PKF DEUTSCHLAND

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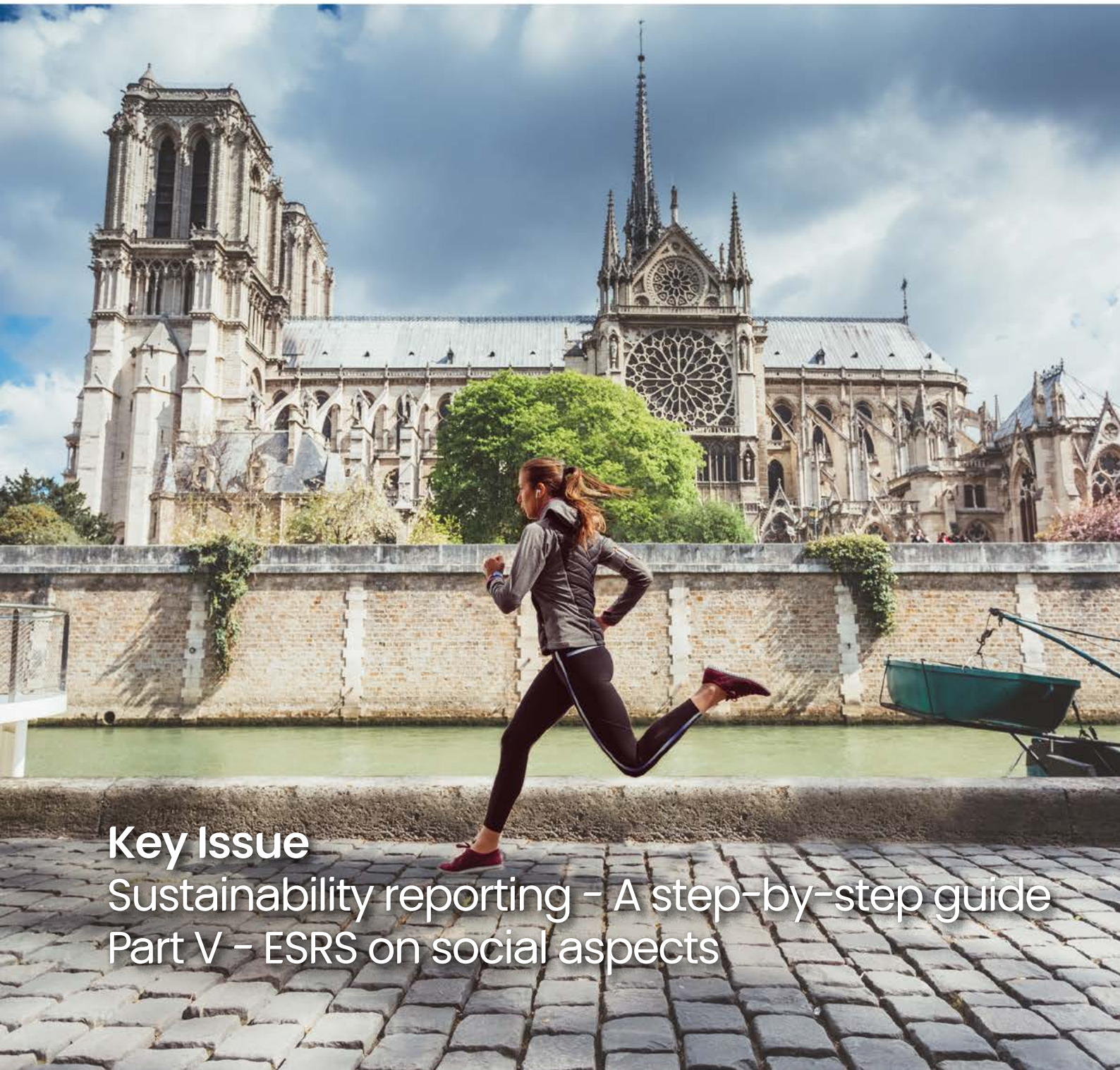


Key Issue

Sustainability reporting - A step-by-step guide
Part V – ESRS on social aspects

Dear Readers,

We begin this summer double issue of our newsletter with another article in our series on **sustainability reporting**. Part V is about the 'S' aspect of the ESG requirements and, to this end, we provide an overview of the **social standards** and the many reporting obligations, for nearly all companies, where the focus is on employee matters. In our second report we mark out the **differences** between the backward-looking **simplified income capitalisation method** and the forward-looking, more sophisticated **company valuation technique**. A recent Federal Fiscal Court ruling introduced a free choice of methods for specific valuation events and, thus, the ability to take advantage of the differences in terms of the parameters for interest rates and earnings.

In the subsequent Legal section, the first article deals with the **obligation to report foreign payments** - which also applies to private individuals. Next up is a review of an interesting structure related to usufruct that was introduced via a recent court ruling. Subsequently, we have a practical case study for you on **liquidation proceedings in the case of a small corporation**. In this edition of our newsletter, we discuss a **typical process from a commercial law viewpoint.** We will take a look at the taxation effects in the next issue of our newsletter.

In our 'In Brief' section we have a number of interesting topics on offer, in particular, a discussion of the, recently published, updated Federal Ministry of Finance circular on the 'Principles of Proper Keeping and Retention of Accounts, Records and Documents in Electronic Form and for Data Access' (abbreviated in German to **GoBD**).

