it is unavoidable for the performance of a contract to which the data subject is a party or if it is required in order to enter into an agreement (article 6 paragraph 1 sentence 1 letter b of the GDPR). However, it is often unclear whether disclosure of personal data is indeed mandatory for the performance of a contract. This often applies to employee data where employees will in the future be employed with the buyer as a result of the transaction (please note that there is a special German provision on employee data; legal justification is article 88 of the GDPR, section 26 paragraphs 1 and 3 of the Federal Data Protection Act (*Bundesdatenschutzgesetz*) and section 613a of the German Civil Code (*Bürgerliches Gesetzbuch*)). In any case, processing must be limited to the extent necessary to perform the contract. Therefore, the only personal data that may be disclosed is data that is absolutely required for the performance of a contract. Nevertheless, the fulfillment of a contractual obligation does not entitle a seller to disclose his or her complete set of stored personal data. Generally, only names and addresses of

customers are required, not e-mail addresses or order histories. Consequently, performance of a contract pursuant to article 6 paragraph 1 sentence 1 letter b of the GDPR is not a sufficient legal basis for the disclosure and transfer of data that is particularly relevant for the success of a business and thus of great interest to a buyer, such as customers' order histories.

Legitimate interest of the controller

Another legal ground for data processing is a legitimate interest on the part of the seller or buyer ("legitimate interests pursued by the controller or third party"), unless the individual concerned has a predominant interest in the data not being processed (see article 6 paragraph 1 sentence 1 letter f of the GDPR). The legitimate interest of the seller or buyer may be interpreted broadly and includes economic interests.

The legitimate interests of the seller or buyer must be balanced against the legitimate interests of the individual concerned in the particular case at hand. The purpose for which the customers' personal data is disclosed can be an indicator of the outcome of a consideration. There are cases where personal data is "only" disclosed as an annex to an asset. For example, if a production site is purchased

and existing customers are delivered, the interest in providing/obtaining certain information to ensure uninterrupted delivery to the business's customers is substantial. As the customers likely have a parallel interest in being provided with seamless continuity of delivery services, usually the data subjects will have no overriding interest in the relevant data not being disclosed. If a CRM database is the asset to be acquired for marketing purposes, there is a legitimate interest of the seller (fulfilment of the purchase agreement) as well as of the buyer (direct marketing of products and increased global reach) in the disclosure of personal data. Recital 70 of the GDPR states that direct marketing can be a legitimate interest. However, customers may have an overriding interest in not being subjected to marketing. Pursuant to article 21 of the GDPR, data subjects must be given the opportunity to object to such disclosure.

Consent

Controllers may also rely on data subjects' consent to the disclosure pursuant to article 6 paragraph 1 sentence 1 letter a of the GDPR. However, consent requirements are rather hefty, as consent must be freely given, specific, informed and unambiguously indicated by a statement of clear affirmation. In addition, con- →

sent may be withdrawn at any time. As a result, other justifications for the disclosure of personal data should be utilized if available. Under specific circumstances, however, a customer's consent is inevitably required (for example, in cases where the personal data concerned falls under certain special categories as delineated in article 9 of the GDPR).

Resolution published by the German data protection authorities

On May 24, 2019, the *DSK* published a resolution on the disclosure of personal data in an asset deal in order to create some degree of legal certainty for parties to such a transaction. The *DSK* created case groups based on the seller's and buyer's legitimate interests in light of article 6 paragraph 1 sentence 1 letter f of the GDPR (please note that the data protection authorities of Berlin and Saxony did not agree to the second case group). The resolution does not consider any other legal basis for disclosure.

Customers' personal data regarding existing contractual relationships

Under German law, transfer of a contract requires the consent of any other parties to the contract. The *DSK* argues that the agreement of the customer in this

context includes – “as a minus” – consent to disclosure of the data. This way, the interests of the data subject are sufficiently considered.

Existing customers without current contracts whose last contractual relationship is older than three years

Under German civil law, the general limitation period is three years, starting at the end of the year in which a claim arises. The three-year period is often used as a last resort to keep personal data (not including data that must be kept due to statutory retention periods).

According to the *DSK*, personal data from existing customers with whom the last active contractual relationship ended more than three years ago may be disclosed, but only used when the use is related to statutory retention periods (in particular for tax-related purposes). In any other case, the data subject's interest in the data not being used outweighs any other parties' interests.

A conceivable alternative is that the personal data of the customers concerned is not disclosed to the buyer but remains with the seller. If an insolvency administrator is involved, he or she will try to find a service provider (to be financed with

the assets) who will retain the data for a certain period.

Personal data of customers in cases of advanced contract initiation; existing customers without current contracts and whose last contractual relationship is less than three years old

In cases where the last contractual relationship is not older than three years (again taking into account the general limitation period under German law) and in cases where a contractual relationship with a prospective customer has been initiated in an advanced stage, the personal data of such customers may be disclosed if the data subjects have sufficient time (the *DSK* suggests six weeks) to object to their data being disclosed to the buyer. This is known as the opt-out model. The *DSK* considers this procedure to be cost saving for companies, as it takes the interests of the customers into account to a sufficient extent without generating excessive effort or risk on the part of the company. According to the *DSK*, many customers would be surprised if asked to give their express consent and would likely refuse to grant it, which would be contrary to the parties' interests. The option to object should be simple and presented in a consumer-friendly manner

for example an option to tick a box in an online procedure.

The *DSK* emphasizes that banking data (IBAN) cannot be disclosed using the opt-out model. The explicit consent of customers is generally required for disclosure of banking data. This, however, does not include payment history.

