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An Export Plan Should Include the Consideration of U.S. Distribution Laws if Selling Into the U.S. Through Sales Representatives or Distributors

A German or other foreign company looking to obtain a presence in the United States market without having to set up its own U.S. sales operation may consider using intermediaries, such as independent distributors and sales representatives to sell its products in the U.S. Typically, a distributor purchases the foreign company's product, imports it into the U.S., and then sells the product to U.S. customers. The distributor may also handle after-sales service and warranty needs. Whereas, a sales representative typically acts as an independent agent who sells the foreign company's product on commission within a specific geographic area with the foreign company delivering the product directly to U.S. customers.

The use of a distributor or sales representative may provide a German or other foreign company with an immediate presence in the U.S. market. However, distribution in the U.S. is subject to legal regulation and the foreign company's export plan should include an examination of any proposed distribution relationship with a U.S. distributor or sales representative to determine if the relationship will be subject to U.S. distribution laws. This blog briefly discusses some of the laws regulating distribution in the U.S.

Franchise Laws

The U.S. federal government and about one quarter of the states regulate the offer and sale of franchises. Whenever a seller allows another party to operate under, or distribute goods or services associated with, the seller's trademark, service mark, trade name or other commercial symbol, franchise laws may apply to the relationship. Typically, when people think of franchises they think of established brands in traditional industries such as the fast food and automotive industries. However, business arrangements not traditionally viewed as franchises may fall within a statutory definition of a franchise, including sales representative and distributor relationships.

The Federal Trade Commission's trade regulation rule on franchising (the "FTC Rule"), which applies to franchises throughout the U.S., requires franchisors to provide a franchise offering circular to prospective franchisees before any offer or sale is made, unless an exclusion or exemption applies. The offering circular contains comprehensive information about the franchisor, the franchise and the terms and conditions of the franchise contract. The offering circular is not required to be filed or registered with the federal government. However, a number of states have franchise laws that require the

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franchisor to register its franchise with the state and receive approval from the state before offering to sell a franchise.

A number of states also have laws governing the ongoing business relationship between the franchisor and the franchisee. These laws can include **(1)** good cause requirements for early termination or non-renewal (such as failure to cure a breach of the franchise agreement after notice and a reasonable opportunity to cure), **(2)** mandatory compensation of franchisees upon non-renewal and **(3)** provisions regarding the transfer of ownership of the franchise.

The definition of a franchise varies under applicable law, although the definitions tend to have the following common elements: **(1)** the grant of a right to operate a business in association with the franchisor's trademark, service mark, trade name or other commercial symbol, **(2)** significant control or assistance by the franchisor (under state laws this element is often replaced with either the "community of interest" definition where some common financial interest exists between the parties in the operation of the franchised business or the "marketing plan" definition where the franchisor prescribes a marketing plan or system in substantial part) and **(3)** the franchisee is required to pay a franchise fee to the franchisor. The definition of a franchise fee has been interpreted broadly and includes any required payment made by the franchisee to the franchisor, including payments for sales and service manuals, promotional literature or a required purchase of excess inventory. Some exceptions are recognized, with the most common being the payment for reasonable amounts of inventory at a bona fide wholesale price. All three elements must be present under the FTC Rule and most state franchise laws for a franchise to exist. In New York, payment of a franchise fee combined with either one of the other two elements constitutes a franchise.

The state franchise laws and the FTC Rule provide various exclusions and exemptions based upon a policy determination that regulation is not needed to protect the public interest. The exemptions vary, and the laws of each applicable state should be examined in each case.

Absent an applicable exclusion or exemption, avoiding the application of U.S. federal and state franchise laws typically requires the careful avoidance of at least one element of the "franchise" definition (while recognizing that the definition is not the same in all jurisdictions). It does not matter what the parties call the relationship in their contract or other documents and protections afforded by the franchise laws generally cannot be waived. The name given to the relationship by the parties is irrelevant in the eyes of governmental regulators who will look at the substance of the relationship.

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Business Opportunity Laws

Many states have enacted business opportunity statutes which are meant to extend certain disclosure protections afforded to purchasers of franchises to those that purchase a business opportunity. The definition of a "business opportunity" is often broad and varies from state to state, although each statute generally has the following common elements: (1) an oral or written contract under which a seller provides products, services, equipment or supplies to enable the buyer to start a previously nonexistent business and (2) certain representations are made by the seller in connection with the marketing and sale of the business opportunity. Examples of representations made by the seller which have been relevant under business opportunity laws include where the seller represents that it will purchase the products made using the goods or services sold to the buyer and where the seller guarantees in writing that the buyer will derive income from the opportunity.

