NEWSLETTER | REAL ESTATE | 12/2020
Current developments in the Real Estate industry

Dear Readers,

there have been and still are many changes in the Real Estate industry. We draw your attention to some important changes in this newsletter and at the same time wish you a happy new year 2021.

We hope you enjoy reading it!

Your
Andersen-Real Estate Team

CONTENT OVERVIEW


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Update: Rent cap Berlin

The second stage of the Berlin Rent Act came into force on November 23, 2020. In the meantime, the Berlin Regional Court has ruled that the rent cap's ban on a specific date is applicable at a later date. The decision of the Federal Constitutional Court (BVerfG) is still pending.

I. Decisions of the Berlin Regional Court on the cut-off date of June 18, 2020

The Berlin Regional Court has already ruled in a case that the ban on rent above the rent ceilings is not already sanctionable on the cut-off date of June 18, 2019, but only applies from March 2020 (Berlin Regional Court, judgment of July 31, 2020 - Case No. 66 S 95/20). Consequently, a higher rent than the rent agreed or applicable on the cut-off date of June 18, 2020 is not already prohibited on this cut-off date, but only as of March 2020.

„...The decision of the Federal Constitutional Court is still pending .... a decision is expected in the second quarter of 2021..."

Although the cut-off date set at June 18, 2019 in accordance with statutory discretion constitutes a relevant reference point for determining the absolute (still) permissible amount of rent, it does not change the fact that the statutory prohibition of higher rents did not yet exist on the cut-off date of June 18, 2019, but only applies as of February 23, 2020. Therefore, a higher rent than the rent agreed or applicable on the cut-off date would only be prohibited for the monthly rent payable from March 2020.

II. Decisions of the BVerfG on urgent applications

In the context of two urgent applications concerning the Berlin rent cap, the BverfG rejected the urgency of the constitutional review, in particular with regard to the second stage of the Law on Rent Restriction in the Housing Sector in Berlin (MietenWoG Bln), which has been in force since November 23, 2020 (BVerfG, judgments of March 10, 2020 - Case No. 1 BvQ 15/20; October 28, 2020 - Case No. 1 BvR 972/20).

In both cases, the court argued that the extent and severity of the disadvantages resulting from a provisional application of the regulations did not justify a provisional (urgent) repeal of the law. Due to the fact that the capping of existing rents pursuant to

Sec. 5 MietenWoG Bln did not come into force until nine months after the promulgation of the Act,

landlords would have had sufficient time to familiarize themselves with the new provisions.

III. Outlook

The decision of the BVerfG remains to be seen. In all probability, the constitutional judges will provide legal clarity in the second quarter of 2021. It will then also become clear whether the numerous objections raised against the MietenWoG - e.g. lack of legislative competence due to final regulation of tenancy law in the German Civil Code (BGB) - are justified or not.

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News on commercial tenancy law: recent case law on the impact of the Covid 19 pandemic on the obligation to pay rent and an overview of the new statutory regulation 2020/21

The second "lockdown" continues. Numerous commercial establishments have had to close again due to government orders to prevent the spread of the Covid 19 pandemic. The question of the impact on rent payment obligations is driving not only affected commercial tenants and landlords, but now also the courts and, once again, politicians.

In view of the ever louder voices calling for relief for commercial tenants in the pandemic, the German Parliament recently introduced a legal clarification (BT-Drucksache 19/2532). In future, in accordance with the new provision in Art. 240 Sec. 7 of the Introductory Act to the German Civil Code (EGBGB), it will be presumed that measures to combat the COVID 19 pandemic generally constitute a case which may result in a rent adjustment due to disturbance of the basis of the contract (Sec. 313 BGB) due to a serious change in the basis of the rental contract.

This should not result in an automatism for rent adjustments. The question of an appropriate rent adjustment expressly remains a decision to be made on a case-by-case basis (for more details, see Section IV below). According to the explanatory memorandum, the declared aim of the provision is to avoid uncertainties between the parties to the commercial lease and to appeal to the parties' willingness to negotiate; a regulatory approach that has yet to prove itself in practice.