Customers' personal data in cases of open claims

Claims against customers may be transferred unless prohibited by law (section 398 and following of the German Civil Code. See section 399, the 2nd alternative German Civil Code and section 354a of the German Commercial Code [*HGB*]). In this context, data may be disclosed by the former creditor to the new creditor. The data subjects' interests, however, outweigh other interests if the transfer is excluded by agreement.

Customers' personal data belonging to a special category pursuant to article 9 paragraph 1 of the GDPR

Article 9 paragraph 1 of the GDPR prohibits the processing of special categories of personal data (personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or →

trade union membership, data concerning health or data concerning a natural person's sex life or sexual orientation, as well as the processing of genetic data or biometric data for the purpose of uniquely identifying a natural person). Such data may only be processed by means of informed consent in accordance with article 9 paragraph 2 letter a and article 7 of the GDPR. This, however, only applies to customer data. Employee data may be disclosed to exercise rights under employment law (article 9 paragraph 2 letter b and paragraph 4, section 88 of the GDPR; section 26 paragraph 3 of the Federal Data Protection Act and section 613a of the German Civil Code).

Conclusion

The GDPR extends its reach to M&A transactions. We welcome the resolution by the *DSK* as an official statement on the disclosure of personal data in the course of an asset deal. Although the statement is non-binding, it provides transaction parties with objective guidelines regarding how to comply with data protection law. Given the fact that transaction parties and authorities are increasingly focusing on data protection law, more comprehensive guidance on data protection during a transaction is needed, as well as direction in dealing with em-

ployee data and data disclosure during a due diligence process (which the resolution does not cover at all). Note here the planned £99 million fine announced by the UK Information Commissioner's Office against a global hotel group due to a security incident that was not identified during due diligence.

The resolution also fails to assess which categories of personal data fall within the scope of the individual case groups. Due to this lack of information, an individual assessment of the permitted disclosure of customer data during an asset deal is always required.

Practical recommendations: what transaction parties need to consider

As non compliance with data protection law may lead to high fines as well as reputational damage, and since the effort of data implementation is great when a target does not comply with data protection law, buyers and sellers are strongly advised to take data protection law into account at all stages of a transaction. This leads to the following recommendations:

- **Find a legal justification for the disclosure of personal data.** Personal data may not be disclosed without a legal justification. Both seller and buyer

need to assess whether the disclosure of personal data in connection with the transaction falls within the scope of one of the above-stated case groups. If it does not, other legal justifications need to be considered.

- **Adhere to the principles of data minimization and purpose limitation.** Personal data should only be processed to the extent required for the specific purpose for which it was collected – and solely for that purpose. If the buyer does not continue to pursue the same purpose, consent is likely required.
- **Implement adequate technological and organizational measures.** Controllers and processors must implement an adequate level of data protection to ensure adequate data security (for example, encryption or pseudonymization of data, “pseudonymization” meaning the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is stored separately and is subject to technological and organizational measures to ensure the personal data is not attributed to an identified or identifiable natural person). This also

includes the security supplied by service providers.

- **Inform data subjects.** The controller (seller/buyer) must provide data subjects with comprehensive information regarding the intended processing procedures (articles 13 and 14 of the GDPR). If information was directly obtained from the data subject, this information regarding processing procedures must be provided when the initial processing occurs. In any other case, data subjects must be informed as soon as possible, at the latest within one month. ←



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Implementation of the risk-based approach in accordance with the 4th EU Anti-Money Laundering Directive

Client risk rating as a key element of the risk-based KYC process

A guest contribution by Dr. Burkhard Eisele

The 4th EU Anti-Money Laundering Directive (4th EU AMLD) became effective in June 2017. Intended to prevent the use of the financial system for money laundering or terrorist financing purposes, the 4th EU AMLD states that financial institutions must evaluate their clients as part of the Know Your Customer (KYC) process by means of a risk-based approach.

Recital 22 of the 4th EU AMLD states that “... a holistic, risk-based approach should be used. ... It involves the use of evidence-based decision-making in order to target the risks of money laundering and terrorist financing ... more effectively.”

The scope of the risk-based approach is defined in Article 14 (5) of the 4th EU AMLD: “Member States shall require that obliged entities apply the customer due diligence measures not only to all new customers but also at appropriate times to existing customers on a risk-sensitive basis, including at times when the relevant circumstances of a cus-



The client risk rating is a key element in the risk-based approach according to the 4th EU Anti-Money Laundering Directive.

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tom change.” In this context, the term “appropriate times” does not refer to a transitional period needed for compre-

to the frequency at which a client must be reevaluated.

Concerning the KYC process, the risk-based approach must be applied in the following three cases:

- During client onboarding to determine the money laundering risk of potential new clients prior to the signing of a contract
- During regular review to periodically determine the money laundering risk of existing clients based on the risk classifications “high risk,” “medium risk” or “low risk”
- In case of an event-driven review, it is necessary to run an ad hoc evaluation of the money laundering risk of existing clients whenever exogenous or endogenous events occur

Almost two years after the 4th EU AMLD became effective, many financial institutions still do not use proper methodolo-

hensive implementation of the risk-based approach for existing clients, but rather

gies in this process and fail to comprehensively utilize the risk-based approach.

Risk types and factors indicating potentially higher risk

In addition to risk factors that need to be determined individually by each institution (for example, on the basis of an institution’s specific business model), Article 8 of the 4th EU AMLD provides a non-exhaustive list of risk factors and risk types that need to be taken into account for the client risk rating: “Member States shall ensure that obliged entities take appropriate steps to identify and assess the risks of money laundering and terrorist financing, taking into account risk factors including those relating to their customers, countries or geographic areas, products, services, transactions or delivery channels. Those steps shall be proportionate to the nature and size of the obliged entities.”