We then continue our journey around the neighbouring European countries through the illustrations that break up the reports from our experts - this time we stop off in France. Despite the Tour de France and the Olympics the focus is on nature and culture. If you are still looking forward to your summer holiday then we wish you a lovely and relaxing time.

Your Team at PKF

Front cover photo: Nôtre Dame and the banks of the Seine in Paris

Key Issue

Sustainability reporting - ESRS on social aspects

Contents

Anne Schlarmann

Sustainability reporting – A step-by-step guide

Part V – ESRS on social aspects

Besides the ecological dimension, which we discussed in the last issue of our newsletter, the social perspective constitutes a further relevant pillar of sustainability reporting that is considered to be an essential component by all companies.

1. 1 An overview of the social ESRS

The standards falling within the social sphere include the following:

- ESRS S1 – Own workforce
- ESRS S2 – Workers in the value chain
- ESRS S3 – Affected communities
- ESRS S4 – Consumers and end-users

ESRS S1 and S2 present strong similarities in terms of their contents because the information and datapoints that have to be reported are almost identical. However, the group of persons considered is clearly different. Each of the standards is divided into the sub-topics of: working conditions, equal treatment and opportunities for all as well as other work-related rights. Unlike ESRS S1, Standards S2, S3 and S4 do not have any disclosure requirements for so-called indicators, thus qualitative statements and quantitative metrics such as, for example, gender distribution. The information required relates solely to strategies, actions and objectives. Requirements with respect to indicators will be added subsequently when further sets of standards are published.

2. Scope of the reporting

The information to be reported on social aspects has to be narrowed down via the materiality assessment (see Part II of our series in the PKF newsletter 04/2024). If a social standard is not included in the report because of a lack of materiality then reasons for the immateriality may be provided. Once a topic/sub-topic is declared to be material then informa-

View over Paris

tion about the strategies, actions and objectives in this respect has to be provided in the report. The information with respect to indicators would again be subject to a materiality assessment. A report would only be required if the information provided by the indicators is relevant for understanding the respective topic/sub-topic.

3. Structure of the standards and disclosure requirements

Like the standards for the environmental sphere, the social standards are basically similarly structured with respect to the necessary data as regards the objective of the standard, its interactions with other ESRS and the disclosure requirements that then result. However, unlike the environmental ESRS, there are no governance aspects here. The disclosure requirements of ESRS S1 to S4 have been set up as follows:

- Strategy and business model **(SBM)**
- Management of the impacts, risks and opportunities **(IRO)**
- Metrics and targets **(MT)**

4. An insight into ESRS S1 – Own workforce

ESRS S1 focuses on the company's own workforce. With its 17 disclosure requirements (cf. Table 1) – which are divided into 3 sub-topics and 17 sub-sub-topics – it is by far the most comprehensive of all the ESRS.

If within the scope of the overall materiality assessment (see Part II of our series in the PKF newsletter 04/2024) it is established that the 'own workforce' topic is material for the company then this issue has to be included in the sustainability report. In practice, however, this would presumably be true for almost every company that is subject to the reporting obligation because the own workforce plays a key role in nearly every company. Although here, according to the ESRS glossary, 'own workforce' is understood to mean not just those who are in an existing employment relationship, but also self-employed workers who have concluded a contract for the performance of work, and also temporary workers.

ESRS S1-1, first of all, requires the disclosure of information on strategies related to the company's own workforce. Here the company is asked how it positions itself in the way it deals with the material impacts, risks and opportunities that have been determined. While formulating its response, the company should specifically explain, among other things, how it deals with discrimination, forced labour and child labour as well as the issue of equality of opportunity.

Subsequent to S1-2 and S1-3 (see Table), under **ESRS**

Table 1: Disclosure requirements under ESRS S1

Reporting area	ESRS	Contents
Strategy	ESRS 2 SBM-2	Interests and views of stakeholders
	ESRS 2 SBM-3	Material impacts, risks and opportunities and their interaction with strategy and business models
Management of the impacts, risks and opportunities	ESRS S1-1	Policies related to own workforce
	ESRS S1-2	Processes for engaging with own workers and workers' representatives about impacts
	ESRS S1-3	Processes to remediate negative impacts and channels for own workers to raise concerns
	ESRS S1-4	Taking action in relation to material impacts and approaches to mitigating material risks and using material opportunities related to own workforce, as well as effectiveness of those actions and approaches
Metrics and targets	ESRS S1-5	Targets related to managing material negative impacts, advancing positive impacts, and managing material risks and opportunities
	ESRS S1-6 bis ESRS S1-17	Various indicators, notably, for the characteristics of employees, adequate wages, diversity, persons with disabilities

