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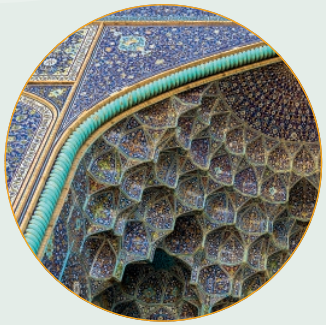



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It's all about compliance

Dear Reader,

In this issue of Business Law Magazine we take a closer look at different compliance matters that have an impact on companies and markets.

Michael Walther and Kai Gesing introduce you to the EU-US Privacy Shield, which now forms the basis for any kind of international data exchange. Dr. Sven-Joachim Otto focuses on the management-liability and compliance implications in the highly important public sector, and Dr. Alexander Cappel concentrates on the future already at our doorstep: Digitization 4.0.

Our authors also tackle the hot topics of banking regulation and a possible Brexit. You won't want to miss any of these articles!

Yours sincerely,

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Canada: economic outlook and changes to come

By Boris Alex and Cora Hilgert

Good prospects

Canada's economic outlook has once again improved. Analysts from Canada's central bank expect an increase in gross domestic product (GDP) of 1.7% for 2016. Following the slump in world market prices for crude oil and natural gas, the country's economic engine ground to a halt. As a result, Canada's economy grew by only 1.2% in 2015, the worst outcome since the 2009 financial crisis.

October 2015 was the beginning of fiscal policy change in Canada with the election of the Liberal government led by Justin Trudeau. To give the economy new momentum, the newly elected government has presented a multi-billion-dollar stimulus package for the country in its first budget.

The additional expenditures are primarily intended for infrastructure investments. In the next decade, a total of CAD$120 billion will be provided for this purpose. The investment program will serve as a boost for economic recovery. The government hopes to raise GDP growth once again above the 2% mark by fiscal year 2017/18 as a result of these investments.

New priorities: energy sector

The incumbent Liberal Party has set new priorities in many areas. In March 2016, the federal government in Ottawa and the provinces have agreed to develop a common strategy for the decarbonization of the Canadian economy, including establishing a fund of over CAD$2 billion for projects to lower carbon emissions. In particular, the environmental technology sector will be able to benefit from these funds. According to a forecast from the consulting company Analytical Advisors, clean-tech sales in Canada will increase 5% per annum, reaching CAD$ 18 billion by 2022. The expansion of electricity generation from renewable energies, especially wind generation, is expected to be pursued in coming years. According to the Canadian Wind Energy Association (CanWEA), wind turbines across Canada contributed capacity of 11 gigawatts (GWs) to the energy grid at the end of 2015. The organization estimates that new capazity of an additional 1.4 GWs in 2016 and 1.4 GWs in 2017 should be contributed. CanWEA estimates that CAD$15 billion will be invested towards this expansion by 2018.

New challenges: mining sector

In addition to the developments in the Canadian energy sector, Canada is a leading mining nation as well. Falling commodity prices on the world market, however, are forcing companies to significantly reduce investment in existing and new projects. Prospecting activities have continued to weaken, as they did in the previous three years. According to information from Natural Resources Canada (NRCan), expenditures on prospecting and exploration of mineral deposits have decreased by 15%, dropping to CAD$1.7 billion in 2015. For 2016, the Ministry of Natural Resources expects a further 18% decline in investment to CAD$1.4 billion. The number of active mining projects has decreased by approximately one-third since 2011, according to estimates by NRCan. At this year's mining trade fair "PDAC Convention" in Toronto, battery storage technology was one of the top themes. The battery storage industry relies on lithium as a raw material and with the expansion of electric vehicles and energy storage, the demand for lithium is expected to grow rapidly in coming years. It is estimated that the value for the raw material's market volume will quadruple in the next 10 years to reach USD8 billion.

Canada as a business partner

From the European perspective, Canada will gain importance as a business partner in the future. After the United States, the European Union is Canada's second most important trading partner: Nearly 10% of Canada's foreign trade is between the 28 member states of the EU. European and German companies currently invest in and export to Canada in high volumes. The planned joint Comprehensive Economic and Trade Agreement (CETA), will further strengthen this relationship.

The agreement reduces, inter alia, 99% of customs duties, which will improve market →

access for industrial goods, agricultural products and services on both sides of the Atlantic. Within the scope of CETA, Canada will open public procurement on a municipal and provincial level to European suppliers. According to the European Commission, the implementation of the agreement is expected to increase the bilateral trade volume for goods and services by 23% across the EU. European companies could save approximately €470 million each year because of the reduction in customs duties. The European Commission expects the GDP of the EU to increase by approximately €12 billion each year.

In particular: Canada, Germany and CETA

The German Federal Ministry for Economic Affairs and Energy anticipates that a decision from the European Council on the signing and provisional application of the agreements on tariff reduction and public procurement could be made in fall 2016. Approval of the agreement by the European Parliament would then be sought afterward. The provisional implementation could possibly take effect by the first half of 2017.

With CETA constituting the future of how trade and investment is conducted between Canada and Europe, the Canadian German Chamber of Industry and Commerce Inc. (CGCIC) is becoming an increasingly important partner for Canadian and German companies. CGCIC acts as a service partner and supports bilateral business relationships. It is closely connected with business, politics and administration in both countries, which enables the around 25 employees in the Toronto and Montreal offices to offer an array of services to German companies interested in Canada and vice versa. These services include payroll and accounting, market- and industry research, immigration and market entry consultation.

To acknowledge Canada's role in both, renewable and clean energy and mining, CGCIC established two competency centers that work on those topics. With its extensive network and expertise, the Competence Centre for Energy & Cleantech not only enables German companies to participate in this rapidly developing sector but also facilitates dialogue between Canada and Germany. The Energy & Cleantech Competence Centre, located in the CGCIC Montreal office, grew out of the numerous activities and projects implemented within the export initiative's "Renewables/Energy Efficiency – Made in Germany" from the German Federal Ministry for Economic Affairs and Energy. The Competence Centre for Mining & Mineral Resources is located in the CGCIC Toronto office. Established in 2012, it has since become an important first point of contact for Canadian and German companies and organizations interested in enhancing bilateral strategic and business partnerships in the mining and mineral resources sector. Funded by the German Federal Ministry of Economic Affairs and Energy, its mandate is to support the implementation of the German government's raw materials strategy to safeguard a sustainable supply of non-energy mineral resources for Germany by providing market information, direct contacts and a platform to foster bilateral business partnerships. Furthermore, it supports German mining supply companies in expanding their activities in the Canadian market. <–

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The EU-US Privacy Shield

Update: the new transatlantic data transfer framework

By Michael Walther and Kai Gesing, LL.M.

Background

Since 1995 (or, more precisely, since EU member states implemented Data Protection Directive 95/46/EC), European data protection laws have enshrined the far-reaching principle that no personal data may be transferred to countries outside the European Economic Area (EEA) unless the destination country ensures an adequate level of data protection (and unless certain narrowly defined exceptions apply).