These risk factors are specified in Annex II to the 4th EU AMLD (“factors and types of evidence of potentially lower risk”) and Annex III to the 4th EU AMLD (“factors and types of evidence of potentially higher risk”; Figure 1).

Methodological approach for the client onboarding process

The client risk rating is an integral part of the client onboarding process and therefore a key element of the risk-based approach. The client risk rating methodology leverages the risk-scoring model and ensures a risk-adequate and client-specific assessment of the money laundering risk.

A suitable methodology for a risk-based KYC approach within the client onboarding process is described in the following section.

Calculation of the client risk rating

As part of the client onboarding process, information is collected about the sources of funds, the purpose of the business relationship and the beneficial owner. This collection of information is performed as a new client is identified and legitimized. The risk scoring model uses this information alongside the previously mentioned risk factors to determine the client risk rating, which results from (a) the initial risk rating and (b) what are known as the “prohibitive risk factors.”

Risk types and factors according to Annex III to the 4 th EU AMLD	
Risk type	Risk factor
(1) Customer risk factors	The business relationship is conducted in unusual circumstances
	Customers that are resident in geographical areas of higher risk as set out in point (3)
	Legal persons or arrangements that are personal asset-holding vehicles
	Companies that have nominee shareholders or shares in bearer form
	Businesses that are cash intensive
	The ownership structure of the company appears unusual or excessively complex given the nature of the company's business
(2) Product, service, transaction or delivery channel risk factors	Private banking
	Products or transactions that might favour anonymity
	Non-face-to-face business relationships or transactions, without certain safeguards, such as electronic signatures
	Payment received from unknown or unassociated third parties
	New products and new business practices, including new delivery mechanism, and the use of new or developing technologies for both new and pre-existing products
(3) Geographical risk factors	Without prejudice to Article 9, countries identified by credible sources, such as mutual evaluations, detailed assessment reports or published follow-up reports, as not having effective AML/CFT systems
	Countries identified by credible sources as having significant levels of corruption or other criminal activity
	Countries subject to sanctions, embargos or similar measures issued by, for example, the European Union or the United Nations
	Countries providing funding or support for terrorist activities, or that have designated terrorist organizations operating within their country

Figure 1: Factors and types of evidence of potentially higher risk (Annex III to the 4th EU AMLD)



Initial risk score	Initial client risk rating
0 to 30	Low risk
> 30 to 60	Medium risk
> 60 to 100	High risk

Table 1: Initial risk score matrix for initial client risk rating

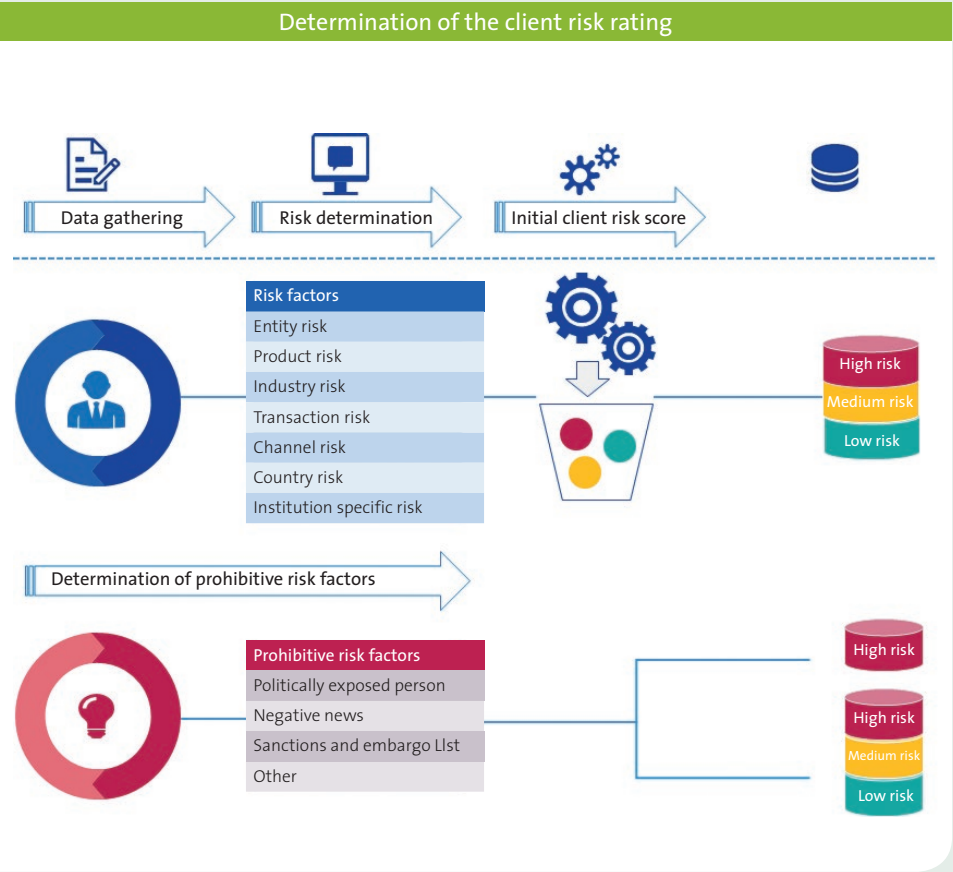


Figure 2: Determination of the client risk rating.