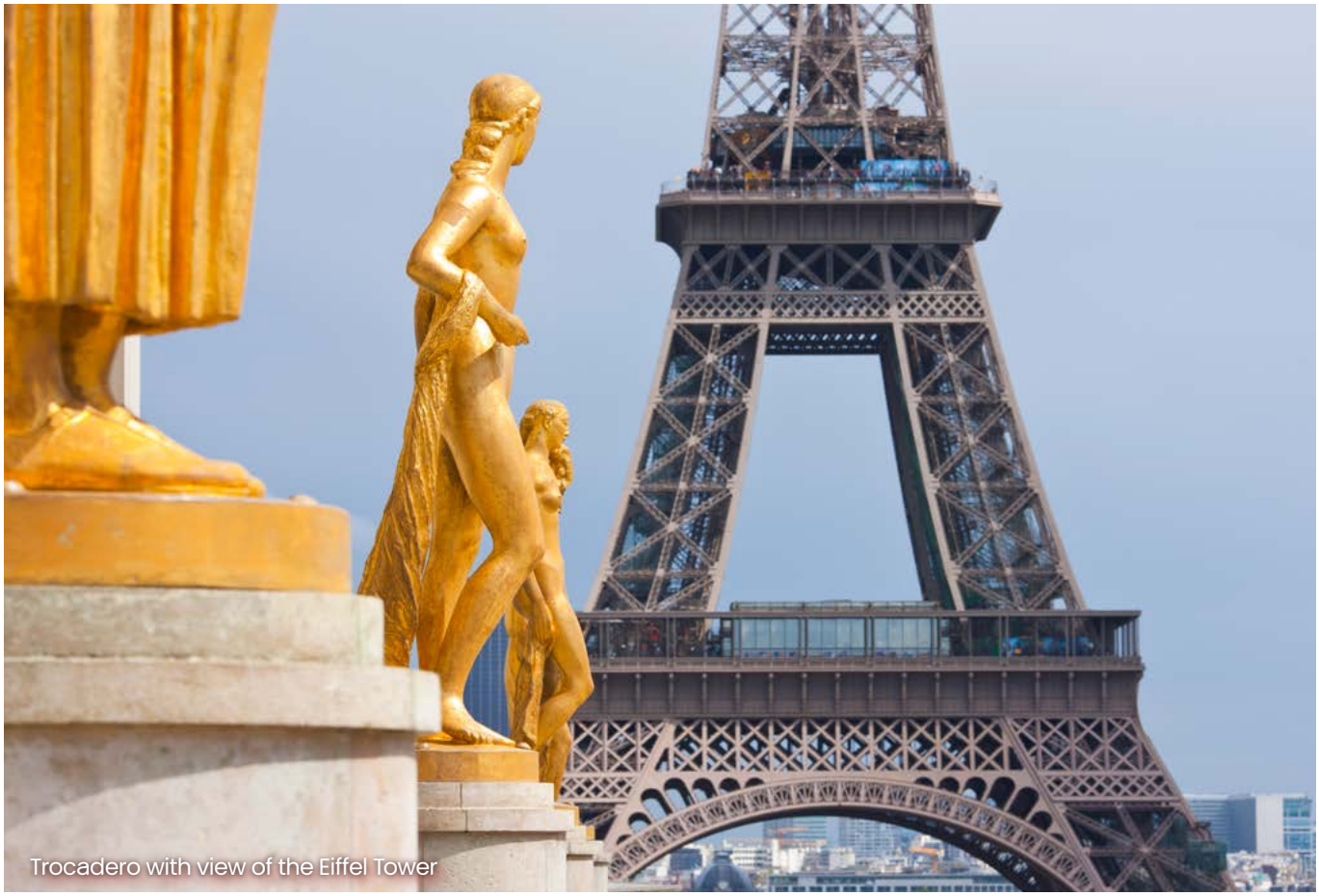
S1-4 and S1-5, which follow, the aim is to describe what actions there will be to implement the strategy and what future targets the company has set for itself in this area. Examples of strategies as well as actions and targets can be found in the ESRS Appendix A.2 - A.4. Accordingly, actions could notably consist in reducing excessive overtime down to reasonable working time, or increasing training that is carried out in the areas of health, safety and also diversity.

Take-away

- The ESRS S are divided into four standards.
- In view of the wide range of disclosure requirements, ESRS S1 is by far the most comprehensive of all the standards in the social sphere.
- ESRS S1 and ESRS S2 are very similar in terms of disclosure requirements and the relevant sub-topics - the key difference lies in the group of workers considered.
- Under ESRS S2, S3 and S4 companies need to provide important information about strategies and the management of the impacts, risks and opportunities (IRO), at this juncture, there are however still no disclosure requirements with respect to so-called indicators.

ESRS S1-6 to 1-17 focus on specific indicators for the company's own workforce. For example, **ESRS S1-6** starts with a request for the characteristics of the company's employees, such as the total number of employees. The information has to be provided in a predefined tabular format as per ESRS S1 AR 55. **ESRS S1-9** requests the disclosure of diversity indicators - firstly the gender distribution at the top management level and secondly the age distribution of the employees.

ESRS S1-10 focuses on adequate wages - for companies with foreign locations, in particular, this is an issue that necessitates a differentiated approach. Wages should be analysed in relation to the applicable reference values (for example, normally the minimum wages set in the EU). The wage levels at the respective foreign branch offices may vary widely so that there has to be a clear separation here. If the company does not observe adequate wage levels, then it has to report the proportion of employees in the respective countries to whom this is applicable.



Trocadero with view of the Eiffel Tower

TAX

Dr. Ulrike Engelmeyer

Valuation of shareholdings – Simplified income capitalisation method or company valuation technique?