Business relationships which have been covered by the business opportunity laws include businesses involving sales of rack displays and vending machines, merchandise discount programs, home health care services and frozen pizza distributorships. If the relationship constitutes a business opportunity under the applicable state statute, that statute will typically require pre-sale registration and detailed disclosure documents. Certain states also require a merit review of the disclosure documents before they will be accepted for filing and a registration issued. Like the franchise laws, there are exemptions from the business opportunity laws available.

Sales Representative Laws

A majority of states have laws that regulate the business relationship between a supplier and the sales representative that promotes the supplier's products. These laws do not have registration or disclosure requirements like the franchise and business opportunity laws discussed above but they can provide substantial remedies (including recovery of double or treble damages, costs and attorneys' fees) if they are violated. These laws are designed to help ensure that the representative is fairly compensated in accordance with the agreement between the parties and often deal with the payment of commissions upon termination of that agreement. Some of these laws require that the supplier have good cause to terminate the agreement while some deal with how payments during the term of the agreement are to be calculated and paid, although generally the terms of the agreement control.

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Industry-Specific Laws

There are a wide variety of industry-specific laws in the U.S. that regulate the relationship between a manufacturer or supplier and the distributor or dealer. Some examples include laws governing petroleum marketers, automobile dealerships, recreational equipment dealers, farm equipment dealers and liquor and wine distributorships. Most of these laws require good cause in addition to notice for termination.

Conclusion

A German or other foreign company should examine each proposed distribution relationship with a U.S. intermediary to determine whether the relationship may be subject to U.S. distribution laws. If the intermediary will have a large territory, more than one of these laws may apply and each should be reviewed. If possible, the foreign company should structure the relationship so as to legitimately avoid application of applicable distribution laws (typically by avoiding one of the definitional elements of the law or qualifying for an available exemption) because complying with those laws can be time consuming and expensive. Additionally, failure to comply with applicable U.S. distribution laws can be costly as non-complying companies and even their owners, officers and directors may, depending on the particular law, be subject to remedies including actions for damages, injunctions, rescission, civil fines and criminal penalties.

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MORE THAN AN EIGHT MILLION DOLLAR PENALTY FOR A TECHNICAL IMPORT VIOLATION: THE DANGERS OF NOT FOLLOWING THE RULES

In a recent case, the most important federal appeals court in the United States for business matters, the U.S. Court of Appeals for the Second Circuit in New York, imposed a wildly disproportionate penalty for an import violation which resulted in no loss of any kind to the United States. The case highlights the importance and necessity of paying close attention to the rules and having an effective import and export (and money-transfer) compliance program.

The facts are simple: the importer purchased two works of art, the painting "Hannibal," by Jean-Michel Basquiat, and the Mediterranean sculpture called "Roman Togatus" by an unknown sculptor. The price was $1.6 million. The owner shipped the art works to Europe, where it thought there would be a better market for an eventual resale. While the artworks were in Europe, the owner made a deal with a New York dealer to sell the artworks in New York, on consignment. The artworks were shipped from Europe to New York, and the shipping company, saying this was common in the industry, invoiced each work of art, as a work of art, at $100.00 and declared that both works had "no commercial value." After the works were imported, they were seized by U.S. Customs as "smuggled" merchandise. Customs had an independent appraiser inspect the art, which was then re-appraised by the independent appraiser in excess of $8,070,000.00. There are no custom duties on art, so even if the art had been declared to Customs to be worth in excess of $8,070,000.00, no duty would have been owed to Customs.

The court upheld the seizure for smuggling, saying that smuggling occurs even when there is no loss of duty, and no mis-declaration, but when the "loss" to the government is merely the receipt of incorrect statistical import information (here, the price of the art). The result in this case is that over $8,070,000.00 was forfeited to the government when it suffered no loss, when the violation was technical, and when the mis-declaration of price was made by the shipping company. (The shipper's statement that it was common in the art industry to invoice goods in this manner may be true, but the practice is nevertheless not legal.) Added to this extreme monetary loss, are the six years of legal fees needed to fight the government on this matter. Even the court seems to realize the unfairness and disproportionality of the punishment, but felt compelled by the law to affirm the seizure.