Initial client risk rating

To determine the client risk rating, all the information collected during the client onboarding process needs to be evaluated; specific KYC data and client documents will be assessed as risk factor input and stored in the KYC workflow system.

The risk scoring model calculates risk factor values and determines the weighted risk score using an econometric model.

The outcome of this step is the initial risk score, which is expressed as a value from 0 to 100. Afterward, the risk score is converted into one of the three risk classifications: “low risk,” “medium risk” or “high risk.” (Table 1)

Prohibitive risk factors

The initial client risk rating provides the basis for the final client risk rating. The following section focuses on prohibitive risk factors.

Prohibitive risk factors are:

- the existence of a PEP (politically exposed person) flag (according to Article 3 (9) of the 4th EU AMLD, a “politically exposed person is a natural person who is or who has been entrusted with prominent public functions”),

- the occurrence of adverse information (“negative news”) and
- identification of activities and transactions related to sanctioned and/or embargoed countries.

If one of the prohibitive risk factors is applicable, the final client risk rating automatically shifts to high and the initial client risk rating will be overruled. If no prohibitive factor is applicable, the final client risk rating is the same as the initial client risk rating. (Figure 2).

Client acceptance and consultation process for high-risk clients

As part of the onboarding process, the client risk rating is a key element used to determine whether client management (the first line of defense) and the compliance function (the second line of defense) need apply the simplified or enhanced level of customer due diligence.

According to the 4th EU AMLD, financial institutions need to take risk factors “into consideration and [take the applicable measures] in situations where enhanced customer due diligence measures are appropriate. Specific account shall be taken of the nature and size of the business, and, where appropriate and proportion-

ate, specific measures shall be laid down” (Article 18 [4]).

Simplified customer due diligence is to be performed for customers with a client risk rating of low or medium; in such cases, no explicit involvement of the compliance function is needed for client acceptance as part of the onboarding process.

Clients who are rated high risk according to the client risk rating must be handed over to the compliance function for the final decision. In the consultation process, the compliance risk exposure associated with the client will be evaluated, and a joint decision will be made by client management (the first line of defense) and the compliance function (the second line of defense). The potential client then receives unconditional acceptance, conditional acceptance or no acceptance.

Regular review

As already indicated, Article 14 (5) of the 4th EU AMLD states that financial institutions must reevaluate existing clients within an appropriate timeframe. The criterion for the frequency of this regular review is the client’s current risk rating. The review of clients and the reevaluation

of the client risk rating are performed at three typical frequencies:

- Low-risk clients: reevaluation of client risk rating every five years
- Medium-risk clients: reevaluation of client risk rating every two years
- High-risk clients: reevaluation of client risk rating annually

This ensures a client’s risk rating is always up to date.

Ideally, regular reviews should not be performed at the same time for all clients in the same risk classification group; rather, the reviews should be distributed over the entire reevaluation cycle.

Event-driven review

In addition to the reevaluation of a client during regular review, clients must be reevaluated immediately if any change in exogenous or endogenous factors indicates an increased compliance risk. A client’s compliance risk can increase as a result of:

- changes to the country risk list according to the Corruption Perceptions Index (CPI),
- appearance on a sanction list or embargo list,
- change in the risk classification of industries by the AMLD,

- occurrence of a PEP or
- significant increase in the client’s transaction volume.

Event-driven review ensures that all clients whose compliance risk increases due to their exogenous or endogenous factors are monitored at the enhanced level of customer due diligence. Similarly, this review ensures that a decreased risk results in application of the simplified level of customer due diligence. If this response to a decrease in risk is neglected, the cohort of clients under enhanced customer due diligence will accumulate over time.

Integrated KYC platform and client risk rating

A high-quality client risk rating can be achieved by implementing an appropriate workflow system. An integrated digital KYC platform supports client management representatives in the collection of client data, evaluation of risk factors and calculation of client risk ratings during the onboarding process.

At the same time, an integrated KYC platform significantly improves the efficiency of the regular review process. The workflow system automatically generates client dossiers for review based on the recorded reevaluation dates. Ideally,

information about exogenous factors is also automatically submitted as a result of queries sent to external data sources.

As part of event-driven review, the workflow system identifies those client dossiers for which changes in exogenous or endogenous factors may have an impact on the client risk score and client risk rating.

Leveraging the fast progress of technology (big data, artificial intelligence, etc.), some leading institutions are currently considering performing a daily client risk rating procedure for all existing customers in an overnight batch run. In such cases, regular review and event-driven review converge, as an up-to-date risk assessment is conducted for all clients every day.

However, it is important that experienced client managers and compliance experts still actively monitor high-risk cases. This ensures that changes to a client’s risk profile can be captured even if these changes are not encapsulated in public information and thus not automatically recognized by the workflow system.

For medium- and low-risk clients, usually sample-based monitoring of client data is adequate if the workflow system can →

flag client dossiers as complete in the automated assessment.

Summary and outlook

The client risk rating is a key element in the risk-based approach according to the 4th EU Money Laundering Directive.

In the risk-based approach, for the first time, money laundering and terrorist financing risks are consistently reflected by means of a comprehensive methodology.

Depending on the client risk rating of a potential new or existing client, financial institutions need to comply with different customer due diligence requirements. However, an adequate risk-based approach entails more than just regular reevaluation of existing clients by means of regular and event-driven reviews.



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It is also important that the risk scoring model continuously generates highly precise client risk ratings. Therefore, the client risk rating model itself needs to be reviewed frequently by back testing the risk scoring model methodology. When necessary, recalibration of this methodology is a crucial prerequisite for a reliable risk-based approach.

