

# Briefing

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## Editorial

*With about 18.000 participants this year's MIPIM had about the same attendance as last year - which is far from the record of 29,000 in 2008, but a stabilisation at an adequate level. Recovery of transaction*



*Thomas Ziegler  
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*markets in the past two calendar quarters and availability of bank finance have brightened overall sentiment. However, new development projects are still a challenge and chances for opportunistic investors remain scarce. The latter might change when investments made prior to the credit crunch need to be refinanced in the years to come.*

*In this Briefing we will update you on new legislation and report about interesting rulings which affect the real estate industry.*

*With best wishes*

Thomas Ziegler

## Legislation

### **Restructuring privilege for loss carried forward**

By Citizens Relief Act (*Bürgerentlastungsgesetz*) of 19 June 2009 a restructuring privilege has been introduced for acquisitions of shares in a company. Initially, the applicability of this restructuring privilege was limited to 31 December 2009. On 22 December 2009 this time limit has been eliminated.

### **Background**

According to the amendment of sec. 8c of the Corporate Tax Act (*KStG*) introduced by the corporate tax reform in 2008 a harmful acquisition of shares in a company triggered - from 01 January 2008 and depending on the acquired quota - the partial or complete loss of the loss carried forward of the company. This provision was limited in time to 31 December 2009 and has now been eliminated for shares acquired for the purpose of restructuring of the company (please see our briefing of October 2009).

According to the amended corporate tax laws losses, loss carried forwards and interest carry forwards of the respective company may be used even in case of harmful direct or indirect acquisitions of shareholdings in the business, if the investment is carried out for the purpose of



restructuring of the distressed company. A restructuring in this context requires that the measures taken in connection with the acquisition are aimed to prevent or eliminate illiquidity or over-indebtedness of the company and that at the same time the material operating structures of the company are maintained. A restructuring in that sense is excluded if in substance the company has already ceased its business operations or if within five years from the relevant acquisition a change of business takes place.

### **Introduction of a corporate group clause**

With sec. 8c subsec. 1 sentence 5 Corporate Tax Act (*KStG*) a corporate group clause was introduced for acquisitions of shares after 31 December 2009. According to this clause losses and losses carried forwards can be maintained in case of reorganisation within a group of companies (for instance in case of transfer of a company within the group).

#### **Background**

As described above, a change of the holder of shares can trigger a partial or complete loss of the losses and losses carried forwards of the company. In order to facilitate restructuring within a group of companies the newly introduced corporate group clause provides that losses and losses carried forward are maintained if the same person holds directly or indirectly 100% of the shares of the transferor or transferee.

### **Permanent increase of tax threshold of interest ceiling and carry forward of unused EBITDA**

By means of the Citizens Relief Act of 19 June 2009 the relevant de minimis amount for the applicability of the interest ceiling rules had been increased from EUR 1 million to EUR 3 million, limited in time to 31 December 2009. On 22 December 2009 this limitation has been eliminated.

Further, the Growth Acceleration Law (*Wachstumsbeschleunigungsgesetz*) provides for the possibility of carry forward (for five years) of the amount of the EBITDA which is not used for deduction of interest expenses.

#### **Background**

The limitation of tax deduction of interest expenses introduced in 2008 did not apply if the annual interest expenses of the company did not reach EUR 1m. This tax threshold was limited until 31 December 2009 and has now been increased permanently to EUR 3m.

The net interest expenses are deductible up to 30% of EBITDA according to the interest ceiling provision. If the net interest expense is below this threshold in one year, the remaining amount may be used (additionally) in the following five years for the deduction of interest expenses.

### **Corporate group clause regarding property transfer tax**

New sec. 6a Property Transfer Tax Act (*GrEStG*) provides for an exemption of property transfer tax in case of restructuring within a group of companies (i. e. merger, splitting and transfer) in which a German property is part of the transfer.

#### **Background**

So far, restructuring within a group regularly triggered property transfer tax if at least 95% of the shares of a partnership or public limited company were transferred directly or indirectly to a legal entity or if a German property was part of the transfer. Sec. 6a Property Transfer Tax Act now exempts intra-group transfers from property transfer tax with effect from 31 December 2009.

## Reduction of feed-in tariffs for solar energy

In March the federal government presented a draft law for the amendment of the Renewable Energy Sources Act (*Erneuerbare Energien Gesetz - EEG*). Pursuant to this draft the current feed-in tariffs for solar energy will be reduced. It is planned that the respective rates are to be decreased by 16% for installations on buildings with effect from 1 July 2010. Tariffs for electricity from open space installations will be reduced by 15%, for electricity from installations on spaces formerly used for commercial or military purposes (conversion spaces) by 11%. Electricity generated from installations on former agricultural fields will in general no longer be funded, if the installation goes online after the 30 June 2010 (exceptions apply for installations in the scope of land-use plans which were approved before 1 January 2010). Moreover, the original limitation in time (until 1 January 2015) for funding of open space installations has been cancelled. The target mark of the annual market volume of solar energy is increased to 3,000 megawatt (MW); regular annual depression of feed-in tariffs is more closely adjusted to market development. In addition, own use will be stimulated; the funded installations will in future not any more be limited to installations with a peak performance of 30 kilowatt (KW), but to a performance up to 800 KW.