This fiasco could have been, and should have been, easily avoided by the importer. First, the importer is responsible for the correctness of all communications

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with, and declarations to, Customs. This is true even when, as is almost always the case, the Customs paper-work is completed and filed by the freight forwarder or customs broker. Second, the importer must check all filings for accuracy both before and after filing. Third, all representations must be true and correct, and another's statement that "we always do it that way" carries no weight, and is no defense. The importer, no matter how small, is responsible for instituting and following a compliance program to insure that these mistakes do not happen; and that if they do happen, they are immediately corrected.

A compliance program is the only way that these enormous, disproportionate, and unfair penalties for technical violations may be avoided. There was no reason for this violation to have occurred. The actual value of the art should have been declared, and no duty would have been paid. Instead, with the value of the forfeiture and legal fees (not to mention other substantial costs), this technical violation cost the importer close to ten million dollars. It is a lesson to those who prefer to do things the wrong way instead of the right way. And two of the great side benefits of a compliance program – which is usually relatively inexpensive and easy to implement – is that it ensures fiscal and economic certainty by foreclosing the possibilities of penalties; and, more importantly, by focusing on processes, it discovers areas where duties may be lowered, and costs reduced. In fact in my experience, compliance programs more often result in duty and other monetary savings than they result in extra duties because merchandise is mis- or under-declared.

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Existing wind turbines in the light of exposures and stability proofs for tower and foundation

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The construction and operation of wind turbines is subject to public law requirements. Today the permits for new facilities usually contain covenants and conditions, which have to be proved towards the authority during the utilization time on regular intervals.

Considering this, regarding existing facilities, which were erected and are operated on the basis of building permits but also for existing facilities that have been permitted for the standard utilization time without special regulatory requirements and conditions years ago, the question of routine reviews of technical data – also for insurance reasons – turns out, in particular regarding the stability. Moreover, wind turbines are constructed under a limited technical operation time. Considering this and different operational conditions, it might be that wind turbines can be used longer but always in compliance with the environmental law and safety requirements.

Additionally, a subsequent order pursuant to section 17 of the German Federal Immission Control Act (Bundes-Immissionsschutzgesetz, BImSchG) may order special requirements and conditions that have to be imposed to the wind park operator subsequently. According to section 5 para 1 no. 1 BImSchG, the erection and the operating of facilities must not lead to harmful effects on the environment and other endangerments, significant disadvantages or significant nuisances to the community or the neighborhood. Section 5 para 3 no. 1 BImSchG establishes the duty to erect, to operate and to put facilities out of service in such a way so that no harmful environmental impacts and other endangerments, significant disadvantages and significant nuisances to the community or the neighborhood may be caused.

Complying with and documenting the requirements given by the directive “Wind Energy Facilities; Exposures and Stability Proofs for Tower and Foundation” (directive) as state of the technology may ensure the proper compliance with public duties and facilitate the prove of insurance matters.

The directive of the German Institute for Construction Technique (Deutsches Institut für Bautechnik, DIBt) applies to the proof of the stability of the tower and the foundation of wind turbines. The DIBt is the only German approval body for construction products and types of construction. The directive contains, based on the provisions of standards of the German Institute for Standardization (Deutsches Institut für Normung, DIN), regulations on impacts on the entire wind energy system, including the associated safety factors that are basis for the determination of the force acting from the machine to the tower and the foundation. In addition, the directive comprises requirements regarding inspection and maintenance of the plant, in order to ensure the stability of the tower and its foundation.

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In essence, the directive contains provisions on the continued operation of wind turbines (see chapter 17).

It should be noted that the directive in so far only refers to the Guidelines for Wind Turbines, Part: Continue Operation of Wind Turbines, published by Germanischer Lloyd SE (now DNV GL). However, according to the directive of the DIBt, all inspections of the wind turbines and assessments of inspections with respect to a continued operation of a wind turbine and assessments of loads and / or components of the wind turbine must be carried out by an appropriate independent expert on wind turbines in any case.

Due to the positive economic and rapid technological development in the field of wind turbines and the increasing extensions of off-shore wind farms one has to expect further changes and amendments in the field of construction techniques in new future. An eye should be kept on further technical and legal developments imperatively.

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Responding to State Breach Notification Requirements

Virtually every state in the United States has imposed a duty on companies doing business in their state to notify its resident customers if the company experiences an unauthorized intrusion into files containing their personally identifiable information ("PII").[1] This regulatory schema has no counterpart under German or E.U. law, and German companies and their subsidiaries doing business in the U.S. need to be aware because the notification process can be a lengthy and costly undertaking with substantial negative ramifications. An educated company may be able to minimize its notification requirements under these laws while fulfilling its legal responsibilities, if it has a thorough knowledge of these statutes and makes careful preparation for a breach.