As this principle has been widely perceived as an obstacle to international trade and data flows, the European Commission has provided a set of instruments facilitating such transfers. These include Standard Contractual Clauses (SCCs), Binding Corporate Rules (BCRs) and – with respect to the United States – a Safe Harbor Framework (Safe Harbor). SCCs are model contracts for data transfers from data controllers within the EEA to service providers and other recipients established outside the EEA. BCRs are internal rules adopted by multinational groups of companies defining an internal policy for data transfers within the group. Safe Harbor permitted data transfers to companies in the United States that self-assess and self-certify their compliance with Safe Harbor and its data protection principles.

The Privacy Shield is designed to guarantee protection of Europe's fundamental rights.

Following Edward Snowden's revelations in 2013 concerning US mass surveillance and intelligence activities, criticism of Safe Harbor increased significantly and included requests for its suspension by European data protection authorities (DPAs). The European Commission reacted later in 2013 by communicating 13 recommendations to improve the transatlantic framework and by entering into negotiations with the US government to address mass surveillance activities as well as a perceived lack of enforcement of Safe Harbor.

In October 2015, a decision reached by the European Court of Justice (ECJ) fueled these negotiations by invalidating the European Commission's July 26, 2000, adequacy decision that had implemented Safe Harbor. The ECJ emphasized privacy as a fundamental right in the European Union and particularly criticized that Safe Harbor only bound US companies and not US public authorities. As a result of the ECJ's decision, the protections in place with Safe Harbor were no longer available to serve as a basis for transferring personal data from the EU to the United States. This led to significant →

uncertainty for businesses on both sides of the Atlantic since European DPAs had only granted short transition periods and were not able to provide much guidance on what would serve as a safe basis for data transfers moving forward. Some DPAs even suggested applying the principles of the ECJ decision to other legal instruments as well – that is, to SCCs and BCRs. Others even questioned if an explicit consent obtained from the data subject would suffice for the transfer of personal data to the United States.

This vacuum was filled by the announcement in February 2016 of a new transatlantic data protection agreement, the EU-US Privacy Shield, which is not yet in effect as it requires an adequacy decision from the European Commission and this has yet to be made.

Elements of the Privacy Shield

The general goal of the EU-US Privacy Shield is to guarantee protection of Europe's fundamental rights to privacy during all data transfers and processing to and in the United States in compliance with European law and the requirements established by the ECJ, in particular those outlined in its 2015 Safe Harbor decision.

Participation in the EU-US Privacy Shield will remain entirely voluntary for US companies (as it was under Safe Harbor), however if a company elects to self-certify, it will be bound by the principles of the EU-US Privacy Shield. These principles mirror fundamental European data protection principles, including, for example, the individual's right to access his or her personal data with the right to request its correction, amendment and deletion; the right to obtain notice about data processing activities; and the purpose limitation principle. Onward data transfers made by a US data recipient are only permitted for specified, limited purposes in accordance with an individual's consent and solely on the basis of a contract with the third-party recipient ensuring its compliance with the principles of the EU-US Privacy Shield.

In comparison with the former Safe Harbor Framework, US companies certifying under the EU-US Privacy Shield will, however, face significantly stronger privacy obligations as well as an increased exposure to legal redress and remedies. Companies have to register with an alternative dispute resolution (ADR) provider and are under obligation to respond to privacy complaints made by EU individuals within a period of 45 days. The US Department of Commerce and the Federal Trade Commission will monitor self-certified companies and cooperate with European data protection authorities to address complaints. In addition, the United States enacted the Judicial Redress Act that provides EU nationals (once the EU is declared as a "covered country") with access to legal remedies in US courts.

» **Onward data transfers made by a US data recipient are only permitted for specified, limited purposes in accordance with an individual's consent.** «

With respect to intelligence activities, the US government has provided assurances (including from the Office of the Director of National Intelligence) that access to EU personal data by public authorities for national-security or law-enforcement purposes "will be subject to clear limitations, safeguards and oversight mechanisms" and restricted to specific purposes. This self-limitation by US national-security institutions is supplemented by the establishment of an ombudsperson to serve as a means for redress in the area of US intelligence activities.

Annual joint reviews of the Privacy Shield are intended to ensure the persistence of an adequate level of protection.

Criticism

Concerns have been expressed by various parties, including the Article 29 Working Party that represents European DPAs. In its opinion issued on April 13, 2016, the experts comprising the Working Party acknowledged the significant improvements in the proposed EU-US Privacy Shield compared with Safe Harbor. The regulators did, however, also express strong concerns and criticize a number of deficiencies in the proposed EU-US Privacy Shield – both in terms of commercial issues and with respect to access by public authorities. Its criticism concentrates inter alia on (a) alleged deficiencies in the implementation of the limitations to onward transfers and basic European data protection principles like the purpose limitation principle and the data retention principle, (b) deficiencies in the safeguards intended to ensure the exclusion of massive and indiscriminate surveillance of individuals, and (c) doubts about the efficiency of the intended redress mechanisms, especially with respect to the establishment of the ombudsperson for national signals intelligence activities. As a result, the →

Working Party requested further amendments to the EU-US Privacy Shield to remedy these concerns.

Status and next steps

While the Commission is expected to take the Working Party's opinion and recommendations into consideration when finalizing its adequacy decision, it seems unlikely the United States will provide additional assurances – in particular, with respect to national-security and enforcement activities. Likewise, it appears unlikely the Commission would deviate from its intended formal approval of the EU-US Privacy Shield, which is the final green light for data transfers to US companies self-certified within the new framework. The final adequacy decision was expected in June, but may be delayed, as the responsible Article 31 Committee consisting of member state representatives and chaired by the EU Commission recently concluded that they needed more time to consider the EU-US Privacy Shield.

Conclusions and outlook

- The EU-US Privacy Shield will essentially eliminate the legal uncertainty that currently exists and establish a framework for protecting EU personal data in the United States that is more robust than the previous instruments.

- A judicial review of the EU-US Privacy Shield is almost inevitable within the next two or three years and will likely be triggered by complaints made by EU individuals and national courts. The chances of success are hard to determine at this point, but data transfers made on the basis of and in compliance with the EU-US Privacy Shield would likely constitute one of the safest options moving forward.

- Alternative instruments (SCC and BCR) will possibly also face court challenges. With respect to the United States, these instruments may indirectly benefit from implementation of the EU-US Privacy Shield (for instance, enactment of the US Judicial Redress Act as well as limitations to US intelligence activities), and future decisions by the European courts concerning these instruments may provide an indication about the robustness of the EU-US Privacy Shield in terms of compliance with fundamental privacy rights in the EU.

- Companies in the United States are well advised to carefully analyze whether certification under the EU-US Privacy Shield and the related adjustment of existing processes are achievable – and desirable – due to the Privacy Shield's stricter requirements. As the new framework imposes detailed obligations on the certifying companies and requires coordination with third parties (for example, with respect to onward transfers to third parties and the registration of an ADR process), certification will likely require more time than was necessary within the previous framework.