In tax law – especially in inheritance and gift tax cases –, it is frequently the so-called fair market value that has to be used as a basis. There are different methods available for determining the fair market value of shares in unlisted corporations. Which methods have to be accepted by local tax offices was decided by the Federal Fiscal Court (Bundesfinanzhof, BFH) in a recent ruling. According to this, taxpayers have the option of whether to apply the simplified income capitalisation method under Sections 199 ff. of the Valuation Act (Bewertungsgesetz, BewG) or another approved valuation method.

1. Introduction

In the case of valuations for tax purposes, the fair market value of unlisted shares in corporations should generally be determined for their recognition. Insofar as it is not possible to derive the fair market value from sales between unrelated third parties then it has to be determined by taking the corporation's earning prospects into account. In doing so, not only the simplified income capitalisation method under Sections 199 ff. BewG could be applied, but also other approved, common methods for non-tax purposes (cf. Section 11(2) BewG).

In principle, the taxpayer may choose the valuation method and the decision should be made with reference to the individual circumstances. In this regard, the BFH, in its ruling of 2.12.2022 (case reference: II R 5/19), decided that the fiscal administration may not switch to the simplified income capitalisation method even on the grounds of supposed errors; instead, it has to allow the possibility of corrective actions within the scope of the chosen method.

Against this background, it would be worthwhile to consider both methods and, particularly in this context, the applicable interest rate as well as the income to be valued.

2. The methodology of the valuation techniques and a sample calculation

According to the Valuation Act (BewG), when the **simplified income capitalisation method** is applied then the *basis for the calculation should be the annual income of the last three preceding financial years.* This is multiplied by the standardised capitalisation factor, which is currently 13.75, and the capitalised income value is thus determined. In a fictitious and highly simplified sample calculation, average annual profit in the amount of €2,100k would result in a capitalised income value in the amount of €28,875k.

The company valuation technique – which likewise may be applied in accordance with the requirements set out by the Institute of Public Auditors in Germany in its standard IDW S 1 – is principally based on discounting the future cash flows to equity capital providers by an adequate rate for the cost of capital.

The multiplier used in the simplified income capitalisation method – 13.75 – is based on an interest rate of 7.27% (1/13.75 = 7.27%). If this is used in the present sample calculation, by way of simplification, as a constant for the rate for the cost of equity capi-

	2021	2022	2023
	Actual	Actual	Actual
Annual profit in €k	2,000	2,500	1,800
Simplified income capitalisation method			
Average profit for the last three years			2,100
Capitalisation factor			13.75
Capitalised income value as at 31.12.2023			**28,875**

	2024	2025	2026ff.
	Budgeted	Budgeted	Budgeted
Annual profit in €k	2,100	2,100	2,100
Company valuation technique			
Cash flow to equity capital providers to be valued	2,100	2,100	2,100
Equity capital costs	7.27 %	7.27 %	7.27 %
Capitalised income value as at 31.12.2023	**28,875**		

tal, and if the annual profits for the budgeted years correspond exactly to the mean value of the actual annual profits for the preceding years, then both methods would produce identical results.

If however the annual profit and the rate for the cost of equity capital vary then this would result in the following capitalised income values:

			Variation in annual profit		
in €k / %			-10%	-	+10%
			1,890	2,100	2,310
Variation in interest rate	-0.5%	**6.77%**	27,906	31,007	34,107
	0	**7.27%**	25,988	28,875	31,763
	+0.5%	**7.77%**	24,316	27,018	29,719
	+1.0%	**8.27%**	22,846	25,385	27,923
	+1.5%	**8.77%**	21,544	23,938	26,332

Consequently, in the sample calculation, where the annual profit remains unchanged and equity capital costs >7.27% then the capitalised income value would, potentially, be significantly below the capitalised income value according to the simplified income capitalisation method (please note: while in this report we have forgone a discussion of the particularities of applying the two above-mentioned valuation methods, notably in complex group structures, we would nevertheless like to refer you to the appropriate specialist literature).

3. Conclusion

Actual values are used as the sole basis for the simplified income capitalisation method, however, company-specific future forecasts are not taken into account. Moreover, a uniform capitalisation factor is applied, while a company-specific (and possibly also a period-specific) rate for the cost of capital is determined for the company valuation technique. The greater the discrepancy between

1. the actual and the budgeted results and

2. the company-specific cost of capital and the standardised capitalisation factor,

the more the results between the two reviewed methods will basically diverge. For the simplified sample calculation, in the table opposite, we have shown the effects from changes in the annual profits combined with the changes in the interest rate.

LEGAL

StB [German tax consultant] Julia Hörning / Nick Meder

Obligation for private individuals to report foreign payments

Companies are normally aware of the obligation to report foreign payments and have integrated the appropriate processes into their payment systems. It is however less well known that private individuals also have to report payments from or to foreigners of above €12,500 to the Deutsche Bundesbank (German Federal Bank). Examples of such payments are the acquisition, maintenance or renovation of properties abroad, the purchase of securities or cryptocurrencies from a foreign broker or fixed-term deposits with a maturity of more than 12 months at a foreign financial institution.

1. Cross-border payments

Reports about cross-border payment transactions are of great importance for the compilation of the balance of payments, thus the overview of money flows in and out of Germany. The reports provide comprehensive information about German foreign trade that is useful for the economic and foreign exchange policies as well as for trade associations and businesses.