The regulatory framework differs among the fifty states, and a detailed knowledge of them can assist in limiting a firm's notification requirements. For example, certain states define PII to be an intruder's possession of personal information, such as an individual's full name combined with a Social Security number or a bank account number along with a code accessing the account.[2] If these are not in the accessed data, it is not considered PII, and the notification requirement does not apply. Some states require notification based solely on any "unauthorized access" to the PII,[3] although others require a risk of harm analysis.[4] In the latter, if it can be determined that there is no reasonable likelihood that any harm can result to the customer from the breach, the notification requirement doesn't apply.

Many states have a statutory provision that, if the PII is encrypted, it is exempted from the law's requirements.[5] Thus, a company should closely review its use and maintenance of PII, and, where the risk of loss and unauthorized access is high, such as in laptops, smartphones and tablets, it should adopt a policy of encrypting this information. Additionally, as encryption is now relatively inexpensive and relatively easy to employ, a company should consider a more extensive use of it. One major reward would be the exemption of this encrypted data from many breach notification requirements.

Some states require a determination of the nature of the unauthorized access and its status within a reasonable period. If such a determination cannot be made in this time, it

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[1] PII can include a customer's name combined with a social security number, driver's license number, state identification card number, credit card number or bank account number.

[2] *See, e.g.,* OR. REV. STAT. § 646A.602(11).

[3] *See, e.g.,* CONN. GEN. STAT. § 36a-701b; N.J. STAT. § 56:8-163-66; P.R. LAWS tit. 10, § 4051-4052.

[4] *See, e.g.,* LA. REV. STAT. §§ 51:3071 et seq.; MD. CODE, COMM. LAW §§ 14-3501 et seq.; Tenn. Code § 47-18-2107.

[5] *See, e.g.,* N.Y. GEN. BUS. LAW § 899-aa(b).

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Responding to State Breach Notification Requirements

is presumed to be unlawfully accessed and the notification procedure must be initiated. This should lead companies to an expeditious investigation of these circumstances, as doing so could save the company from incalculable harm.[6]

In fact, in all of the above, the German company and its subsidiaries doing business in the U.S. would benefit greatly from a careful formulation or review of their policies and procedures regarding the handling of PII including the following:

- designate an employee or employees to coordinate the safeguards;
- identify and assess the risks to customer information in each relevant area of the company's operation;
- evaluate the effectiveness of current safeguards for controlling these risks;
- design and implement a safeguards program;
- select appropriate service providers and require them (by contract) to implement appropriate safeguards;
- establish proper training and testing programs and
- regularly evaluate the program.

An incident response plan ("IRP") should also be developed, and it should include the following:

- defining a data breach incident;
- creating an incident response team ("IRT");
- establishing response team duties in both preparing for and responding to the incident;
- drafting of incident notifications to clients and regulators;
- creating a cybersecurity incident log, a cybersecurity incident report and other appropriate forms to be used by the IRT;
- investigating the incident;
- training and testing programs; and
- remedial measures.[7]

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[6] *See, e.g.,* MD. CODE, COMM. LAW §§ 14-3501 et seq.

[7] Massachusetts requires any company that maintains the PII of its citizens to carefully review its cybersecurity policies and procedures and to develop a complete written information security plan for the security and protection of its PII. 201 MASS. CODE REGS. 17.01.

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The IRT should consist of senior officers from each department at the company that would be involved in an incident and, based on the company's size, could include legal, compliance, IT, security, HR, PR and any other affected department. The IRT should have the responsibility for the further development and implementation of the IRP. One of its first tasks should be to review the manner in which PII is handled in storage and in transit at the company and to make appropriate recommendations for any corrective action including the use of encryption.

The company that pursues the above strategy will enhance its capability to expeditiously investigate unauthorized intrusions into files containing PII, and, in so doing, potentially save the company from unnecessary cost and problems involved in the notification process.

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The representation of the layout of a retail store, such as an "Apple" flagship store, may be registered as a trade mark for services

if the representation is capable of distinguishing the goods or sevices of one undertaking from those of other undertakings.

Judgment of the Court of Justice of the European Union in case C-421/13 Apple Inc. v German Patent and Trademark Office.

Apple Inc. had already registered with the United States Patent and Trademark Office a trademark consisting of a multiclour drawing showing a typical Apple "Flagship Store" in a view from the street to the inside. The trademark was registered for retail store services. According to Apple's own description "the trademark consists of distinctive design and layout of a retail store".