- Companies in the EU that still transfer personal data (solely) based on the previous Safe Harbor framework are well advised to urgently discuss alternate legal instruments with their US counterparts or to seek alternative solutions for processing personal data from the EU. Companies that have already sought and implemented alternative solutions (for example, on the basis of the European Commission's SCCs) will likely experience less urgency in deciding whether and how to make use of the benefits offered by the EU-US Privacy Shield.

- For companies active in Germany, September 30, 2016, will be an important (but widely disregarded) deadline to bear in mind. After this date, companies may also face civil litigation under the German Injunction Act *(Unterlassungsklagegesetz)*, which was recently amended to improve enforcement of data protection provisions to the benefit of consumers. A grace period set forth in Section 17 of this bill, which concerns data transfers based on the previous Safe Harbor, will expire on September 30, 2016. ←

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No political and legal limbo any more

Management liability in public-sector undertakings

By Dr. Sven-Joachim Otto

Most transaction information has to be kept strictly secret. .

Introduction

The results of a PwC study on crime in the public sector (Salvenmoser, Weise, Heck, Bussmann and Krieg: "Kriminalität im öffentlichen Sektor – Auf der Spur von Korruption & Co.," October 2010) indicate there are substantial arguments for approaching the subject of compliance in a long-term, comprehensive and strategic manner. Depending a public company's scope of activity, there is a wide range of obligations (Otto and Fonk: "Haftung und Corporate Compliance in der öffentlichen Wirtschaft" in Corporate Compliance Zeitschrift, 2012, pages 161 and 166) that sometimes cannot be clearly determined.

Obligations of management bodies for municipal undertakings

Management of the company

In a municipal private company, management is responsible for making most business and leadership decisions. Management has to create an organizational structure that ensures the company meets its obligations and acts in a manner that conforms to the law (in principle, regulated by federal company law but also complementary in state communal law). All public companies have to observe the rules of competition and procurement as well as communal, company and group labor and tax law. Depending on their particular market activities, public utility companies also have to observe laws pertaining to energy and grid regulation. In principle, managing directors or CEOs have to be informed of all relevant decisions made by the company general meeting or the stockholders' meeting, and they must execute these decisions.

Management has to establish a company strategy to ensure the owners' targets are met and public missions are fulfilled. A risk-management system has to be implemented that includes communication and frequent reporting of possible risks to the supervisory board (Römermann: Münchener Anwaltshandbuch GmbH-Recht, third edition, 2014, § 16, marginal number 70 ff.; Grützner and Jakob: "Vier-Augen-Prinzip" in Compliance von A-Z, second edition, 2015; Hellmann and Beckemper: Wirtschaftsstrafrecht, second edition, 2015, § 15).

Supervisory board

The supervisory board is the company's most important controlling and monitoring body. Its main tasks comprise appointment, dismissal and supervision of the management board (section 84, 111 [1] of the German Stock Corporation Act *[Aktiengesetz, AktG])*. The supervisory board has to make sure it receives all relevant company information at all times (Westermann and Maier: "Berichtspflichten der Geschäftsleitung kommunaler Unternehmen" in KommJur, 2011, pages 169 and 171; Hoppe and Uechtritz: Handbuch Kommunale Unternehmen, third edition, 2012, § 9, marginal number 30 ff.). Prevailing case law of the highest German courts requires that all members of a supervisory board have the necessary basic business, organizational and legal qualifications for making proper business decisions without further assistance.

Another primary task of the supervisory board is to ensure that management implements a risk-management system and complies with it. If a company is owned by a municipality, further informa- →

tion and reporting obligations to the city council and its committees apply (for example, those regulated in Article 93, paragraph 2, page 2 of the Bavarian municipal code *[BayGO];* § 113, paragraph 5, page 1 of North Rhine-Westfalia municipal code *(GO NW)* and § 104 paragraph 1, page 3 of Baden-Württemberg municipal code *[GO BW];* see Hoppe and Uechtritz: Handbuch Kommunale Unternehmen, third edition, 2012, § 9, marginal number 33 ff.).

Municipal companies are advised by the consulting business to introduce periodic information commitments. Completion of these commitments should be documented transparently and systematically as part of an internal monitoring system. When applicable, a company compliance trustee (Hüffer and Schneider: ZIP, 2010, page 55) or an external ombudsperson should be appointed as a contact person for all staff members.

Management liability

Personal management liability is governed by section 43 (2) of the German Limited Liability Companies Act *(GmbH-Gesetz, GmbHG)* for managing directors of limited liability companies and in section 93 (2) of the stock corporation statute *(AktG)* for members of the managing board of a stock corporation. It is a tortious liability. Directors are liable for negligent breach of the duties incumbent upon them. Director's duties are defined in section 43 (1) of the *GmbHG* as "the due diligence of a prudent businessperson" (see Oetker in Henssler and Strohn: Gesellschaftsrecht, second edition, 2014, § 43 of the *GmbHG,* marginal number 18).

Obligation of confidentiality

Subject matter

In practice, most problems related to the obligation of confidentiality (section 116 and 93 of the *AktG)* occur when members are delegated to the supervisory board of a municipal stock corporation or to a limited company with a compulsory supervisory board. (For companies with a fa-cultative supervisory board, an obligation of confidentiality is not mandatory; see § 52, paragraph 1 of the *GmbHG.)* These delegated members often think they are allowed to report company secrets to the public entity (for example, the city council) that appointed them to the supervisory board. In principle, the obligation of confidentiality applies to all supervisory board members. It does not, however, apply in terms of the company management or other members of different parties. What company secrets does the obligation of confidentiality apply to? Secrets are all facts whose disclosure could lead to damage to the company (for example, trade secrets; finance, investment and, strategy planning; lists of customers; consumption; marketing; calculations; and staff-related decisions). There is no obligation of confidentiality if a legal obligation of disclosure exists.

There are many small city council groups who, because of their size, are not represented in the supervisory boards of municipal companies. These groups are very much interested in gaining information about the company. The legal literature reflects different opinions about whether the obligation of confidentiality also applies to members of the city council (van Kann and Keiluweit: Der Betrieb [DB], 2009, pages 2,251-2,252). Prevailing case law (Strobel in Die Öffentliche Verwaltung, 2004, page 479) finds the obligation of confidentiality applicable to city council members and to city council groups. To ensure that its members comply with the obligation of confidentiality, the supervisory board should adopt explanatory decisions, guidelines or annotations.

For companies with a facultative supervisory board, section 52 (1) of the *GmbHG* provides more leeway for regulating the obligation of confidentiality in the articles of association.

Duty of consideration

Each member of the supervisory board has to individually consider if a certain fact has to be kept secret. According to sections 116 and 93 of the *AktG,* the benchmark for this consideration is "the due diligence of a prudent businessperson and not just "diligentia quam in suis rebus."