I. Decisions AGAINST a reduced rent payment obligation

The courts are continually dealing with the issue of the reduced obligation to pay rent. However, the court rulings issued to date do not necessarily contribute to legal certainty; on the contrary, they give the impression that the outcome of a legal dispute depends to a significant extent on the court before which the legal dispute is conducted.

In its ruling of July 30, 2020 (Case No. 5 O 66/20), the Regional Court of Heidelberg already rejected a reduced obligation to pay rent on the basis of government closure orders. This was followed by the Zweibrücken Regional Court in its judgment of August 19, 2020 (Case No. HK O 17/20) and the Frankfurt am Main Regional Court in its judgment of October 2, 2020 (Case No. 2-15 O 23/20).

In this respect, it is unanimously assumed that Art. 240 Sec. 1 (4) No. 1 EGBGB (Act to Mitigate the Consequences of the COVID 19 Pandemic in Civil, Insolvency and Criminal Procedure Law of March 27, 2020) does not help. The provision only applies to consumers and small businesses and also only grants them a temporary right to refuse performance ("moratorium"). According to the official justification, the obligation to pay rent expressly remains. Therefore, the respective rental agreement must be checked as a matter of priority to determine whether the obligation to pay rent is possibly dependent on certain connecting factors (e.g. turnover of the

tenant) and whether this has an effect on the obligation to pay rent.

If this is not the case, no rent reduction is to be assumed according to e.g. the Heidelberg Regional Court, since the sovereign measures are not linked to the condition, location or state of the rental object itself, but solely to the use by the tenant. Despite the closure order, the rental object would still be suitable for the contractually agreed purpose in the same way and, if necessary, could still be used in part (e.g. for storage purposes, as an office or for online trading). The risk of use - and thus the risk of generating certain sales – would be borne solely by the tenant, which is also used to justify the fact that no case of exemption from the obligation to perform in return due to impossibility could be assumed.

The Heidelberg Regional Court also rejects an adjustment of the contract due to disturbance of the basis of the contract pursuant to Sec. 313 (1) BGB. This would require a substantiated statement by the tenant that his own existence is endangered or, in any case, that he is economically affected to such an extent that further adherence to the unchanged rental agreement appears unreasonable, taking into account all other circumstances.

The mere fact that a large part of the workforce was on short-time working or that a tenant was not receiving state aid or was experiencing liquidity bottlenecks would not be sufficient. The economic losses over a limited period of 4 ½ weeks must be able to cope with a healthy company. After all, due to the Heidelberg Regional Court the tenant bears the risk of use of the leased property and thus also the risk of making a profit.

II. Decisions FOR a reduced rent payment obligation

In contrast, the Munich Regional Court I affirmed the reduced obligation to pay rent in its ruling of September 22, 2020 (Case No. 3 O 4495/20).

A corresponding tendency also emerges from a decision of the Nuremberg Higher Regional Court of October 19, 2020 (Case No. 13 U 3078/20).

In its ruling of November 2, 2020 (Case No. 12 O 154 /20), the Regional Court of Mönchengladbach affirmed a rent reduction by 50% due to disturbance of the basis of the contract (Sec. 313 BGB).

For the reasoning, the judgment of the Munich Regional Court I refers to the early period of the application of the BGB and the case law of the Imperial Court. There, due to the prohibition of the opening of retail stores or the hospitality industry, it had been recognized that a defect within the meaning of Sec. 536 (1) BGB could exist because the suitability of the rented premises for the contractual use would be thereby nullified or reduced. In this context, it would be even irrelevant if the specific use (e.g. as a dance hall) was not mentioned in the written contract.

The restrictions under public law would also not fall within the tenant's sphere of risk and it would be irrelevant that the tenant had to obtain and maintain any further official permits required for its operation. When concluding the lease agreement, the parties would not have given any thought to restrictions on use due to epidemiological measures. Thus, the official restriction would affect the possibility of use of the leased property itself, which was assumed in accordance with the contract. In view of the considerable interference with the purpose of use, a rental defect would exist.