Later Apple applied for the international registration of its US trademark in several states some of which rejected the extension of protection in particular Germany. The German Patent and Trademark Office (DPMA) argued: the depiction of the space devoted to the sale of the undertaking's goods is the representation of an essential aspect of that undertaking's trade services which the consumers may not perceive as an indication of the quality or commercial origin of of the products. Besides, it considered that the retail store depicted in the case before it was not sufficiently distinguishable from the stores of other providers of electronic products.

Against this rejecting decision Apple brought an appeal before the German Federal Patents Court. The Court found that Apple's trademark indeed shows distinct character over the layouts of other retail stores of competitors, however it adressed several other fundamental problems which resulted in the following questions presented to the Court of Justice of the European Union:

1. Is it consistent with European law that the protection for the "packaging of goods' also extends to the presentation of the establishment in which a service is provided?
2. Is a sign representing the presentation of the establishment in which a service is provided capable of being registered as a trade mark?
3. Is the requirement for graphic representability satisfied by a representation by a design alone or with such additions as indications of the absolute dimensions in metres or of relative dimensions with indications as to proportions?

On these questions the Court of Justice of the European Union notes in the present judgement:

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The representation of the layout of a retail store, such as an "Apple" flagship store, may be registered as a trade mark for services

> the representation, by a design alone, without indicating the size or the proportions, of the layout of a retail store, may be registered as a trade mark for services consisting in services relating to those goods but which do not form an integral part of the offer for sale thereof, provided that the sign is capable of distinguishing the services of the applicant for registration from those of other undertakings.

The latter condition is given if the depicted layout is essentially distinct from those which are usual and well known in the respective field of business. The registration of a trademark for the products of the aplicant is not excluded by the European law.

In a next step the German Federal Patents Court will have to decide the case taking into account the judgement of the Court of Justice of the European Union. A the Patents Court had no problem with the distinct character it will probably decide to register Apple's trademark.

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"UBER" Facing Legal Obstacles in Europe

The ongoing legal quarrels between the software company Uber, which provides a "ride-sharing" app, and local authorities and taxi companies in Germany is symbolic for a clash of legal cultures and legal expectations with the US-American company demanding more economic liberty in the strongly regulated market for single person transport services in Germany.

Uber was founded as UberCab in San Francisco in 2009. As the original name reveals, the founders had in mind to compete with taxicabs as the traditional means of single person transport in urban areas. The loan word "uber" – an anglicized version of the German word "über", which means "above" or "over" – is used in informal English as a prefix to imply superiority. Uber's CEO Travis Kalanick commented at the so-called "Code Conference" on 28th May, 2014 that he sees his company in a "political campaign" and that the opponent is an "asshole named taxi". Uber – set up by Kalanick and co-founder Garrett Camp as a start-up enterprise – as soon as 2010 began to be the target of investors such as Google Ventures and Goldman Sachs. The company is now valued at the considerable amount of 18.2 billion $, or 14 billion €.

Uber provides mainly two services – labelled UberBlack and UberPop. Only the latter is subject of controversy. Both services distinguish between users acting as "drivers" and "riders". Drivers need to be approved. Riders can request inner-city "rides" via Uber's smartphone app, which the drivers can subsequently accept. Uber sets the prices and charges a 20 percent fee on all rides to their drivers. UberBlack as a premium product – providing mainly sedan services – requires applicants to be professional drivers with the necessary administrative authorization. The equivalent minimum standard for UberPop drivers is trivial.

Considering the obvious similarities to traditional taxi services, Uber's business activities in the US led to considerable legal controversies, culminating in a cease and desist order by Californian authorities including the threat of a 20,000 $ fine per contravention. The company could conclude an agreement with the authorities but its entry to the European and especially the German market proved to be even more arduous. Uber started its business in five German cities in 2013 – Berlin, Munich, Hamburg, Frankfurt and Duesseldorf. Soon it discovered that both regulatory authorities and unions of local taxi enterprises saw the company in breach of national and regional legislation.

Notwithstanding the interventions of administrative units in Hamburg and Berlin, unions of competing taxi companies successfully invoked unfair competition claims. Courts in Berlin and Frankfurt consequently granted injunctions against Uber. The courts repudiated Uber's allegation to merely provide intermediation for transport services and instead considered the company in actual competition with taxi services. Since Uber

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"UBER" Facing Legal Obstacles in Europe

drivers are usually neither licensed nor adequately insured, Uber enjoyed an unfair advantage compared to traditional taxi services, commented the court.