Liability of the supervisory board

In terms of the supervisory board's liability, differentiation is made between private law and criminal law.

Liability under criminal law

Breach of the obligation of confidentiality is punishable under section 85 of the *GmbHG* for limited liability companies and under section 404 of the *AktG* for stock corporations. The punishment can be up to one year imprisonment. There is no punishment if the management board has waived the obligation of confidentiality.

Liability under private law

There is no differentiation made among members of the supervisory boards of limited companies with a faculta- →

tive supervisory board, limited companies with a compulsory supervisory board and stock corporations. In all cases, sections 116 and 93 of the *AktG* apply *(Brandenburgisches Oberlandesgericht, Urteil* [verdict], 17.2.2009 – 6 U 102/07; *Brandenburgisches Oberlandesgericht, Beschluss* [court order], 09.04.2014 – [1] 53 Ss 39/14 [21/14]).

Ordinary negligence is sufficient for establishing the liability of a supervisory board member. As already stated above, each member of the supervisory board has to individually consider if a certain fact has to be kept secret. In addition to the criterion of "negligence," a breach of the obligation of confidentiality has to create a "violation of duty." A disclosure is not a violation of duty if it doesn't disadvantage the company or, in other words, if it serves the well-being of the company (see section 93 chapter 1 of the *AktG)*. This "business judgment rule" is only applicable to management decisions or facts related to management decisions. Should a disclosure take place, the burden of proof is shifted to the supervisory board member. He or she has to prove that the disclosure was not a violation of duty. The company has to state the facts of the case, including a disclosure, and the damage to the company as well as prove causality between them.

Municipal utility companies today are often looking to create joint ventures, found new companies and participate in or try to take over other companies. These kinds of transactions are usually very liability sensitive. On the one hand, the city council has a right to information; on the other hand, however, most transaction information has to be kept strictly secret. There is always the risk of millions of euros in damages if a projected M&A transaction cannot be executed because of early disclosure of information.

Criminal law and misdemeanors – corruption and bribery

Offenses committed by public officials are regulated by chapter 30 (sections 331-358) of the German Criminal Code (Löw: "Korruptionsdelikte im Lichte der Compliance Funktion – 'Aber Sie wissen doch, wie es läuft,'" JA, 2013, page 88 ff.). There are further special offenses and misdemeanors regulated by environment, tax, competition, company and accounting law (Hellmann and Beckemper: Wirtschaftsstrafrecht, fourth edition, 2015).

Public companies that sponsor regional events and institutions face an increasing number of liability and reputation risks (see "PwC Public Services," September 2013 issue, page 21 ff.). In January 2011, the Higher Administrative Court of Saxony *(Sächsische Oberverwaltungsgericht, Aktenzeichen* [file number]) 4 B 270/10) upheld a decision made by the Dresden Administrative Court *(Verwaltungsgericht Dresden, Aktenzeichen* [file number] 7 L 391/10), which ruled that the sponsoring of sports events by public water companies is illegal.

Another very important issue concerns the criminal prosecution of invitations extended to public officials to participate in sports and entertainment events. In its Claassen case, the Federal Court of Justice *(BGH,* decision 14.10.2008,1 StR 260/08) ruled that providing football tickets to representatives of the state of Baden-Württemberg is a "benefit to a public official" (section 333 [1] of the German Penal Code) punishable by imprisonment of up to three years or a fine. The court ruled that providing tickets would not be a "benefit" if visiting the football game was part of the official and representative duties of the public official (for example, when the public official is the minister of sports). If the visit to the game is made in a representative function and the public official also has a personal interest in visiting the game, the circumstances constitute a "benefit" and the basis of an offense.

There are also potential legal risks in public-private partnerships between municipalities and private companies. It is illegal and punishable if a city council demands the creation of a citizen's foundation and regular payments from a wind-farm operator in exchange for passing a zoning law.

Conclusion

Public companies and appointed board members are not acting in political and legal limbo anymore. In recent years, municipal undertakings underwent significant professionalization. Development of compliance structures plays an important role in this. Damages and liability cases are causing tremendous reputation risks, especially for public undertakings. Management has to give top priority to compliance as a consistent and well-structured prevention measure. <–

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Digitization 4.0 – compliance challenges under EU sanctions

A closer look: dos and don'ts when providing technology and software in sanctioned countries

By Dr. Alexander Cappel

Introduction

The world of law currently faces various legal issues caused by digitization of business streams. Those legal topics include numerous IP questions (ownership of big data, protection of know-how, IP protection of 3D printing, scope of copyright protection, standard essential patents), antitrust and liability-related risk allocation as well as topics concerning technology export control and EU sanctions. In upcoming editions of Business Law Magazine, we will deal with a number of these topics. In this edition, we will take a closer look at the challenges companies face with EU sanctions if technology and software is provided to sanctioned countries.

The majority of EU sanctions stipulate prohibitions on making funds or economic resources available either directly or indirectly to certain listed individuals and legal entities (economic-resource embargo). The various EU sanctions specify that the term "economic resource" (see, for example, Article 1 [h] of Council Regulation [EU] No. 267/2012 dated March 23, 2012, concerning restrictive measures against Iran according to which "economic resources" means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds, but which may be used to obtain funds, goods or services) has to be interpreted broadly and, thus, it generally covers not only the delivery of goods to certain customers designated by all EU sanctions, but also the provision of specific technology or software. With this in mind, the German Federal Office for Economic Affairs and Export Control *(Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA)* has also issued guidance on this issue, stating that, in particular, embargos targeting certain listed individuals and legal entities will have to be considered prior to any exports of technology and software (see page 10 of the *BAFA* guidance on the transfer of technology and nonproliferation: link as of April 29, 2016). As a result, companies providing technology or software are obliged to both scrutinize – in the same way companies exporting, for instance, industrial goods must do so – the respective technology or software against applicable export restrictions and check their customers and business partners against the various EU sanction lists under which individuals or legal entities might be designated. As an even more challenging consequence, companies are also required to ensure that planned →

EU sanctions restrict the provision of technology and software to sanctioned countries.

business transactions will not lead to indirect breaches of EU sanctions because, for example, an unlisted business partner is owned or controlled by a listed individual or company.

Against this background, companies dealing with technology and software should not only focus their compliance systems on potential export restrictions in terms of specific technology and software, but also focus on customer and business-partner due-diligence measures. This article will examine feasible approaches to potential business-partner due-diligence measures to comply with applicable EU sanctions, especially with regard to the export of technology and software that might pose further specific risks and challenges.