All cross-border payments for services, gifts, donations or transactions involving securities, cryptocurrencies or fixed-term deposits that have maturities of more than 12 months and exceed the exemption threshold of €12,500 have to be reported to the Deutsche Bundesbank. According to Section 11 of the Foreign Trade Act (Außenwirtschaftsgesetz, AWG) in conjunction with Sections 67 ff. of the Foreign Trade Ordinance (Außenwirtschaftsverordnung, AWV), this applies in equal measure for incoming payments from foreigners as well as for outgoing payments to foreigners. The foreigner status should not be based on nationality. The crucial factor is the registered office or domicile of the recipient or the sender. Individual payments that fall below the €12,500 threshold are not reportable. It is however not permissible to divide up larger payments in order to circumvent the reporting obligation.

Please note: The reporting requirement does not apply to mere account transfers between own accounts and loans or fixed-time deposits with a maturity of less than 12 months. Payments for the import and export of goods are likewise not relevant as these would in any case already be declared to customs.

2. The report

In order to be able to submit reports, first of all, you have to apply for a reporting number. To this end, there is an application form available on the Deutsche Bundesbank website. Upon receipt of the reporting number, it is then possible to register in the Allgemeines Meldeportal Statistik (general statistics

Côte d'Azur

reporting portal, abbreviated in German to: AMS). The reports can be submitted here.

Please note: The Deutsche Bundesbank allows a simplified procedure for private individuals who only occasionally make or receive payments to or from foreigners and, in doing so, exceed the reporting thresholds. By way of exception, such individuals are also able to submit their report by telephone via the free hotline 0800 1234 111.

When submitting a report, you should take note of the reporting deadline pursuant to Section 71 AWV. Payments arising from foreign trade have to be reported by the 7th calendar day of the following month. The reporting deadline for payments related to securities transactions and financial derivatives is even shorter, namely, the 5th calendar day of the following month. Subsequently, the reporting documentation has to be retained for three years.

3. Consequences in the case of infringements

Infringements of the reporting requirement (such as late reporting or a failure to report) may be classified as regulatory offences by the customs authorities and could lead to the imposition of fines. Under Section 19(6) AWG fines of up to €30,000 are possible.

Recommendation: If you have already forgotten to submit reports or if they were incorrect then these should now be submitted or corrected without delay.

Daniel Scheffbuch / Luca Gallus / Christina Schultz

Liquidation proceedings in the case of a small corporation

Part I – Case study of a typical process

The number of insolvencies has been increasing for some time now and one question that comes up again and again is: how can a GmbH [German private limited company] that was founded without a set termination date be dissolved and what are the taxation effects that would arise in this respect? A dissolution that has to be carried out because of legal requirements would not directly result in the GmbH ceasing to exist, but would merely terminate its operational business activities. The liquidation proceedings would commence after the dissolution. In the following section, first of all, a specific case study is used to describe how a liquidation would typically take place. In the second part there will then be a more detailed examination of the extent to which a liquidation is taxed and the implications that a liquidation would entail for shareholders.

1. Case Study

In the case study outlined below, K GmbH operates an online food retail business. The financial year corresponds to the calendar year. Despite all the efforts, even after more than a year, it has not been possible to acquire enough customers and the sales figures have remained below expectations. The sole shareholder and managing director 'S' has therefore decided to liquidate the company. The requisite shareholder's resolution is adopted on 28.2.2023. Notification of the dissolution is entered in the Commercial Register (Handelsregister) on 24.3.2023.

In order to liquidate the company, the creditors are requested to contact K GmbH via an announcement in the Federal Gazette (Bundesanzeiger). After identifying and measuring all the assets and liabilities the call to creditors can be made on 26.4.2023. The liquidation is completed on 3.5.2024.

2. The liquidation process

2.1 Dissolution

2.1.1 Resolution on dissolution

Dissolution denotes a process through which a company passes from having operational activities into the next phase, during which it winds up its affairs in order to terminate its existence.

While the Limited Liability Companies Act (Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG) provides many different reasons for dissolution, in the underlying case study the company was dissolved by a shareholder's resolution brought about by S on 28.2.2023. Such a resolution

requires a majority of three quarters, insofar as the company agreement does not contain any deviating provisions. This resolution does not result in any changes to the bylaws, with the advantage that neither a particular form nor a reason or justification are required. The resolution on dissolution brings about the dissolution of the company on a specified date, here it was 28.2.2023.