Both decisions temporarily disallow Uber to provide its services. Each infringement may be fined up to 250,000 €, or 327,000 $. Uber decided to carry on its business, despite of any possible sanctions. The applicant in Berlin then abstained from enforcing the injunction and claiming fines for infringements, being afraid of potential compensation claims. Meanwhile in Frankfurt, the court has set aside the injunction denying the special urgency of the case. But the court explicitly held that it still considers Uber's business to be illegal. A possible appeal and of course the main proceedings are still to come and show that Uber is not over.

Uber's fight against regulatory requirements is symbolic for the clash of the so-called shareeconomy with traditional service providers. Prior to Uber's confrontation with taxi companies, hotel businesses complained about Airbnb, a website that allows non-commercial providers to offer their apartment or room for short-term accommodation. While the US-American company emphasizes the social value and the complementary nature of its services, hotel managers remark that Airbnb competes with hotels not observing the relevant regulations and thereby eroding social and regulatory standards.

The public discussion about Uber exceeds its nature as a merely legal confrontation and has become political. EU Commissioner for Digital Agenda Neelie Kroes heavily criticized the ban of Uber by local authorities in Brussels. While she can easily be agreed with that technological innovations have changed and are changing our lives, this cannot grant absolution for infringements with regulation that seeks to maintain social standards, costumer or employee protection. Uber's blunt refusal to obey judicial decisions cannot be the right way to deal with such areas of tension.

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Inversion transactions: What exactly is behind these transactions and how does proposed legislation would influence such structuring?

Corporate tax rates in the U.S. are amongst the highest in the world. Not surprisingly U.S. based MNE's are constantly looking for optimizing their taxes and to keep non-U.S. income out of the tax net in the U.S. Recent M&A activities of U.S. companies (completed and proposed) have put the spotlight on a technique to lower the tax burden that was formerly known only to a few insiders: corporate acquisition inversions.

Such an inversion transaction is typically completed in connection with the purchase of a foreign-incorporated acquisition target and generally involves two different steps: first, a newly formed non-U.S. holding company is put on top of the existing U.S. corporation whereby the shareholders of the U.S. corporation now become the shareholders of the non-U.S. holding company followed by the second step in which the non-U.S. holding company acquires the foreign target and where the shareholders of the foreign target entity now become shareholders in the newly set-up non-U.S. holding company. Main criteria to make an acquisition inversion work under the current set of rules is that the shareholders of the foreign target entity receive more than 20% of the shares in the non-U.S. holding company. Otherwise the current anti-inversion rules would generally treat the non-U.S. holding entity as a U.S. tax resident entity and would therefore deny any tax benefits resulting from such structuring. Typically the management of the U.S. corporation is taking over the same roles at the level of the non-U.S. holding company and also remains physically in the U.S.

Tax benefits of implementing such an inversion structure include the reduction of current or future non-U.S. earnings, the optimization of intercompany indebtedness and the set-up of a tax optimized structure for future acquisitions.

Inversion transactions present a number of challenges: not only is the implementation highly complex from a tax perspective, there are also a lot of issues to be considered from a corporate and capital markets perspective, e.g. approval from the shareholders of the existing U.S. entity and the target and governance and capital market issues associated with the redomiciliation of the U.S. entity.

The number of completed and proposed inversion transaction has attracted the attention of the U.S. authorities and earlier in May this year the draft of a "Stop Corporate Inversions Act of 2014" has been introduced by Senator's Carl and Sander Levin (the Obama administration made a similar proposal in March of 2014). Under the proposed rules a new class of corporations would be created that would be treated as domestic for U.S. tax purposes: A foreign corporation would be treated as an inverted domestic

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European Tax Survey: Role of German tax departments of multinational corporations (MNCs) is changing

corporation in part by reference to the continuity of its ownership by more than 50% (rather than present law's 80% or more) of the owners of the domestic corporation or partnership whose assets were acquired by the foreign corporation. A foreign corporation would also be treated as an inverted domestic corporation, even absent the greater-than-50% continuity of ownership, if the management and control of the expanded affiliated group (EAG) which includes the entity occurs primarily within the U.S. and the EAG has "significant domestic business activities." Substantial foreign business activities may, similar to present law, exclude a foreign corporation from inverted domestic corporation status.