Scope of the economic-resource embargos

EU sanctions (for example, against Russia or Iran) entail differing restrictions on, inter alia, the free movement of goods, technologies and services including financial services. Almost all EU sanctions stipulate, however, prohibitions on making funds or economic resources available either directly or indirectly to certain sanctioned individuals or legal entities. According to the German Federal Supreme Court *(Bundesgerichtshof, BGH)* jurisprudence, funds or economic resources will be deemed to have been "made available" once a sanctioned individual or legal entity gains factual control over such funds or economic resources (see *BGH,* April 23, 2010, AK 2/10, published in NJW 2010, page 2,370 et seq.). With regard to technology or software, an even stricter standard might apply since, for example, Article 2, paragraph 2, subparagraph iii of EC Dual Use Regulation 428/2009 stipulates that technology will be considered to have been "exported" upon "transmission of software or technology by electronic media, including by fax, telephone, electronic mail or any other electronic means to a destination outside the European Community." This also applies to "oral transmission of technology when the technology is described over the telephone." Since there is, at least under German law, no relevant case law available, there is a risk that companies might, under certain circumstances, be obliged to conduct enhanced business-partner checks as early in the process as oral contract negotiations when background information regarding certain technology or software will be orally transmitted (for example, over the telephone). This may ultimately lead to having to increase compliance efforts since companies may be required to check their business partners long before they ultimately enter into a business relationship.

» **Companies dealing with technology and software should not only focus their compliance systems on potential export restrictions, but also focus on customer and business-partner due-diligence measures.** «

Moreover, it is important to note that making funds or economic resources available to an unlisted company that is owned or controlled by a sanctioned individual or company may also constitute a breach of the economic-resource embargo since in this case the transmitted technology or software (as an economic resource) may indirectly benefit a listed company (for more information, see chapter five "Embargo- und Sanktionsmaßnahmen" by Marian Niestedt in EU-Außenwirtschafts- und Zollrecht, 2014). In this regard, an unlisted company is considered owned by a listed target if the relevant company or individual holds more than 50% of its shares. In contrast, an unlisted company is deemed to be controlled by a sanctioned target if such a sanctioned target exercises factual control over the unlisted company due to special voting rights, specific agreements with other shareholders or any other means. By inverse conclusion, any mere minority shareholding by a listed individual or company in an otherwise unlisted company to which funds or economic resources is to be made available will not necessarily present a breach of the EU sanctions. The specific circumstances do, however, have to be analyzed in each case prior to executing the business (or even prior to entering into contractual negotiations) in order to avoid a breach of the economic-resource embargo. According to "Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy" dated April 30, 2013 (EU guidelines), in particular, (a) any contractual links between the unlisted company and the sanctioned target will have to be considered as well as (b) the relevance of the affected area of operations to the listed company and the goods' properties and (c) the characteristics of the funds or economic resources made available, including their potential practical use by, and ease of transfer to,

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the listed company (see link as of April 29, 2016).

As a result, the prohibition on making funds or economic resources directly or indirectly available to certain individuals or entities on the EU sanctions list poses an exceptional compliance challenge. This is particularly the case since EU sanctions themselves do not comprise detailed provisions outlining the scope of exactly what compliance obligations need to be heeded. It is important to note that violations of EU sanctions, including violations of the economic-resource embargo, may result in administrative and even criminal-law penalties not only against the involved companies but also against the acting individuals. According to the administrative and criminal-law provisions for violations of EU sanctions stipulated in the German Foreign Trade Act *(Außenwirtschaftsgesetz),* any individuals contravening economic-resource embargos must, at the very least, have acted in negligence before they face administrative or criminal repercussions. Furthermore, the EU sanctions specify that acting parties may not be held liable if they had no knowledge nor reason to assume, that any of their actions would violate provisions of the economic-resource embargo. This means the compliance challenge companies generally face is identifying the due-diligence measures they have to conduct in order to not be held liable in the unfortunate event that a violation of EU sanctions may later be discovered (that is, because technology was indeed delivered indirectly to a sanctions target although the prior due-diligence measures did not discover it from an ex ante perspective).

Risk-based approach to due diligence for sanctions

Since neither German nor EU lawmakers provide clear guidance on the extent to which business partners need to be checked in terms of EU sanctions, in particular, in terms of the economic-resource embargo, a risk-based approach seems to be advisable to minimize liability risks as much as possible. Although there is no one-size-fits-all approach, a risk-based approach should generally contain the following elements:

Risk classification of (potential) customers

On the basis of their regional center of operations as well as on other circumstances that may be cause for concern, (potential) customers should be categorized as "high risk," "moderate risk" or "low risk." Parameters for the classifications may comprise the following:

- In particular, for cases where the (potential) customer or business partner is located in a country against which sanctions are enforced (for example, Iran, Russia or Syria) or where obvious indications are given that the (potential) customer or business partner directly operates with such a country, increased caution should be exercised in reviewing the business relationship. As a result, the customer or business partner is to be classified as high risk.

- Similarly, for cases where the (potential) customer or business partner is located in a classic "gateway country" (for example, the United Arab Emirates or Iran), such business relationships may also be classified as high risk if additional circumstances suggest a connection to a company or individual in a sanctioned country exists (for example, obvious shareholding connections or business relationships in sanctioned countries). Otherwise, those (potential) customers or business partners may be classified as "moderate risk."

- In contrast, a (potential) customer or business partner located in a country other then those mentioned above, may, in the absence of further risk-increasing factors, be classified as "low risk."

Identification of due-diligence measures

In addition to risk classification, potential due-diligence measures should be developed for each category. The following due-diligence measures may be feasible, although the individual circumstances always have to be borne in mind:

- No matter what the category – high risk, moderate risk or low risk – every known customer or business partner as well as all other involved parties should be routinely checked against the applicable sanctions lists in order to identify if the business involves any listed persons or entities.

- In particular with regard to high-risk and moderate-risk customers and business partners, companies may also want to conduct risk-based background researches (for example, by conducting Internet research, using special tools or databases and instructing local lawyers or business consultancies) and/or obtain disclosure of the ownership structure

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from the (potential) customer or business partner.

- Especially with regard to high-risk customers or business partners, companies may want to also obtain written assurances that the technology or software will not be made available to the benefit of any designated targets. Various international companies have also made it a best practice to include provisions in their business contracts (in particular with high-risk customers) that prohibit clients from further disposing of received goods to sanctioned targets within the applicable legal framework. With regard to these two measures, companies should carefully consider if they are permitted under local law to conduct them or if and to which extent anti-boycott legislation (such as Section 7 of the German Foreign Trade Order *[Außenwirtschaftsverordnung]*) may apply.

Summary

Companies dealing with technology and software generally have routinely implemented compliance measures to address the respective export restrictions stipulated for technology and software in the EC Dual Use Regulation 428/2009 and the Export List (see link as of April 29, 2016) published by *BAFA*. In addition to those export restrictions, however, EU sanctions pose further compliance challenges to those companies because technology and software may be affected by the economic-resource embargos stipulated by almost all EU sanctions.

>> **EU sanctions pose further compliance challenges to those companies because technology and software may be affected by the economic-resource embargos stipulated by almost all EU sanctions.** <<

EU sanctions do not, however, provide clear guidance on what compliance measures need to be fulfilled in order to not be held liable. As a result, companies should implement their due-diligence measures using a risk-based approach as no standardized measures apply. Although such measures should generally safeguard against violations of EU sanctions occurring, enhanced caution must, in particular, be applied to cases where a company indicates that a minority shareholder of a (potential or existing) customer is on the EU sanctions list. In those cases, authorities and courts may argue that EU sanctions were indirectly breached (that is, the technology was delivered indirectly to a listed target).