The amount of the rent reduction confirmed by the Munich Regional Court I is also noteworthy. Thus, the court considered a reduction rate of 80% to be appropriate for the period in which the retail store was closed and was only available for employees, the maintenance of the administration or inventory work, and possibly a mail-order business.

When, after elaborate demarcation, around 25 % of the sales area could be used again and there were further restrictions on public traffic requiring adjustments, the Munich Regional Court I confirmed a reduction rate of 50 %. When the store could be operated again, but restrictions still applied due to compliance with a hygiene concept and a restriction of one customer to 20 square meters, the Munich Regional Court I still considered a reduction of 15% to be appropriate.

Although the Munich Regional Court I affirmed the applicability of the overriding defect liability rules, it still clarified that a disturbance of the basis of the contract according to Sec. 313 BGB was also to be assumed. The parties would have obviously not considered the consequences of a pandemic and infection protection measures by the state and would otherwise hardly have concluded the rental agreement in this way. Rather, they would obviously have agreed on an adjustment by way of a reduced rent, the amount of which would correspond to the statutory reduction.

The Regional Court of Mönchengladbach also affirmed the rent adjustment due to disturbance of the basis of the business. For this purpose, it allowed sales losses in the amount of 100% over a period of about one month to suffice for the assumption of unreasonableness in adhering to the unchanged

III. Political state of discussion

Like the case law, the political camps are also deeply divided on the issue of the reduced obligation to pay rent.

On the one hand, there are calls, some of them with prominent support, for example from the Federal Minister of Justice Christine Lambrecht, for the law to clarify that there is regularly a disturbance of the basis of the contract. On the other hand, other political camps and the real estate industry reject the blanket application of Sec. 313 BGB and instead rely on individually negotiated contract adjustments in individual cases.

IV. New legal regulations at the turn of the year 2020/21

This discussion was initially brought to an end by a legal clarification of Sec. 313 BGB passed by the German Parliament on December 17, 2020. Thus, in the event of a complete or significant restriction of the usability of commercially used land and rented and leased premises (as a result of sovereign measures to combat the COVID 19 pandemic), a disturbance of the basis of the lease within the meaning of Sec. 313 (1) BGB is to be presumed, which may result in an adjustment of the rental agreement.

However, one will have to look closely here. This is because this presumption - which is also rebuttable - only applies to the first of a total of three elements of Sec. 313 (1) BGB. The presumption rule does not apply to other prerequisites, so that it is already questionable whether the simplification intended by the legislator will actually occur in practice. The explanatory memorandum to the Act therefore also states that, when applying Sec. 313 (1) BGB, it will continue to be relevant whether the commercial tenant has received public or other subsidies with which it can at least partially compensate for lost sales due to pandemic-related restrictions and whether it has saved expenses, e.g. due to short-time working or reduced purchases of goods. In the future, many questions will have to be answered and clarified in detail.

This is because, despite everything, the warranty law under rental law is still primarily applicable and strict requirements continue to apply in the area of application of Sec. 313 BGB with regard to the presentation and proof of the "unreasonableness" criterion in particular. The legal issues discussed in the case law therefore retain their full validity until a supreme court decision is reached.

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Construction projects: Better to Conciliate than to Dispute - Conciliation and Arbitration Rules for Construction Disputes in New Version (SOBau 2020)

Disputes in construction projects are almost the norm. The issues to be resolved quickly turn out to be highly complex, as they often involve technical questions that are difficult to assess and billing issues. The state courts deal with these issues, but not always with the necessary speed and expertise in construction technology and law.

Against this backdrop, the importance of alternative dispute resolution procedures continues to grow.

The Working Group on Construction and Real Estate Law of the German Bar Association has therefore recently presented a revised, modernized version of the SOBau dispute resolution instrument. It contains tried and tested procedural regulations geared to the needs of practice. New features include an "accelerated dispute resolution and determination procedure" that can be used in disputes about the client's right to order pursuant to Sec. 650b BGB or about a corresponding adjustment to remuneration pursuant to Sec. 650c BGB, provided that the parties so agree. In addition, SOBau 2020 contains new regulations on how to deal with so-called notices of dispute.