Regulations would provide that the management and control of an EAG would be treated as occurring primarily in the U.S. if "substantially all of the executive officers and senior management of the expanded affiliated group . . . are based or primarily located in the United States." An EAG would have significant domestic business activities if at least 25% of (i) the employees of the group are based in the United States, (ii) the employee compensation incurred by the group is incurred with respect to employees based in the United States, (iii) the assets of the group are located in the United States, or (iv) the income of the group is derived in the United States.

The outcome of this legislative initiative is still unpredictable; however these proposals have to be taken into consideration when implementing inversion transactions in the near future.

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Selbstanzeigeverfahren bei internationalen Sachverhalten

This article addresses the recently modified rules for Voluntary Disclosure procedures applied by the IRS for taxpayers with foreign assets

Im Fokus: US-Steuerpflichtige mit Auslandsvermögen

Die US-Bundesfinanzbehörde *(IRS)* konzentriert sich seit Jahren auf diejenigen US-Steuerpflichtigen, die Einkünfte aus dem US-Ausland beziehen. Im Fokus stehen US-Staatsbürger, Greencard-Besitzer und sonstige in den USA steuerlich ansässige Personen (kurz: *US-Personen*), die ihre aus dem US-Ausland bezogenen Einkünfte nicht oder nicht ordnungsgemäß erklärt haben. *US-Personen* sind z.B. deutsche, österreichische oder schweizerische Staatsbürger, die in den USA leben und arbeiten oder die sich in Europa aufhalten und die Greencard oder die doppelte Staatsbürgerschaft besitzen.

Das Paradebeispiel sind nichtversteuerte Zinseinkünfte aus Guthaben oder Anlagen bei Banken im US-Ausland und/oder die pflichtwidrige Unterlassung der jährlichen Meldung der im US-Ausland gehaltenen Finanzkonten auf dem Formular FinCEN 114 *(FBAR)*, bzw. weiterer Informationserklärungen, wie z.B. im Fall des Beteiligungsbesitzes an Gesellschaften im US-Ausland.

Flankierend dazu haben die USA durch den *Foreign Account Tax Compliance Act (FATCA)* und durch besondere zwischenstaatliche Vereinbarungen mit einer Reihe von Ländern (u.a. Deutschland, Österreich, Schweiz), das Netz an automatischen Meldungen an den US-Fiskus enger gezogen. Die im US-Ausland sitzenden Finanzinstitute, die *US-Personen* als Kunden haben, müssen ab 2014 deren Jahresendkontostände inkl. Namen und Kontonummern an den US-Fiskus melden (in Deutschland über das Bundeszentralamt für Steuern).

Voluntary Disclosure Procedures – Wege in die Steuerehrlichkeit

Die formgerechte Selbstanzeige *(Voluntary Disclosure)* vor Entdeckung der o.g. unterlassenen Steuerpflichten kann u.U. den Steuernachzahlungszeitraum und die Höhe der Bußgelder reduzieren sowie Straffreiheit gewährleisten. Der Steuerpflichtige steht dabei grundsätzlich vor folgenden Entscheidungsalternativen:

1. Nichtstun, was im Entdeckungsfall zu relativ hohen Bußgeldern und ggf. Strafverfolgung führen kann. So ist z.B. die schuldhafte Nichtabgabe des o.g. FBAR-Formulars pro Konto und pro Jahr mit einem Bußgeld von $10.000

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beschwert, bei Vorsatz von bis zu $100.000 oder 50% des höchsten Guthabenstands. Das Entdeckungsrisiko dürfte durch FATCA (s.o.) stark zugenommen haben.

2. Stillschweigende Nachholung *(Quiet Disclosure)* der versäumten Steuerpflichten für vergangene Jahre und/oder ab dem laufenden Steuerjahr. Da diese außerhalb der in Ziff. 3 genannten *Voluntary Disclosure* Verfahren stattfindet, ist das Bußgeld- und Strafrisiko auch hier hoch (wie Ziff. 1). Das Entdeckungsrisiko dürfte hier u.U. noch größer sein, wenn der steuerformularmäßige Anschluss an die Vorjahre fehlt.
3. Teilnahme an einem der folgenden vom IRS angebotenen formalisierten Selbstanzeigeverfahren, die mit Wirkung ab 1.7.2014 modifiziert wurden und deren Charakteristiken im Folgenden aus Platzgründen nur angedeutet sind:
    a. *Offshore Voluntary Disclosure Program (OVDP):* Nacherklärungszeitraum von 8 Jahren für Steuer- und Informationserklärungen, teilweise reduzierte Bußgelder (*Offshore Penalty* 27,50% bzw. 50%), keine strafrechtliche Verfolgung, mögliche *Opt-out Election.*
    b. *Streamlined Filing Compliance Procedures (SFCP)*: Nacherklärungszeitraum von 3 Jahren für Steuererklärungen und von 6 Jahren für Informationserklärungen, **allerdings unzulässig bei Vorsatz *(Willfulness)*:**
        – *Streamlined Domestic Offshore Procedure (SDOP)* für in den USA lebende Steuerpflichtige: *Offshore Penalty* von nur 5%,
        – *Streamlined Foreign Offshore Procedure (SFOP)* für außerhalb der USA Lebende: bußgeldfrei.
    c. *Delinquent FBAR Submission Procedure* bzw. *Delinquent International Information Return Procedure:* bußgeldfrei, falls keine Steuerverkürzung und kein Verschulden vorliegt.