Consistent rollout of the client risk rating in financial institutions – especially those with complex group structures – and integration of the model into a workflow-based, integrated compliance platform will certainly bring challenges in the upcoming years. <–

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A new era for trademarks in Germany

An initial assessment from a practitioner's point of view

By Dr. Boris Uphoff

The Trademark Law Modernization Act (*MaMoG*) introduces new types of trademarks and expands protection for trademark owners. The new act has been in force for nearly nine months. This article represents a practitioner's view of the act's advantages and limitations.

Effective January 14, 2019, the *MaMoG* fundamentally reformed German trademark law, aligning it with European standards following the EU Trade Mark Directive 2015/2436. The *MaMoG* contains a reaction to recent technological developments and strengthens the rights of trademark owners within the parallel systems of national trademarks and European Union trademarks. A significant change to section 8 of the German Trademark Act (*MarkenG*) has considerably broadened the range of signs eligible for protection. The reform aims to provide protection for trademarkable content that previously failed to meet the strict standards of "graphical representability." Now, video sequences, characteristic

sounds and even scents can be protected (at least theoretically).

The origin of trademarks in the brewing industry

The first German trademarks in today's sense developed with the increasing economic role of the brewing industry. The first German law regarding the protection of trademarks came into force on May 20, 1875, when the first trademark, Meißner Porzellan, was registered. The best-known German trademark still is the Eau de Cologne with its flagship perfume 4711. Other well-known early trademarks are Coca-Cola (1896), Maggie (1897), Dr. Oetker Original Backin' baking powder and Wrigley's (both 1893), as well as the champagne Monopole (1895). The economic upswing in Germany after World War II set the foundation for a fast-growing range of branded products. When well-known brands became increasingly associated with whole product groups and started to serve as synonyms for common products – such as Uhu for glue, Hansaplast for adhesive bandages



Trademarks will likely be slightly more diverse in the future; but in most cases, the objects of protection will still be represented graphically.

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and Tempo for tissues – the product labels increased in economic value for the trademark owners. A comprehensive protection of trademarks thus became essential.

Until now, the distinctiveness of a trademark that uses a logo to identify a product like a soft drink, a bag of chips or a pair of tennis shoes was assessed according to its graphical represent- →

ability in the media. According to the former wording of section 8 of the *MarkenG*, a trademark's graphical representability was a prerequisite for its protection: "Signs that cannot be represented graphically ... are excluded from registration as protected trademarks." However, as globalization and digitalization accelerated, it became increasingly clear that trademark protection regulations would need to be adjusted to reflect modern communication technologies. The hard and fast concept of a trademark's graphical representability had to be left behind, and a broader definition of the requirements for registration had to be established. The new wording in the *MaMoG* reads: "Signs that cannot be depicted in the [trademark] registry in a way that allows the respective authorities and the public to clearly and unambiguously recognize the subject under protection [...] are excluded from registration as protected trademarks."

Entirely new types of trademarks are now possible

The elimination of the previous requirement of graphical representability is an obvious change under the *MaMoG*. Not quite as obvious are the new possibilities that have now emerged for businesses. With the elimination of the graphical rep-

resentability requirement, entirely new types of trademarks are now registrable. This was, after all, the main purpose of the new regulation. Movements, sounds and even video sequences can now be registered as trademarks. However, it is still required that "the object under protection in the trademark registry can be recognized clearly and unambiguously." In the aforementioned examples, this criterion can be met using common data formats for filing the trademark in the electronic trademark registry. The German Patent and Trade Mark Office has published a list of possible types of trademarks that expands beyond the classic categories of words, figurative marks and position marks that the European Court of Justice (ECJ) already mentioned in 2018: pattern marks, motion marks, hologram marks and multimedia marks are just a few examples.

The red sole of the shoe

An interesting case that came before the ECJ, won by fashion designer Christian Louboutin against a competitor in 2018, is a vivid example of the difficult questions concerning possible trademark infringements that pre-existed the reform. Van Haren, a Dutch shoe chain that belongs to the Deichmann Group, had released a shoe that very strongly resembled an ex-

clusive and widely successful Louboutin product. The French designer specializes in high-class shoes with an eye-catching detail: the red sole. Louboutin has managed to establish the red sole of his shoes as a symbol known worldwide. His high heels have become some of the most popular on the market and have secured the Louboutin brand a high level of recognition value. Similar to the cases involving Nivea blue, Langenscheidt yellow and Milka purple, the ECJ acknowledged Louboutin red as a "contourless single-colour mark." However, this does not mean any specific color can be registered as a trademark on its own. Although the ECJ does not explicitly state this, the combination of a specific color located in a certain position will continue to play a crucial role when the court is deciding whether the trademark in question is distinctive enough to be protected. This will not be the case with every color-position combination. In the Louboutin high heels case, the ECJ regards this requirement as fulfilled: "Position marks that define the position of a certain color at a certain position of the object in question are generally registrable," the ECJ states.

With the elimination of the restrictive graphical representability requirement under the new *MaMoG*, it is now possible, for example, to register an advertising

jingle as a protected trademark without providing a written sequence of the musical notes used in the jingle. This used to be required under the old law so that the melody could be depicted graphically. However, the change addresses more than just a matter of convenience. As the sequence of musical notes is no longer required, it is now also possible to register sounds as a "sound mark" that would be impossible to depict as a sequence of notes.