In view of these and other alternative dispute resolution mechanisms, it is always advisable to consider which building blocks should be used in individual cases and project-related dispute resolution and in what proportion to each other in construction and planning contracts.

Please feel free to contact us on this and on the optimal design and inclusion of corresponding clauses if required.

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New HOAI as of January 1, 2021 - An overview of the changes taking place at the turn of the year 20/21

With the turn of the year 2020/21, there will be an amendment to the Fee Structure for Architects and Engineers (HOAI), which has been in force in this form since July 2013. The practical consequence of this is that the "binding fee law for planners" will now be officially abolished. In the amended HOAI, the previous system for pricing is retained in principle, but the new regulations are only intended for orientation and are no longer to be understood as legally binding price framework law. In practice, this could lead to the application of new types of remuneration models in architect and engineer contracts in the future.

I. The occasion

The specific reason for the adjustment of the HOAI is the legal requirements that the European Court of Justice imposed on the Federal Republic of Germany in a judgment dated July 4, 2019 (Case No. C-377/17). In the ruling, the ECJ found that the price framework law for architectural and engineering services applicable in Germany to date - i.e., the specification of certain minimum and maximum fee rates - violated EU law. Germany had not been able to convincingly demonstrate in the proceedings that a coherent and systematic regulatory system existed. According to German law, the provision of planning services is not reserved for certain professions. In view of this contradiction, the connection between the requirement to fix minimum and maximum rates and the provision of high-quality planning services had not been sufficiently demonstrated.

In other words, the ECJ states that the existence of statutory minimum rates for planning services can in principle contribute to ensuring a high quality of planning services. However, this is only the case if this component is embedded in a coherent regulatory system free of contradictions, which is not the case here.

II. The consequences of the ECJ ruling of July 4, 2019

It followed directly from the judgment that the Federal Republic of Germany was immediately no longer allowed to apply the minimum and maximum rate requirements from the HOAI. In this respect, there was an active obligation to take all necessary measures to end the identified infringement. The Federal Ministry of the Interior (BMI) therefore also already announced in a decree dated August 5, 2019 to the federal and state authorities that it intended to amend the HOAI as a result of the ruling. For the transitional period, guidance on the application of the

HOAI was issued and a sample contract adapted to the changed situation was published in the Guidelines for the implementation of federal construction tasks (RBBau).

At the same time, a dispute has arisen between several higher regional courts as to how far the obligation not to apply the HOAI should extend. This was particularly the case with regard to disputed contractual relationships in which the public sector is not involved as a contractual partner. For example, in a ruling of July 23, 2019, the Higher Regional Court of Hamm (Case No. 21 U 24/18) took the position that the price law of the HOAI should continue to be applied in ongoing architect fee litigation despite the ECJ ruling.

Thus, only the Federal Republic of Germany or other state agencies would be bound by the ECJ ruling. However, this would not automatically apply to individual citizens or contractors; there would be no third-party effect.

In the meantime, the Federal Court of Justice (BGH) has also been allowed to deal with this question, but as a result has initially passed the ball back to the judges in Luxembourg within the framework of a so-called preliminary ruling procedure (BGH, decision dated May 14, 2020, Case No. VII ZR 174/19). The BGH will only take a final position on this matter after answering two legal questions.

III. Development of the new HOAI

The reaction prescribed by the ECJ was that in August 2020 the draft bill for an "Ordinance amending the Fee Regulations for Architects and Engineers" was presented, on which the federal states and associations were initially able to submit comments. On September 16, 2020, the Federal Cabinet then launched the draft of the amended HOAI; the Federal Council approved it on November 6, 2020. At the same time, the draft law amending the law regulating engineering and architectural services and other laws was adopted.

IV. HOAI 2021 – The innovations at a glance

As expected, the most important adjustment is that all references to binding fee specifications have been deleted from the HOAI. Accordingly, the entire HOAI is now only intended to serve as a "fee orientation"; the amounts that continue to be listed in fee schedules are thus merely "orientation values". It will thus be possible without further ado to freely negotiate fees for architectural and engineering services without having to continue to observe the price framework originally specified by the HOAI.