2.1.2 Registration of the dissolution for entry in the Commercial Register

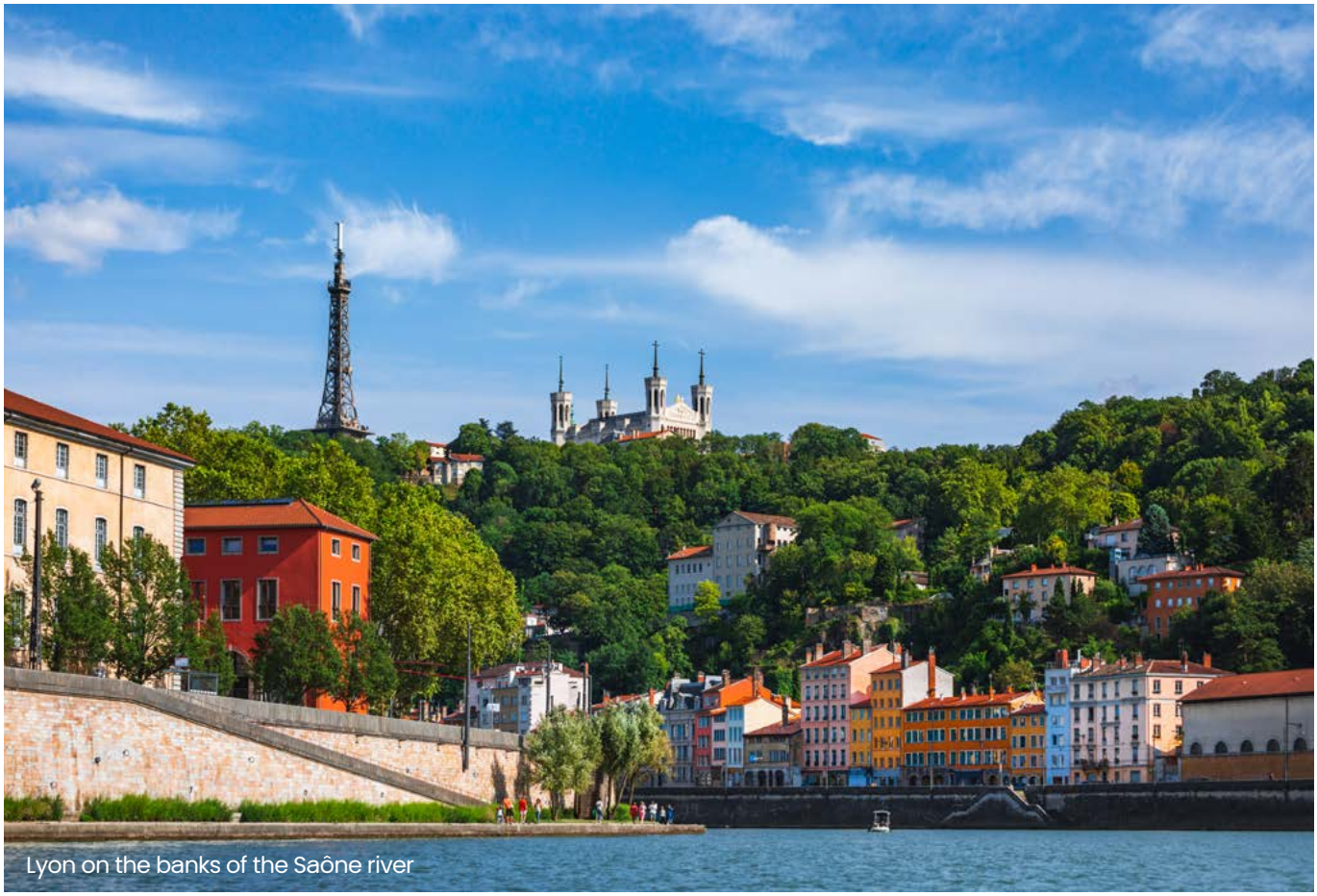
The dissolution of the company moreover has to be registered in a notarially authenticated form for entry in the Commercial Register (Section 65 GmbHG). The company's legal representatives (whether a liquidator or a managing director) are responsible for registering the dissolution. In the absence of a diverging shareholders' resolution, as the managing director up to now, S automatically became the liquidator. This function is exercised until the deletion in the Commercial Register.

In the case in question, the notification of the changes was entered in the Commercial Register on 24.3.2023. Accordingly, the following changes can be seen in the extract from the Commercial Register: S is no longer the managing director, but instead the liquidator. In the extract from the Commercial Register it has been noted that the company has been dissolved. As of this date, K GmbH has to add 'in Liquidation' or 'i.L.' as a suffix to its name in business transactions. However, the submission to the Commercial Register merely has a declaratory effect and, therefore, has no influence on either the timing of the resolution on dissolution (28.2.2023) or on the call to creditors (26.4.2023) and the liquidation of the assets.

2.2 Winding up

2.2.1 First short financial year and opening liquidation balance sheet

According to prevailing opinion, if a company is dissolved during the course of a year, then a new financial year will 'automatically' begin on the day of the dissolution without a resolution; in such a case the (first) short financial year will arise for the period prior to the dissolution. In the case in question, this runs from the start of the previous financial year up to the day that precedes the resolution on dissolution, thus from 1.1.2023 - 27.2.2023. Annual financial statements with a closing balance sheet have to be prepared for this short financial year to which the general provisions will apply. These final financial statements



Lyon on the banks of the Saône river

for the operating company (with a cut-off date of 27.2.2023) have to be published.

An opening liquidation balance sheet has to be prepared on the date on which the dissolution was approved (in this case: 28.2.2023) and this likewise has to be published.

2.2.2 Announcement of the dissolution in the Federal Gazette

The aim of the call to creditors is to inform them about the dissolution. The creditors have to be requested to contact the company at the same as the announcement is made. The announcement of the dissolution is of particular importance because it is only once it is has been made that the blocking year commences (Section 73(1) GmbHG). This means that the assets may not be distributed to the shareholders prior to the expiry of one year from the day on which the creditors were requested, in the public papers, to contact the company.