Since breaches against EU sanctions may lead to severe criminal and administrative penalties – not only against the involved company, but also against the responsible individuals – as well as cause considerable loss of reputation, companies dealing with technology and software – along with other exporting companies – should carefully consider whether pursuing business opportunities in sanctioned countries justifies the investment of resources necessary to ensure compliance with EU sanctions. Companies that do not do this could face severe criminal-law liabilities. <–

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A hot issue to be watched closely

The rehabilitation of the Iranian economy has begun: new opportunities for German and American companies

By Dr. Hanns Christoph Siebold and Dr. Mark C. Hilgard

Background

On July 14, 2015, the P5+1 (China, France, Germany, Russia, the United Kingdom, and the United States), the European Union and Iran reached a Joint Comprehensive Plan of Action (JCPOA) to ensure that Iran's nuclear program will be solely used for peaceful purposes. The JCPOA took effect on October 18, 2015, at which point participants in the agreement began taking the steps necessary to implement their JCPOA commitments.

On January 16, 2016, the International Atomic Energy Agency (IAEA) verified that Iran had implemented the key nuclear-related measures described in the JCPOA, and the US Secretary of State confirmed the IAEA's verification. As a result of Iran verifiably meeting its nuclear commitments, the United States lifted its nuclear-related secondary sanctions on Iran as described in the JCPOA. This step signified Implementation Day of the JCPOA and thus the start to the rehabilitation of the Iranian economy.

Setting up business in Iran

The sanctions had affected the export and import of goods and associated services in the finance, banking, insurance, energy, petrochemical, shipping, shipbuilding and automotive sectors as well as the trade in gold and other precious metals. In addition to the lifting of these nuclear-related secondary sanctions, the United States removed more than 400 individuals and entities from the List of Specially Designated Nationals and Blocked Persons (SDN List) issued by the US-Department of the Treasury's Office of Foreign Assets Control (OFAC) as well as from the Foreign Sanctions Evaders List (FSE List) and the Non-SDN Iran Sanctions Act List (NS-ISA List). Starting on Implementation Day, non-US persons have no longer been subject to sanctions for conducting transactions with any of the removed entities.

Companies wanting to set up business in Iran do, however, need to be aware that the lifting of sanctions only affects →

German companies are happy about the end to economic and financial sanctions against Iran, an important trading partner in the past.

non-US persons. Since the US domestic trade embargo on Iran remains in place, US persons – including US companies – are still broadly prohibited from engaging in transactions or dealings with Iran and its government. Apart from certain exceptions, such as the export of airplanes solely for civil use as well as the import of specific Iranian products, most restrictions on persons under US jurisdiction remain in place.

As a result, any business project with Iran needs to be carefully checked for possible applicability of US law as well as for adherence to German law. Especially when it comes to concrete contract negotiations with Iranian partners, German companies and persons need to be aware of the snapback mechanism in the JCPOA, which foresees reinstatement of all lifted secondary sanctions should Iran violate its nuclear-program-related commitments.

In connection with Implementation Day, the OFAC issued several documents, including "Guidance Relating to the Lifting of Certain Sanctions," and answers to frequently asked questions. These provide essential information for companies seeking to establish business relations in Iran.

German business relations with Iran

Implementation Day marks an important date in the history of business relations with Iran, from both US and German perspectives. As a result of the nuclear deal, German exports to Iran are expected to quadruple within the next few years. It will, however, be a tough market for German companies as they face competition from Chinese, Korean, Middle Eastern and other rivals that filled the void left by Western companies prevented from trading under US-led sanctions against Iran.

But whether industry heavyweights or one of the thousands of smaller, family-owned firms, German companies are now eager to reclaim their once-dominant role in exports to Iran. Even today, products and services "Made in Germany" enjoy a good reputation among Iranian customers.

Historical facts and figures reflect this dominant role and outline the changing shape of bilateral trade relations between Germany and Iran over recent years. Beginning with an export sum of about €1.9 billion in 2001, volume continuously increased in the years following. After topping out at €4.4 billion in 2005, German exports to Iran slumped to a low of €1.8 billion by 2013. Apparently anticipating the easing of sanctions, exports jumped 30 percent last year. These were driven by sales of machinery, agricultural products and pharmaceuticals.

The strong demand for modernization in almost every branch of the Iranian economy suggests great market potential for German companies operating in various business areas. Planned modernization of the oil industry offers German machinery and equipment producers in particular substantial market opportunities, with Iranian Minister of Petroleum Bijan Namdar Zangeneh mentioning multimillion-euro projects for the modernization process.

Outlook

Some business leaders forecast German exports to Iran could leap to more than €10 billion "in the medium term" – a significant jump from the €2.4 billion last year that takes into consideration the automotive, chemical, healthcare and renewable-energy industries as other likely beneficiaries.

Immediately following conclusion of the JCPOA in July 2015, German Minister for Economic Affairs and Energy Sigmar Gabriel travelled to Tehran as a first step in paving the way for German companies. Having been criticized for this trip at an earlier point, Gabriel defended the pursuit of economic rapprochement. According to Gabriel, the guiding principle should be "contacts instead of conflicts." With Iran having met its nuclear commitments, there was no need to continue avoiding formerly restricted business relations.

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Any business project with Iran needs to be carefully checked for possible applicability of US law as well as for adherence to German law.
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German companies are happy about the end to economic and financial sanctions against Iran, an important trading partner in the past. Expectation for new market opportunities and a targeted return on former export volumes have created an optimistic mood among German business leaders.

This progress proved reason enough for AmCham Germany's Corporate and Business Law Committee to ask top US officials to provide insight into →

the present situation: Andrew Keller, Deputy Assistant Secretary for Counter Threat Finance and Sanctions at the US Department of State, Bureau of Economic and Business Affairs, for example, delivered an address titled "Update on US Sanctions with Special Focus on Iran" at a well-attended committee meeting in early February. Our committee plans to closely watch developments regarding the lifting of sanctions and continue providing first-hand information on this hot issue. <–

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Too big to fail – no more

The new European resolution framework for banks: the corporate perspective

By Dr. Andreas Wieland, Stuart Willey and Dr. Dennis Heuer, LL.M.

Introduction

On January 1, 2016, the new European resolution framework for banks took full effect. This forms a cornerstone to what has come to be known as the European Banking Union.

The Banking Union

The European Banking Union rests on three pillars: (a) the Single Supervisory Mechanism (SSM), (b) the European Deposit Guarantee Scheme (EDGS) and (c) the Single Resolution Mechanism (SRM).