For example, a company might use custom-made packaging that generates a sound when opened in order to set its products apart from those made by competitors. Such a trademark would not have been registrable under the old *MarkenG*. But with the new *MaMoG* reform, it is now sufficient to provide an audio file with the desired sound for registration.

However, even the new possibilities under the *MaMoG* have their limits. Even a sound that cannot be captured in musical notes, for example, can be objectivized using a sonogram (a spectrogram that shows the time on the x-axis and the respective frequencies in hertz [Hz] on the y-axis). Registering a taste as a trademark, however, is still problematic. A recipe cannot convey a taste exactly as it →

is perceived by consumers. In that case, how can a taste be depicted permanently and unambiguously? Measurement of a tester's neuronal reaction to a specific taste will not sufficiently distinguish the taste. Filing a registered design or a sample is unlikely to do the job either. Even if it did, how can it be guaranteed that the initially filed taste remains unchanged over the course of the whole period of protection – 10 years or even longer? At this point, the challenge of conserving tastes has not yet been mastered.

Apart from broadening the range of types of trademarks, the *MaMoG* also introduced certification marks, a whole new category of trademark believed to have an important role to play in the future market. Quality seals and eco-labels can now be licensed for companies or products. Certification marks are intended to put an end to the unchecked and illegal use of unregulated quality seals for organic foods and fair-trade products. If a trademark owner guarantees his or her products have certain features (such as the use of certain materials, production methods, services or quality standards), his or her products need to be distinguishable from products without such a guarantee from the manufacturer.

No lengthy and costly proceedings

Another change under the new *MaMoG* concerns opposition procedures in what are known as nullity proceedings before the German Patent and Trade Mark Office. Previously, if a trademark owner appeared not to have used his or her trademark in practice, the options for filing an opposition were limited. Starting May 1, 2020, it will also be possible to justify an opposition with relative grounds for invalidity or the upcoming expiry of a trademark's protection. These new possibilities are intended to shorten proceedings and lower costs, at least in theory. This would be a welcome improvement for trademark owners who need a fast option for checking on their trademark's protection status, as well as for opposing parties who want to avoid lengthy and costly proceedings.

Outlook

It remains to be seen whether the new trademark law will indeed result in fundamental changes regarding the practical application of the *MarkenG*. Trademarks will likely be slightly more diverse in the future, but in most cases, the objects of protection will still be represented graphically.

There are a few reasons for this: First, the ways of delineating an object of protection “clearly and unambiguously” in a legally secure manner are limited. Secondly, graphical representation will, in most cases, be the easiest and most effective way to ensure protection. Thirdly, attorneys will advise that companies use a method proven effective in the past, which equates to graphical representation of the object of protection. It will take years before new methods of representing objects of protection will prove equally safe as graphical representation. It will therefore also take years before public perception of trademarks expands beyond graphically representable objects.



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New ECJ ruling

Clocking in for all? Employers to be required to comprehensively document employees' working hours

By Dr. Isabel Meyer-Michaelis and Ulrike Thiel

On May 14, 2019, the European Court of Justice (ECJ) ruled that the recording of working hours must extend beyond documenting overtime (Case C-55/18). In the future, employers will be required to record their employees' working hours systematically and comprehensively.

Recording of working hours in Germany non-compliant with ECJ requirements

Section 16 (2) of the German Working hours Act (Arbeitszeitgesetz or ArbZG) stipulates that employers are obliged to document the working hours of their employees that extend beyond the eight-hour workday.

This has now been declared inadequate by the ECJ.

Trade union demanded detailed recording of working hours

A Spanish trade union brought an action before Spain's National High Court seeking to oblige Deutsche Bank to compre-

hensively record the daily working hours of its employees in Spain, arguing this was the only way to ensure compliance with the working hours laid down by law. The trade union backed up its case with a statement that 53.7% of overtime hours worked in Spain are currently not properly recorded. Just as in Germany, employers in Spain have so far only been required by law to record overtime. Accordingly, Deutsche Bank had only documented the overtime worked by its staff.

The National High Court in Spain referred the case to the ECJ.

Judgment foreshadowed by the Advocate General's concluding opinion

At the end of January, Advocate General Giovanni Pitruzzella showed himself clearly in favor of stricter rules regarding the recording of working hours in his concluding opinion. He took the view that the EU's Charter of Fundamental Rights imposes an obligation on employers to introduce a system for recording the actual daily working hours of employees. →



The introduction of a working hours recording system spells additional bureaucratic effort for employers across Europe.

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In his opinion, national legislation that does not achieve this level of protection is contrary to EU law and would therefore not be applicable.

The Luxembourg judges have now adopted this view.

Protection of fundamental rights under the EU Charter

The ECJ judges based their ruling on the EU Working Time Directive 2003/88/EC and the Charter of Fundamental Rights. The judges pointed out that the latter guarantees “the right [of every worker] to limitation of maximum working hours, to daily and weekly rest periods” (see article 31 (2) of the Charter of Fundamental Rights).

The court went on to state that the introduction of a system for the comprehensive recording of working hours was essential to guarantee this fundamental right in its entirety and to protect employees. Without a system of this kind, it would not be possible to establish whether the permissible working hours had been exceeded. This would, in practice, make it almost impossible for employees to enforce their rights as guaranteed under European law. Furthermore, in the event of a legal dispute between

an employer and his or her employees over compliance with maximum working hours and rest periods, it would be particularly difficult for employees to produce evidence.

Regulations on the national level that do not require employers to maintain a record of daily and weekly working hours, instead merely requiring them to record overtime, are consequently not appropriate for ensuring the practical effectiveness of the rights enshrined in the Charter of Fundamental Rights and the EU Working Time Directive.