According to the new draft law the following tariffs would apply:

	Installation	Base payment (ct/KWh)	Feed-in tariffs (regular depression included) with effect from January 2010 (ct/KWh)	Feed-in tariffs (one-time depression included) with effect from July 2010 (ct/KWh)
1	conversion areas	31.94	28.43	25.30
2	other open spaces	31.94	28.43	24.16
3	installations on buildings			
a)	up to 30 KW	43.01	39.14	32.88
b)	up to 100 KW	40.91	37.23	31.27
c)	up to 1 MW	39.58	35.23	29.59
d)	> 1 MW	33.00	29.37	26.14
e)	for own use	25.01	22.76	as 3a) - c) minus 12 ct/KWh

### Background

Costs for solar installations have decreased continuously due to technical development, improvement in production of solar installations and increased competition between the providers. Therefore, installations can now be installed at considerably lower costs than assumed in the calculation of payment rates for the Renewable Energy Sources Act as currently in force and effect. In order to avoid an excessive promotion of solar energy and to protect consumers from unnecessary costs, the payment rates are to be adjusted to the expected continuing growth and the current and expected price and cost development. At the same time the increase of the target mark to 3,000 MW allows for a dynamic expansion of business activity in this sector.

**Draft law to strengthen the protection of investors and to enhance the functionality of the capital market**

**The Federal Ministry of Finance announced by means of a press release on 4 March 2010 a draft law to strengthen the protection of investors and to enhance the functionality of the capital market. Subject of this draft law are to be real estate investment funds in particular. In this regard the following amendments are planned:**

Institutes have to comply with the requirements of the Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*) for providing advice in relation to and placing of shares of closed-end funds (requirements are e. g. investor-friendly advice, provision of minutes of the consultation, publication of commissions). Moreover, the prospectuses for funds have to contain more detailed information in the future and will furthermore be reviewed more intensively by the federal financial supervisory agency (*Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin*) (i. e. also checked for coherence). In addition, the institutes will be obliged to register their investment advisers and persons who have influence on the institute's sales guidelines with BaFin; the institutes will have to hand in information on qualification and advanced training when registering their advisers with BaFin. In case of mis-selling, lacking publication of provisions or offences against the requirements of WpHG, BaFin will be in the position to impose sanctions in future including exclusion of these persons from providing advice on investments for a limited period of time.

Open-ended real estate investment funds which invest in long-term real estate investments committed themselves towards investors under the current prevalent agreements to handle repurchasing demands at short notice, namely each trading day. As a consequence several funds were repeatedly not able to meet their obligations towards the investor. This is why in future a minimum-holding-period of two years shall be obligatory for all investors and shall be supplemented by termination periods between six and 24 months. The shorter the applicable termination period, the more liquidity has to be kept in place in future. Also announced is an improvement in the applicable proceedings for orderly liquidation of funds that have no prospect of a sustainable re-opening due to their real estate portfolio and distribution network.

## Leases

**Tenant's claims for repair of deficiencies do not become time-barred during the lease term**

**By a landmark decision of 17 February 2010 (VIII ZR 104/09) the German Federal Court of Justice (*Bundesgerichtshof – BGH*) has decided that the tenant's claims for repair of deficiencies continue to exist during the entire lease term and thus do not become time-barred.**



Gero Martin, Munich

### Facts

The attic floor of an apartment building had been fitted out for residential purposes. In 2002 the tenant of the apartment located directly under the new top floor apartment complained about noise emissions and demanded improvement of the deficient acoustic insulation of the new apartment. In the following months the tenant did not care about the noise and did not follow up her demand. Only in 2006, she contacted the landlord again and demanded the renewal of the acoustic insulation. As the landlord did not react to her demand, the tenant initiated independent proceedings for the taking of evidence (*selbständiges Beweisverfahren*) in 2007. The expert instructed by the court came to the conclusion that the apartment's acoustic insulation was actually deficient and had to be repaired. The landlord argued that the tenant has been aware of the defect since 2002 at the latest and that a potential claim of

the tenant for repair of deficiencies has become time-barred after 3 years, thus prior to 2007. While the court of first instance decided in favour of the landlord, the regional court and in the end also the Federal Court of Justice decided in favour of the tenant.