Under the SSM, the European Central Bank, headquartered in Frankfurt, supervises all significant banks in the eurozone. This currently comprises 129 banking groups, including all the groups' banking subsidiaries. European rules on deposit protection reach back to the early 1990s with the enactment of the Deposit Guarantee Schemes Directive. This directive has been subject to various updates, most importantly the increase to €100,000 per depositor in the protected amount following the aftermath of the financial crisis. Presently, the European Commission is planning to expand integration of European deposit guarantee schemes by merging current national deposit guarantee schemes into a single scheme (EDIS). The SRM establishes the European rules for the resolution of banks, in particular the interplay between European and national resolution authorities. The European Banking Union is augmented by a single rulebook for banks whose most important elements include the Capital Requirements Directive IV (CRD IV), the Capital Requirements Regulation (CRR) and the Bank Recovery Resolution Directive (BRRD)

New resolution framework for banks

Two major legal acts underpin the European resolution framework for banks: the BRRD and the SRM regulation. The BRRD applies to all credit institutions and certain investment firms based in the European →

Governments tended to avoid the insolvency of banks in the past and bailed them out.

Union and requires that rules for recovery and resolution of banks be harmonized throughout the 28 member states of the European Union. The SRM regulation calls for further integration and is directly applicable to all member states in the eurozone. It establishes the Single Resolution Board (SRB) based in Brussels, a European resolution authority for the eurozone, and the Single Resolution Fund (SRF), which will facilitate and help finance the orderly resolution of significant banks and cross-border banking groups.

Ending "too big to fail"

The contemporary concept of bank resolution was conceived in the aftermath of the 2008 financial crisis. The Lehman Brothers case demonstrated that bank failures can produce severe spillover effects that adversely affect the stability of the whole financial system and the wider economy.

As a result, governments tended to avoid the insolvency of banks in the past and bailed them out with taxpayers' money. This phenomenon is also known as the "too-big-to-fail" dilemma. The new bank resolution framework tries to avoid such bailouts by creating a framework for the rescue of systemically important bank functions and the orderly winding down of the remaining parts of a bank without using taxpayers' money. The new framework shifts the major burden of a bank failure to the bank's shareholders and other creditors and sees additional support being provided through a common resolution fund sponsored by the banking industry. The use of public money is limited to extraordinary situations and is only allowed after shareholders and other creditors have substantially contributed to the bank rescue through burden sharing. The new bank resolution framework can only be applied to an entity if the application of ordinary insolvency laws would entail systemic risks. As a result, smaller or less-connected institutions remain subject to national insolvency laws.

Bail-in

The new resolution framework provides for the following resolution tools: (a) sale of the business, (b) a bridge institution, (c) asset separation and (d) bail-in. The first three of these resolution tools can be described as good bank-bad bank solutions, in which the parts of the bank that are systemically important are conserved in a good bank and the remaining parts of the bank are placed in a bad bank and wound down in an orderly procedure. The bail-in instrument is the primary and most innovative instrument to ensure burden sharing by shareholders and creditors. Within this context, shares can be cancelled and debt can be written down or converted into equity. The bail-in tool can be used alongside good bank-bad bank solutions.

Banks: the most important debtors of corporates

Corporates are key creditors of banks: All companies assume considerable risk from the banks they deal with. This starts, of course, with a company's excess cash and other liquidity that is deposited or invested in debt or equity instruments issued by banks. In addition, corporates use bank payment systems and derivatives for hedging purposes. Every company has a multitude of contact points with various banks depending on the size and type of business. As a result, bank failure poses a significant risk to companies.

The new normal: bank failures are a real threat

Given the significance of bank relationships, one would expect the topic of bank failure to always be a major worry of company treasurers and risk managers. Surprisingly, this has not been the case historically, probably because bank failures have been very rare in the past. This is not necessarily the result of effective risk management by banks or prudent supervision, but rather the result of the too-big-to-fail dilemma and the resulting implied state guarantee. With the new banking resolution framework now fully in place, this has changed dramatically.

» The bail-in instrument is the primary and most innovative instrument to ensure burden sharing by shareholders and creditors. «

For the first time, a fully thought-out, workable toolkit is available to supervisors and resolution authorities to rescue or wind down even larger banks in an orderly manner without endangering the stability of the whole financial system. In addition, the resolution authorities are determined to avoid further spending of taxpayers' money in connection with bank failures. Furthermore, the financial situation of some countries would not allow their governments to sponsor the bailout of a larger bank even if they wanted to. As a result, bank failure is a real possibility, and we expect further banking failures to occur in the →

future, in particular in the event of an economic downturn. This increased threat is also reflected in the rating decisions of the major rating agencies: Referring to the new resolution framework, they have downgraded most banks on the basis of weakening in the implied state guarantee.

What happens with my company's claims?

As a result of this threat, it is important for corporates to understand what would happen with their claims in a resolution scenario.

In a bail-in, claims are generally treated in accordance with the order established by the national insolvency law. This means that any bail-in measure would start with equity (or Core Tier 1 capital in banking jargon) – that is, cancellation of shares, followed by holders of Additional Tier 1 instruments (such as contingent convertibles, CoCos), followed by supplementary capital (typically long-term subordinated debt qualifying as Tier 2 capital). In contrast, certain instruments are by definition exempted from a bail-in. This includes covered deposits – that is, deposits protected through statutory deposit protection (typically deposits made by individuals and small and medium-sized enterprises [SMEs] that total up to €100,000) as well as secured liabilities such as covered bonds.

Important new developments affect senior debt instruments, including senior unsecured bonds and commercial paper. Certain EU member states have changed their insolvency laws to declare senior bonds as subordinated. This is true for Germany (among other countries) where, starting on January 1, 2017, generally all bank senior debt instruments will be subordinated by operation of law, even if they were issued beforehand. A bail-in would affect these senior debt instruments prior to any other senior creditor of the bank, including all holders of non-covered deposits. Deposits held by private individuals and SMEs are privileged over holders of noncovered deposits and other senior creditors. Different rules may apply in other countries as the applicable laws in this area have not been fully harmonized under the new European resolution framework and are instead subject to the decisions of individual member states in certain respects.

The end of magic

For creditors of German banks, another development should be monitored: The Association of German Banks has organized its own voluntary deposit protection scheme for the private banking sector in Germany. This scheme supplements and complements statutory deposit insurance and has historically provided very comfortable protection levels of up to 30% of a bank's own funds for each depositor. Several bank failures and the greater risk of bank failures have led the Association of German Banks to gradually reduce the maximum protection amount to 8.75% of a bank's own funds. In addition, further changes are currently being discussed including a carve-out of all deposits held by institutional investors. No details have been released so far, but it seems possible that large corporates may also be affected by such carve-outs. A change in the rules of the German banking industry's voluntary deposit protection scheme would further increase the exposure corporates would face should a bank fail.

What should companies do now?

Corporates should draw a number of conclusions from these developments:

1) Bank failures are no longer theoretical; they pose a real threat to corporates.

2) The changed risk profile of banks may also require that corporate treasuries make changes to their risk management. Corporates need to closely monitor the financial situation of the banks they do business with. This includes conducting an initial due diligence of a bank prior to entering into a broader business relationship as well as continuously monitoring the bank's financial situation.