Terminologically, there is also only talk of "basic fee rate" instead of "minimum rate". However, the other fee calculation parameters remain largely the same. This applies in particular with regard to the factors "scope of services", "chargeable costs", "fee zones", "service phases", etc. However, the term base fee also makes it clear that there will continue to be a kind of "catch-all rate" if the contracting parties do not succeed in concluding a fee agreement.

With regard to the former (strict) requirements for a fee agreement, this no longer has to be "in writing" (i.e. by handwritten signature) and "when the order is placed", but only the relatively simple text form within the meaning of Sec. 126b BGB is required. 126b BGB is sufficient (electronically by e-mail or by pdf document) to be effective. However, if a planner contract is to be concluded with a consumer, the consumer must be informed before submitting an offer for a fee agreement that a lower or higher fee than the HOAI can be agreed. If this is not the case or if the consumer protection notice is given too late, only the amount of the respective base fee rate is deemed to be agreed.

Apart from many minor, mainly editorial comments, only minimal changes have been made to the content. For example, the provisions on the due dates of the planner's fee and progress payments have been removed from Sec. 15 HOAI and replaced by a blanket reference to corresponding provisions in the BGB. Finally, Sec. 57 HOAI also clarifies that HOAI 2021 will only be applicable to contractual relationships concluded from January 1, 2021.

V. Conclusion

- The amendment of the HOAI is thus exhausted to the necessary minimum of adjustments to be made by the legislator. The system of fee calculation, including the fee calculation parameters, has been changed only insignificantly, even though the minimum and maximum rate requirements no longer exist. In the future, there will probably no longer be any actions to increase fees, which in the past were often used to sue for differences between the agreed fee and the statutory minimum rates. However, depending on how the ECJ and subsequently the BGH decide, the processing of corresponding old cases pending before the courts may still take some time.
- The elimination of "cap and floor" in the HOAI offers contractors the opportunity to contractually draft and also price individual projects much more precisely in the future, without fear of coming into conflict with the pricing requirements of the HOAI.
- It is to be expected that there will be clearly individualized fee models in the future, possibly also through a combination of flat-rate fees, effort-based and HOAI parameter-oriented calculations. If the planner contract falls short at this point, it may be that basically the minimum rate comes back through the back door as the base fee rate. A contract that is as individualized and suitable as possible will therefore continue to be the absolute be-all and end-all in the future.

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Condominium Modernization Act 2020 - Overview of innovations

The new law on condominium ownership

„The German Condominium Modernization Act (WEMoG)“, which came into force on December 1, 2020 amends the regulations on condominium ownership. This entails numerous changes and implications for the practice of condominium owners' associations and their management, which are outlined below:

„...The digital transformation is by enabling condomnium owners to participate in condominium meetings in electronic form...is taken into account.“

I. Position of the owners' association

The WEMoG clarifies that the community of condominium owners is itself the bearer of rights and obligations. It is responsible for the management of the common property, so that it is, on the one hand, the holder of claims in the event of impairment of the common property and, on the other hand, the addressee of claims for proper management and use of the residential property. Claims for injunctive relief against individual condominium owners due to use of condominium units contrary to the intended purpose are to be asserted by the community of condominium owners. Condominium owners can only take action against such impairments individually if they are also concretely affected in their individual property. In future, actions for resolutions (actions for rescission, actions for annulment, actions for the replacement of resolutions) must be directed against the community of condominium owners.

Pursuant to Sec. 9a of the German Condominium Act (WEG), the community of condominium owners comes into being as a single-member community as soon as the condominium land registers are created. This means that the developer or dividing owners can already pass resolutions and legally bind the community of condominium owners. First-time buyers are deemed to be owners vis-à-vis the community of condominium owners and the other condominium owners if they have a claim to transfer of condominium ownership against the dividing owner, a priority notice has been entered in the land register in their favor and possession of the rooms belonging to the condominium ownership has been

transferred to them (cf. Sec. 8 (3) WEG). This means that the future owner-purchaser can participate in the condominium owners' meeting in place of the former first owner-seller without requiring a power of attorney for this purpose.