In the case of K GmbH, the shareholder's announcement appeared in the Federal Gazette on 26.4.2023. Consequently, the blocking year commenced from this date. This date is of no relevance for any accounts.

2.2.3 Final distribution and the blocking year

Any distribution of assets to shareholders is prohibited for the duration of the blocking year, i.e., until 26.4.2024. This means that only the claims of third-party creditors arising from third-party transactions may be settled. There is no ranking among the creditors.

The amount and maturity of the liabilities are unaffected by the blocking year. In accordance with the general rules, the creditors' claims continue to exist. The blocking year is not a preclusive period. Even after the blocking year has expired, it would still be possible to assert claims against the company. Although, the status of the claims will crucially depend on whether, during the blocking year, the respective creditor was known or had remained unknown.

After the blocking year has expired (i.e., from 27.4.2024), provided that company assets are still available, even previously unknown creditors may contact the company and try to satisfy their claims. However, if the assets have already been distributed then these creditors would get nothing. By contrast, known creditors will always have to be taken into account even after the blocking year has expired. If a known creditor does not get in touch, then the amount that is owed would, possibly, have to be


Château de Chambord in the Loire Valley

deposited or a security provided (cf. Section 73(2) GmbHG).

2.2.4 Second short financial year and closing liquidation balance sheet

After the first short financial year, a financial year commences that diverges from the calendar year. In the case in question, K GmbH's new financial year runs from 28.2.2023 up to 27.2.2024, for which 'normal' annual financial statements will have to be prepared. This first set of financial statements in liquidation likewise will have to be published.

A set of annual financial statements will once more have to be prepared for a second short financial year until the liquidation has finally been completed. The cut-off date for the end of this financial year will be the day on which the liquidation is completed. As mentioned at the beginning, the liquidation of K GmbH will be completed after the end of the blocking year by 3.5.2024. Consequently, there will be a closing short financial year from 28.2.2024 up to 3.5.2024. A closing liquidation balance sheet as at the reporting date of 3.5.2024 has to be prepared and published; this should show the final distribution of the company's assets and liabilities following the completion of the liquidation.

In principle, for micro enterprises that are in liquidation the same rules apply as generally for micro corporations, which are exempt from preparing notes to the financial statements and a management report (Section 267a of the German Commercial Code). Consequently, for such companies the circumstances and the progress of the liquidation do not have to be described in the annual financial statements.

2.3 Deletion

The liquidation will be completed when no more winding-up measures are necessary. The completion of the winding-up proceedings is a condition for registering the deletion of the company in the Commercial Register and thus basically also the complete termination of the GmbH as a legal entity.

According to Section 74(1) GmbHG, the company will be fully terminated once the completion of the liquidation and the deletion of the company have been entered in the Commercial Register. The completely terminated company thus ceases to exist.

RA/StB [German lawyer/tax consultant] Frank Moormann

Right to a compulsory portion (of a testator's estate) – Usufruct is not necessarily a gift

The wish to disinherit specific legal heirs in a will is not uncommon. However, in Germany, the right to a compulsory portion of a testator's estate precludes this; this right ensures that particular individuals (children, marriage partner and, in the case of childless individuals, also parents) will receive at least half of the compulsory portion. Lifetime gifting is an effective means for avoiding such an outcome. Although, when doing so, you need to consider a number of particularities.

1. Augmenting the compulsory portion through gifting

In the case of gifts, there is a 10-year time period during which the gifts would still be allocated to the estate. For each year that elapses since the gifting this portion goes down by 1/10. However, this period would not be initiated if the gift is made to a marriage partner, or if the donor reserves a comprehensive right of use for themself (a usufruct, a right to reside). In such cases, the gift would thus still be fully taken into account for the calculation of the compulsory portion.

2. Does the reservation of usufruct constitute a gift?

2.1 Facts of the case

The Higher Regional Court of Saarbrücken recently had to rule on an unusual situation (ruling of 15.11.2023, case reference 5 U 35/23); in the specific case, a testator who had bowel cancer had transferred the house that she used to her grandson in return for consideration. The consideration consisted in the reservation of a lifelong usufruct for herself and a cash amount. Furthermore, in the transfer agreement, the testator established a lifelong gratuitous usufructuary right for her son (the father of the grandson) subject to the condition precedent of her death.

Upon the death of the testator the son's usufruct came into effect. He had moreover been appointed as the sole heir, to the annoyance of his siblings. They viewed the usufruct donated to him as a gift and asserted their claims for augmented compulsory portions.

2.2 The decision - No claims for augmented compulsory portions

The OLG upheld the position of the heir and decided that the usufruct donated by his mother did not constitute a gift and, accordingly, claims for augmented compulsory portions did not exist.

Gifting requires not only an increase in the beneficiary's net worth, but also a corresponding decrease in the donor's assets. This was not the case here because, for the transfer of the house to the grandson, the testator had received an adequate consideration in the form of the reservation of usufruct and the additional cash amount.

The court also clarified that for the calculation of the value of the usufruct, despite the cancer, the use of official mortality tables as a basis was permitted because, when the transfer took place, the testator was still living in the house and there was nothing substantial to indicate that she would die soon. The usufruct that was granted to her son subject to the condition precedent of her death did not result in an outflow of assets for her and, therefore, also not in a reduction of the estate for which compensation would be required.