3) Corporates should assess all their business relationships with banks and closely monitor each bank's key financial figures and ongoing development. If risks are identified, the corporate may have to consider broadening its risk diversification as well. For some companies, proper risk management may involve creating backup plans in case of a bank failure.

4) These measures need to be intensified once a given bank's situation becomes critical. Companies need to increase their monitoring of the situation and may need to reduce their exposure in terms of the bank that is in trouble.

5) A moratorium may precede resolution measures. During this phase, companies will need to determine if they want to agree to a voluntary bank restructuring or to sell their →

claims to investors with a bigger risk appetite to avoid having their claims written down in a bail-in. ←

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No revolution, but change will come

Brexit: a forecast of the impact on German investors and trading partners

By John Hammond

Introduction

Some of the opinion polls in the UK are now showing a majority of Britons want to leave the EU to sail off into an uncertain but independent future. If you wake up on June 24, 2016, to the news the Leave campaign has won, what impact will it have on your business in and with the UK and when? While there is a framework for an exit process and a timetable, the UK's future relationship with the EU is matter for speculation.

Legal background

Many of you may already be familiar with Article 50 of the Treaty on the European Union, which says any member state may withdraw from the Union in accordance with its own constitutional requirements. The European Council must be notified of a decision to withdraw following which the withdrawal agreement is to be negotiated with the exiting member state, taking into account the framework for its future relationship with the EU. The treaty negotiations would be a matter for the Council, excluding the UK's representative, and the final treaty would need the prior consent of the European Parliament.

The UK would formally exit the EU only when the treaty came into force or the two-year period for negotiations expires. A time extension requires the unanimous consent of the Council. Two years looks very short when you recall that Greenland (population 56,000) took longer to negotiate an exit agreement when the only issue was fishing! Against this background, bold claims the UK will get a quick, advantageous exit deal look optimistic at best. It's more likely the divorce would be difficult and bitter.

The good news is: nothing will change immediately – but ...

Following a vote to leave, the good news from a legal point of view is that nothing would change on June 24, 2016. The UK would remain a member of the EU. And EU law is deeply embedded in the UK's legal system, with EU directives incorporated into national law and EU regulations having direct effect. Although there is little political clarity on the way forward, it seems likely the UK would continue applying existing EU law, which has direct effect . Continuity would be the likely default position despite the bonfires of EU regulation promised by certain politicians. Over time, changes would be made to a wide range of laws and regulations to maintain the status quo, to replace references to EU rules and EU institutions, and to repatriate political sovereignty, but this would be a process, not an event.

... here are the hurdles ...

Following a vote to leave, the UK government would need to choose a model for its future relationship with the remaining members of the EU. Although there are a number of examples available, including rejoining the European Free Trade Area (Norway), agreeing on a single customs area (Turkey), or a hybrid arrangement (Switzerland), it's most likely the UK will want to negotiate its own special →

EU rules currently play an important role in almost all areas of UK law.

deal, sometimes referred to as Canada Plus. A vote to leave would represent a rejection of one of the four pillars of the single market, namely the free movement of people. Rightly or wrongly, immigration policy lies at the heart of the referendum debate, so it is hard to see the UK accepting freedom of movement as the price for access to the single market. A free-trade agreement following the model of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) seems a more likely outcome. CETA has taken over seven years to agree on and when it finally comes into force, will eliminate all industrial duties and promote trade in services. It is, however, a long way from the full membership of the single market the UK currently enjoys.

... and consequences for investors and trading partners

But what practical consequences would an exit have for German investors and trading partners and how can you plan for it in advance? EU rules currently play an important role in almost all areas of UK law, so I will look at the likely impact on just some of those areas: contract law, customs and tax, intellectual property rights and freedom of movement of workers.

When negotiating trading or investment contracts, there is no need to avoid either English law as a choice of law or English courts as a forum for dispute resolution just because the UK votes to leave the EU. Nor should there be any concern that a choice of German law or German court jurisdiction will not be recognized by English courts in the future. Choice of law is currently governed by an EU regulation referred to as Rome I, and if the UK leaves the EU, this will no longer apply in the UK. English courts have, however, historically always respected choice of law clauses and will almost certainly continue to do so whether or not Rome I applies. German courts will continue to apply Rome I and to recognize an express choice of law in a contract even if one party is from a non-EU state.

When looking at jurisdiction clauses, however, the position is less certain. The risk of parallel proceedings in different member states may reappear and the automatic recognition and enforcement of court judgments may, in the worst case, no longer apply. One solution to this uncertainty would be to use arbitration for disputes with UK parties as the recognition and enforcement of arbitration awards run under the New York Convention, not under EU law.

The UK has successfully attracted significant direct investment over many years, and Germany has been a very active participant in the UK market. The UK's membership of the EU no doubt played a role in attracting German investors, but the harmonization of rules and regulations on the EU level will only have been one, possibly small, factor in those investment decisions. After a UK withdrawal from the EU, German investors may be faced with issues such as diverging product regulation, employment law and other compliance issues that they would need to keep on top of. It is likely customs procedures will be reintroduced and customs duties may reappear depending on the terms of the UK exit. In the worst case, these duties would be the World Trade Organization's "most favored nation" duties; but in the UK at least, the expectation is for continued tariff-free trade with the EU.

Value added tax (VAT) is an EU tax and so on exit, the UK would no longer be required to maintain or administer it in a manner consistent with the remaining EU members. It is, however, likely that VAT would remain largely as is, with maybe some changes to reliefs and the imposition of import VAT, which, while it may be recoverable, would impose cash flow costs.

Moves to simplify EU patent and IP rights are also likely to suffer following a UK withdrawal. The systems currently being set up to unify patent registration across the EU and the moves to unify community trademarks and registered Community designs would almost certainly no longer apply in the UK. Businesses would need to look at dual registration in the EU and in the UK and a range of transitional issues would need to be answered such as can a community trademark be split between an EU CTM and a UK national mark with both having the same priority date?

>> **A free-trade agreement following the model of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) seems a more likely outcome.** <<

Freedom of movement for workers is probably the most contentious issue in the whole EU referendum debate. There is no clear political line on what would happen should the UK leave the EU, and although it would be possible for the UK to maintain the status quo, this →

seems unlikely in the current political environment. No one is suggesting that all EU citizens would need visas to travel to the UK, but work permit requirements would almost certainly be reintroduced, at least for new recruits. Whether this would lead continuing EU members to impose similar restrictions on UK nationals working in Europe remains to be seen.

The way ahead

The economic impact of a UK exit is subject to fierce debate, but even the Leave campaign admits the short-term consequences would be adverse. And the rest of the EU would not escape unharmed, economically or politically. We all have an interest in the outcome on June 23, 2016, even if we don't have a vote. <–

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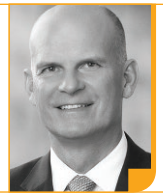

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