The condominium owners' association is not capable of insolvency. The condominium owners are personally liable for liabilities of the condominium owners' association in proportion to their co-ownership share, even up to five years after the sale of their co-ownership share.

II. Condominium owners' meeting

The WEMoG contributes to making condominium owners' meetings more flexible. Sec. 25 WEG no longer provides for a quorum. This means that the condominium owners' association generally has a quorum regardless of the number of co-ownership shares present or represented. Resolutions are generally adopted (cf. exceptions under VII.) by a majority of the votes cast.

Greater planning security for the benefit of the condominium owners is provided by the extension of the notice period for the convening meeting to three weeks instead of the previous two weeks (cf. Sec. 24 (4) WEG).

The digital transformation is taken into account by enabling condominium owners to participate in owner meetings in electronic form (cf. Sec. 23 (1) WEG). However, the option of attending meetings in person must remain unchanged. In future, circulated resolutions will only require text form instead of written form (cf. Sec. 23 (3) WEG). The latter opens up the possibility of also using electronic means of communication such as e-mail, internet platforms or apps to pass a circular resolution.

III. Strengthening of the Supervisory Board

The fact that the number of members of the Supervisory Board (Verwaltungsrat) can in future be determined by resolution of the condominium owners makes the composition of the Supervisory Board more flexible. The function of the Supervisory Board is strengthened by the fact that Sec. 29 WEG expressly assigns it the task of monitoring the administrator. The liability of the honorary members of the Supervisory Board is limited to intent and gross negligence.

IV. Extension of the rights of the apartment owners

The condominium owners are granted the right vis-à-vis the community of condominium owners to inspect the administrative documents. In addition, the condominium owners have a right to a property report to be prepared annually by the administrator, which provides information on the economic situation of the community.

V. Position of the administrator

The condominium owners' association shall be represented in and out of court by the administrator. The administrator is appointed for a maximum of five years, in the case of the first appointment according to the declaration of division for a maximum of three years.

In the external relationship, the administrator's power of representation is unlimited, with the exception of property transactions and loan agreements (cf. Sec. 9b (1) WEG). In the internal relationship, the administrator is entitled and obliged to take measures of proper administration which are of minor importance and do not lead to significant obligations or are necessary to meet a deadline or to avert a disadvantage. What is of minor importance in an individual case depends on the size of the condominium owners' association to be managed. The rights and duties of the administrator can be restricted or extended by a resolution of the condominium owners.

Since it is no longer necessary for good cause to exist in order to dismiss an administrator, condominium owners can now dismiss the administrator at any time. The administrator's contract shall end no later than six months after his

dismissal. The administrator cannot contest the resolution on his dismissal.

The WEMoG introduces the "certified administrator". Sec. 19 (2) No. 6 WEG grants every condominium owner the right, under certain conditions, to demand the appointment of a certified administrator as part of proper administration. In view of the fact that the certification procedure has yet to be introduced, the entitlement to the appointment of a certified administrator exists for the first time two years after the WEMoG comes into force. Administrators who were already administrators of a community of condominium owners when the WEMoG came into force are still deemed to be certified administrators vis-à-vis the condominium owners of these communities until June 01, 2024.

Pursuant to Sec. 26a WEG, a person is deemed to be certified if he or she has passed a relevant examination before the competent Chamber of Industry and Commerce (IHK). However, certification is not a prerequisite under trade law for the granting of a permit under Sec. 34c (1) No. 4 GewO.

VI. Extension of the special ownership capability

Whereas previously special rights of use were established for the exclusive use of individual condominium owners for areas of the property outside the building - such as terraces, garden areas or outdoor parking spaces for vehicles - these open spaces are now eligible for special ownership under Sec. 3 WEG. Insofar as special ownership was established for these areas, they can be sold and encumbered separately.