Folgende Entscheidungskriterien spielen dabei eine wichtige Rolle:

- Höhe der Steuernachzahlung und der Nachzahlungszinsen (u.a. auch abhängig vom Nacherklärungszeitraum)
- Höhe der Straf- bzw. Bußgeldfestsetzung
- Risiko der strafrechtlichen Entdeckung und Verfolgung
- Maß der relativen Rechtssicherheit nach Verfahrensbeendigung

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Selbstanzeigeverfahren bei internationalen Sachverhalten

- Höhe der Rechts- und Steuerberatungskosten (Beratung bei der Auswahl des Verfahrens, Erstellung der nachzureichenden Steuer- bzw. Informationserklärungen, Vertretung vor dem IRS, ggf. Verteidigung im Strafverfahren)

Aufgrund der Komplexität der Regelungen und der steuerlichen und ggf. strafrechtlichen Konsequenzen für den Steuerpflichtigen ist diesem angeraten, sich von einem in den USA zugelassenen Steuerberater (CPA) bzw. Rechtsanwalt (Attorney) beraten und vertreten zu lassen. Dabei ist zu beachten, dass US-Berufs- und -IRS-Vorschriften es verbieten, dem Mandanten zur Durchführung der o.g. Nullalternative (Ziff. 1) oder der *Quiet Disclosure* (Ziff. 2) zu raten.

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Internal Revenue Service Issues New Streamlined Compliance Procedures

In 2012 the Internal Revenue Service (the "IRS") issued Streamlined Compliance Procedures aimed at US taxpayers who had failed to report income from foreign financial accounts on their US income tax returns and who had failed to report those accounts annually on Form TD F 90-22.1 (Report of Foreign Bank and Financial Accounts) ("FBARs").These procedures were only available to US taxpayers who had lived abroad and not filed a US tax return since January 1, 2009. In addition, the IRS would generally permit the Procedures to be used only by taxpayers whose liability did not exceed $1,500 in each of the three years for which tax returns needed to be filed. A participating taxpayer had to complete and submit a risk questionnaire, which was used by the IRS to evaluate whether the taxpayer posed a sufficiently "low compliance risk" to qualify for the program.

On June 18, 2014, the IRS issued new Streamlined Procedures. The classes of taxpayers eligible to use these procedures was considerably broadened and the conditions to qualify were eased. Now US tax residents as well as nonresidents may take advantage of the Procedures. There is no longer a $1,500 cap on tax liability for eligible participants. In addition, the risk questionnaire has been eliminated.

As under the original Procedures, a participating taxpayer must file 3 years of original or amended US income tax returns, as the case may be. In addition, 6 years of FBARs must be filed. A key advantage of the new rules is that a participating taxpayer must pay to the IRS only the tax due and statutory interest. In contrast with the Offshore Voluntary Disclosure Program, no late or underpayment penalty or 20% substantial underpayment penalty is due.

However, the Procedures for US residents do require payment of an "offshore" penalty equal to 5% of the highest aggregate value of the taxpayer's foreign financial assets during the 3 years for which tax returns must be filed and the 6 years of required FBAR filing. No such penalty is imposed under the Procedures for nonresidents.

A common requirement of both the domestic and foreign Procedures is that the taxpayer must certify, under penalties of perjury, that his or her failure to report income and file FBARs was due to "non-willful conduct." Basically, the IRS does not want to extend the benefits of the Streamlined Procedures to taxpayers who knew what their filing obligations were and deliberately chose to ignore them. On the applicable certification form (Form 14654 for a US tax resident, Form 14653 for a non-resident), non-willful conduct is defined as conduct that is "due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law."

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