While the questions addressed by the National High Court of Spain and the Advocate General’s concluding opinions were limited to full-time employees who had not expressly agreed, either individually or collectively, to work overtime and who were not mobile workers, merchant navy employees or railway workers, the ECJ judges did not make a distinction in this respect. In their ruling, they refer to all employees regardless of the type of employment concerned and regardless of any additional regulations regarding working hours.

Implications of recording working hours: More bureaucracy and the end of trust-based working time in its existing form

As the current legal situation in most EU Member States is comparable with the legal situation in Spain and Germany, this decision by the European Court of Justice will have considerable repercussions on employment law in countries throughout Europe.

Compliance with working hours legislation is set to become more important as a result of the ruling. That said, the ECJ’s judgment does not impose any direct obligation on employers to act. Such an obligation would require statutory implementation of the ruling by each of the legislative bodies in the EU Member States. The legislative bodies will have to oblige employers to set up a system for recording working time that meets the requirements laid down by the ECJ. However, the Member States can themselves decide on the details of implementation. They are at liberty to determine a method for recording effective daily working hours that is appropriate to the circumstances in their respective country. The ECJ judges also stressed that it would be possible to take special situations into account. For example, the size of a company or the nature of its operations may justify

exceptions to the strict requirements around time recording.

As a result, each national legislature is now required to put the appropriate regulations in place. The crucial requirement is that the employer shall establish an “objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured” (Press Release No 61/19 issued by the ECJ on 14 May 2019).

It is apparent that current “trust-based working time” arrangements in which neither side checks or records working time are unlikely to have a future. In the world of Work 4.0, strict procedures for time recording that are in line with the ECJ’s requirements appear to be a retrograde step. The flexibility that has increasingly become a feature of the modern workplace looks likely to suffer under such systems.

It is also clear that the introduction of a system for recording working hours spells additional bureaucratic effort for employers across Europe. The German Minister for Economic Affairs, Peter Altmaier, has expressed concern about this aspect of the matter and has spoken out against tightening the regulations on recording working hours. In particular, he →

warned against the introduction of excessive bureaucracy. The culture of trust between employers and employees created by a trust-based working time model would also be impacted, he added. Meanwhile, the German Labor Minister, Hubertus Heil, stated that any additional bureaucratic effort would not be wasted, as the government wants to strengthen workers' rights in any case. The Ministry for Economic Affairs and the Ministry of Labor are currently considering whether a change in the law is necessary in Germany, and if so, how such a change might look. In any event, the ECJ ruling has brought employers' compliance with working time regulations into sharp political focus. <—



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A one-stop-shop solution:

‘Global Merger Control Handbook’, published by Globe Law and Business in cooperation with German Law Publishers

By Dr. Sebastian Jungermann

Global Merger Control Handbook, published by Globe Law and Business in cooperation with German Law Publishers, is a comprehensive, three-volume handbook describing merger control rules in the 55 most relevant jurisdictions around the world. The handbook was written and edited by attorneys at DLA Piper with the support of other local firms in certain jurisdictions. The new “Global Merger Control Handbook” offers a detailed overview of the most relevant local rules, methodologies, processes and timing requirements. The handbook is available as a hard copy and in electronic format. It is a helpful reference guide for transaction lawyers, merger control experts and in-house counsel involved in M&A activities.

The competition rules for merger control are highly relevant, and non compliance can lead to steep fines. In most jurisdictions, notifiable transactions are subject to a standstill obligation, prohibiting the consummation of a transaction prior to its clearance. Breaches of this standstill



“Global Merger Control Handbook”, published by Globe Law and Business in cooperation with German Law Publishers, is a comprehensive, three-volume handbook describing merger control rules in the 55 most relevant jurisdictions around the world.

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obligation, usually referred to as jumping the gun, have been subject to significant enforcement actions by competition authorities around the globe. In most cases, these breaches have consisted either of a deal without notification or a deal with notification that was consummated before having been cleared. The European Commission, for instance, imposed gun jumping fines amounting to €20 million in 2009 (Elactrabel) and again in 2014 (Marine Harvest), as well as €125 million in 2018 (Altice). In addition, procedural violations, such as supplying wrong, incorrect or incomplete information during the merger review process, have recently been prosecuted more aggressively. In 2017, for instance, the European Commission imposed a €110 million fine for the submission of wrongful information to the case team (Facebook/WhatsApp).

Successfully closing complex international transactions can be challenging. A wide range of both predictable and unexpected factors can make life difficult for deal makers and transaction



specialists. In 1990, fewer than 12 jurisdictions worldwide had merger control laws, but today more than 110 countries have introduced merger control regimes. In the past few years especially, the world has seen a surge in merger control enforcement. Some merger control jurisdictions are more active than others, but all should be taken into consideration when assessing the antitrust risks of a cross-border transaction.

The new 1440-page Global Merger Control Handbook, published in March 2019, offers a practical overview of the 55 most relevant jurisdictions and their respective merger control regulations in three volumes. To help transaction and merger control specialists navigate the most relevant jurisdictions, it offers a thorough and detailed overview of relevant local rules for these 55 jurisdictions on a country-by-country basis.

The handbook focuses on the most relevant jurisdictions and dedicates extensive chapters to the most widely important ones, including the European Union, the United States and Canada. In addition, it covers the most important jurisdictions across Europe, Asia-Pacific, Africa and the Middle East. It also draws attention to some exotic countries.