3. Additional information

The arrangement in the situation described above could definitely be considered in appropriate cases. Nevertheless, you should bear in mind that when the consideration of the grandson was calculated the usufruct for the father was not likewise taken into account because this would then have constituted a reduction in the testator's assets. Moreover, the additional usufruct burden could be viewed as a gift from the grandson to his father - this was not something that the court had to decide in this case.

From a gift tax perspective, the testator's gift was not taxable because a generous gift 'at the expense' of the donor would also be necessary for tax purposes (Section 7(1) no. 1 of the German Inheritance Tax Act), thus the disenrichment of the donor. This was not the case for the testator, nevertheless, in the relationship between the grandson and his father this could be accepted.

IN BRIEF

Non-compliance with formal requirements as grounds for refusing an exemption from VAT

The ECJ has decided that a company from one Member State cannot obtain an exemption from VAT for supplies of goods in another Member State where that company is not able to prove that the goods were supplied to a recipient having the status of a taxable person in that Member State and the information necessary to verify this is lacking.

In the case in question, a Czech energy company made deliveries of rapeseed oil to Poland in 2015. The Czech authorities refused the VAT exemption for these supplies. The authorities argued that the company had not satisfied the conditions for this. The company had not provided proof that it had transferred the right to dispose of those items to the recipients mentioned in the tax documents. Nor had the company demonstrated that the items had been supplied to a person registered for tax purposes in another Member State. That is why the Czech tax authority assessed VAT on the supplies. The complaint lodged by the company was rejected. However, the claimant argued that the evidence that had been provided confirmed that the items had actually been received by other companies and thus it was possible to identify the recipient.

In its judgement of 29.2.2024 (case: C-676/22), the ECJ decided and established that non-compliance with formal requirements can result in a refusal to allow an exemption from VAT if this non-compli-

ance would prevent the production of conclusive evidence that the substantive requirements have been satisfied. The competent tax authorities and national courts have to verify, on the basis of all the documents provided - including the documents that were in the supplier's possession - whether the material conditions for exemption were met.

GoBD – New circular from the German fiscal administration

The Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) recently updated its 2019 circular on the principles for the application of the 'Principles of Proper Keeping and Retention of Accounts, Records and Documents in Electronic Form and for Data Access' (Grundsätze zur ordnungsmäßigen Führung und Aufbewahrung von Büchern, Aufzeichnungen und Unterlagen in elektronischer Form sowie zum Datenzugriff, GoBD). These contain extensive provisions for ensuring that the digital records and processes in a company comply with applicable rules and regulations.

The adjustment became necessary on account of the Act to Transpose the Council Directive (EU) 2021/514 of 22.3.2021. This Directive aims to improve administrative cooperation in the field of taxation and to modernise procedural tax law. That is why, in its circular of 11.3.2024 (reference: IV D 2 - S 0316/21/10001 :002), the BMF revised the hitherto applicable GoBD, which were last published in its circular of 28.11.2019 and updated them with immediate effect.

The important points included in the new GoBD are, in particular, the obligation to record business transactions in a manner that is timely and unalterable as well as requirements for the proper keeping of digital documents and for the preparation of detailed documentation on procedures that ensure the traceability of digital flows.

Transformation - No consolidation of profits in the year of the merger

According to a new Federal Fiscal Court (Bundesfinanzhof, BFH) ruling, when a partnership is included retroactively in another company then the operating earnings of the transferring company may only be allocated to the acquiring company as of the effective date of the transfer in accordance with German commercial law.

In the case of a merger, the assets of the transferring company are subsumed into the acquiring company. Unlike a contribution of business assets in the context of singular succession, a transfer by way of universal succession is also permissible when it is done retroactively (Section 24(4), Section 20(5) and (6) the German Transformation Tax Act). The consequences that this has for determining taxable income in the year of the merger have been made very clear in the BFH ruling of 14.3.2024 (case reference: IV R 6/21). The case concerned the assets of a transferring KG [German limited partnership]. Its assets were merged by notarised agreement (July 2015) into an affiliated partnership that was identical in terms of participation via a transfer in return for granting company membership rights. The business assets were transferred at carrying amounts in accordance with German commercial and tax law that were consistent with the closing balance sheet of the KG as at 31.12.2014. The acquiring company applied to offset the losses of the transferring KG with its own profits for 2014. Neither the local tax office nor the tax court approved the application. The BFH was likewise of the opinion that not allowing the losses to be offset in the year of the merger had been right and proper.

While the tax implications are backdated to the effective date of the transfer for tax purposes and the transfer of earnings arises in the year in which this effective date lies, nevertheless, earnings are only allocated on the effective date of the transfer in accordance with German commercial law. This means that the tax perspective is retrospective while the financial reporting only applies from the specified transfer date.

AND FINALLY...

„No, I'm not rich. I had a tax problem in this country, curiously enough, and my accountant said the British government was patently wrong in taxing me, and they were, but we couldn't persuade them and it cost me everything I had."

Donald Sutherland (17.7.1935 – 20.4.2024) was a Canadian theatre and film actor. In 2018, he received an honorary Oscar.

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