VII. Facilitation of structural measures

Before the WEMoG, structural changes to the common property generally required the consent of all affected condominium owners. As a result of the amendment, each condominium owner can, even against the will of the majority of condominium owners, demand appropriate structural changes at his or her own expense that serve to reduce barriers, set up charging facilities for electrically powered vehicles, protect against burglary and connect to a very high-capacity telecommunications network (cf. Sec. 20 (2) WEG). The condominium owners' association can only co-determine the type of implementation.

The adoption of resolutions on structural changes to the residential complex generally requires a simple majority of votes, with the costs of structural measures being borne by those condominium owners who voted in favor of them in proportion to their co-ownership shares.

By way of exception, the costs of structural changes must be borne by all owners in accordance with Sec. 21 (2) No. 1 WEG if the measure was decided by a majority of two-thirds of the votes cast at the owners' meeting, which must represent half of the co-ownership shares, and its costs are not disproportionate. A distribution of the costs among all owners is provided for in Sec. 21 (2) No. 2 WEG in the event that the costs of the modernization measure are amortized within a reasonable period of time.

VIII. Resolution on the top of the accounts

Pursuant to Sec. 28 (2) sentence 1 WEG, the resolution on the annual financial statement is now limited to the settlement peak, i.e. the balance of the advances to be paid on the basis of the economic plan and the costs actually attributable to the respective condominium unit. The calculation itself, however, is no longer the subject of the resolution.

IX. Acquisition protection

In order to protect purchasers of the condominium, Sec. 10 (3) sentence 1 WEG provides that resolutions adopted by the condominium owners on the basis of an agreement must be entered in the land register in order to take effect vis-à-vis legal successors. This includes, for example, resolutions adopted by the owners on the basis of opening clauses in the declaration of division. For old resolutions adopted

prior to the entry into force of the WEMoG on the basis of an agreed opening clause, a transitional period until December 31, 2025 applies: By then, the old resolutions must also be entered in the land register in order to take effect against special successors of condominium owners.

X. Harmonization of home ownership and tenancy law

Sec. 15 WEG provides for harmonization of condominium and tenancy law by obliging tenants of condominium units to tolerate construction measures in the condominium. In the case of rented owner-occupied apartments, it is now no longer the living space that is decisive in the relationship between the renting owner and the tenant, but rather the cost allocation according to co-ownership shares that applies in the community of condominium owners.

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News on tax law: Foreign holding companies threatened with German withholding tax - draft bill on the Withholding Tax Relief Modernization Act of November 19, 2020

Under the previous provision of Sec. 50 d (3) Income Tax Act (EStG), a foreign company is not entitled to full or partial relief from German withholding tax to the extent that persons have an interest in the company to whom the refund or exemption would not be due if they earned the income directly and the gross income earned by the foreign company in the relevant fiscal year did not derive from its own economic activity, as well as

1. there are no economic or other significant reasons for the involvement of the foreign company with respect to such income, **or**
2. the foreign company does not participate in general economic transactions with a business operation that is appropriately set up for its business operations.

I. Status to date

Previously, in the case of foreign holding companies that do not carry out their own entrepreneurial activities, it was argued that the forwarding of dividends from the target companies to the shareholders of the holding company constituted an economic activity within the meaning of Sec. 50d (3) EStG or another relevant reason.

II. New state

Now, however, Sec. 50 d (3) EStG is to be comprehensively revised according to the draft bill for the Withholding Tax Relief Modernization Act of November 19, 2020. For the future, this could lead to significant disadvantages with regard to withholding tax relief for foreign holding companies:

- Holding companies need their own economic activity, which now explicitly does NOT include the mere forwarding of dividends;
- Tightening of personal relief eligibility, so that in certain cases there would be a final 25% withholding tax charge;
- Entitlement to relief would only be given if it could be proven that NONE of the main purposes of the involvement of the holding company is to obtain a tax advantage or the holding company is listed on the stock exchange.

Overall, the proof of discharge eligibility becomes significantly more complex under the current draft legislation.

III. Recommendation

We therefore recommend a critical review and, if necessary, revision of the current inbound holding structures in order to minimize or avoid the risk of a German withholding tax burden.

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This newsletter is of a general nature and can therefore not replace legal and tax advice in individual cases.
We will be happy to answer any further questions you may have in a personal meeting.