For the sake of clarity, the country-specific chapters are structured similarly, offering both practical information and instructions. Each introductory section presents a quick overview of the merger control regime in the relevant jurisdiction, followed by an overview of the merger clearance process and the role of the national competition authority. The next section deals with transaction types that require filing: asset and share deals, joint ventures and foreign-to-foreign mergers. The subsequent sections deal with the relevant jurisdiction's filing obligations, its various thresholds, its basic principles

and its filing and clearance process, as well as an explanation of the required documentation, a description of the substantive analysis and additional practical advice for lawyers involved in merger control proceedings. This last item is also highly relevant in practice and particularly helpful when trying to coordinate the respective reviews and procedures locally. At the end of each chapter, quick facts – questions and answers – are presented in tabular form, some of which refer to the previous paragraphs. This enables the practitioner to quickly and comprehensively consider country-specific questions.

Though parties to transactions today have over 110 jurisdictions to monitor, most transactions usually do not require notification in more than five to 10 jurisdictions. Only the largest transactions require filings numbering 20, 30 or more – a situation that is quite rare. This comprehensive handbook is of practical relevance and provides a good overview

of the 55 most relevant jurisdictions in the area of competition law merger control. The handbook can serve as an important tool for successful preparation, review and implementation of transactions. The intuitive and user-friendly structure provides a good, quick overview of country-specific regulations. From a linguistic point of view, it is easy to read and understand, though the chapters were written by various authors and thus differ somewhat stylistically. As a solid and up-to-date guide, the handbook provides a one-stop-shop solution. It is therefore highly recommended for external and in-house lawyers involved in cross-border M&A transactions. ←

‘Global Merger Control Handbook’

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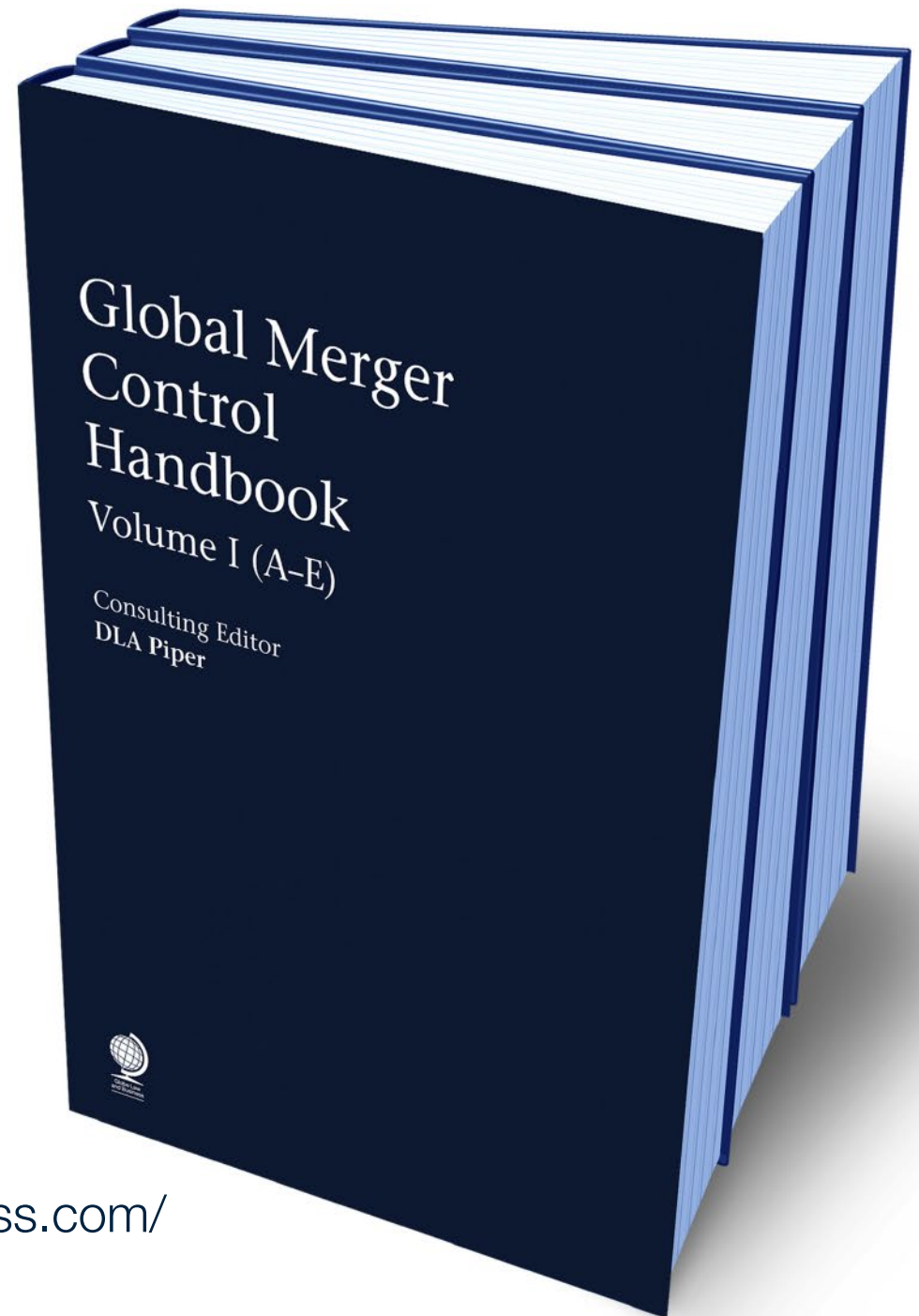


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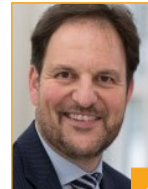
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