### Reasons

According to sec. 535 para. 1 German Civil Code (*BGB*) it is the main obligation of the landlord to grant the usage of the rented object to the tenant in the condition agreed under the lease agreement. This obligation does not only refer to the initial hand-over of the rented object to the tenant but also includes the duty to maintain the rented object in a utilizable state, i.e. free of defects, during the entire lease term. Such duty constitutes an ongoing obligation of the landlord, also in regard to the future. Consequently, during an existing contractual relationship such an ongoing obligation cannot become time-barred but comes into existence constantly again and again. Therefore, during the lease term the tenant is entitled to ask the landlord for repair of deficiencies irrespective of the point in time he has become aware of the respective defect for the first time.

### Comment

This judgement of the BGH resolves a long lasting controversy in jurisdiction and legal literature. The decision will also have to be considered with respect to commercial tenancies.

As the tenant's claim for repair of deficiencies will not become time-barred during the lease term, landlords will not be able anymore to "play out" in case of a notice of defects by the tenant. Therefore, potential defects should be examined immediately and (in case defects actually exist) removed, in particular to prevent (further) rent reductions and to facilitate the enforcement of potential claims for damages against third parties (craftsmen etc.).

**Commercial leases:  
Allocation of property  
management costs as  
operating expenses  
by General Terms and  
Conditions valid**

**The Federal Court of Justice (*Bundesgerichtshof – BGH*) confirmed with its judgement of 9 December 2009 (XII ZR 109/08) that with respect to commercial leases "costs for the commercial and technical property management" can be allocated to the tenants as operating expenses by General Terms and Conditions.**

### Facts

The landlord had rented commercial premises using a standard-form lease agreement. Regarding the allocation of operating expenses to the tenant the lease agreement referred to an attached schedule listing the relevant operating costs. At the end, under "No. 17 - Other Expenses" this schedule contained inter alia "costs of the commercial and technical property management". The operating costs charged by the landlord exceeded the agreed advance service charge by far, with property management costs amounting to 5.5% of the gross rent. The tenant refused the additional payment resulting from the accounting of the operating expenses, arguing that the respective clause regarding the allocation of property management costs was "surprising" and "unclear" and thus invalid. Whereas the courts of first and second instance had decided in favour of the tenant, finally the BGH has now decided that the relevant clause was valid.

### Reasons

According to the BGH the clause is neither "surprising" nor "unclear" to



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a commercial tenant: Contrary to residential leases it is common practise with respect to commercial tenancies that property management costs are allocated to the tenants. In this regard the landlord is not obliged to provide specific amounts already in the lease agreement. In principle the tenant may also not act on the assumption that the amount of operating costs actually allocated by the landlord will not exceed the amount of the advance payments of service charges agreed under the lease agreement. In fact the tenant is adequately protected against excessive additional landlord's claims by the applicable general efficiency rule (*Wirtschaftlichkeitsgebot*) pursuant to which the allocation of inadequate or unnecessary costs is excluded.

The listing of property management costs at the end of the schedule regarding operating costs under the headline "Other Expenses" is irrelevant as such a numeration does not imply a valuation; all listed items have to be considered as of the same priority. Furthermore, for a commercial tenant the term "costs of commercial and technical property management" used in the clause is sufficiently clear and understandable – also in reference to the existing legal definition applicable for residential leases in sec. 1 para. 2 no. 1 German Regulation of Operating Costs (*Betriebskostenverordnung*).

### Comment

By its decision the BGH clarifies several questions with respect to the allocation of property management costs in General Terms and Conditions and provides important guidelines for the wording and implementation of respective clauses in practice:

- In general "Management costs" comprise – on the basis of the legal definition in sec. 1 para. 2 no. 1 German Regulation of Operating Costs – the "costs for the necessary staff and equipment for the management of the building, costs for supervision, the value of the management work done by the landlord himself, costs for the statutory or voluntary review of the annual balance sheet and the costs for executive management".
- Contrary to prevailing jurisdiction and legal practise so far it is not (longer) required to specify a fixed amount (e. g. "EUR 100.00 per month") or a maximum amount (e. g. "up to an amount of 5% of the gross rent") regarding the allocation of management costs in the lease agreement. However, when allocating and charging these costs to the tenant, the landlord has to consider the applicable efficiency rule (*Wirtschaftlichkeitsgebot*), i.e. the allocated costs have to comply with the customary and necessary limits. In this respect, management costs in the amount of (up to) 5.5% of the gross rent are considered as customary.
- In case of partial overlapping of „costs for commercial and technical property management" with other items, e.g. with the "costs for a caretaker", the landlord has to ensure that costs are not allocated twice. Furthermore, if the landlord also charges similar costs – e.g. costs for "centre-management" – additionally this will probably lead to in-transparency and thus invalidity of the respective allocation clause.

In the meantime the BGH has confirmed its above described jurisdiction by a new judgement of 24 February 2010 (XII ZR 69/08) and considered also the allocation of "management costs" to commercial tenants valid.

Transfer of building insurance due to acquisition of real estate



Melanie Kersting,  
Munich

## Property

The Federal Court of Justice (*Bundesgerichtshof – BGH*) has decided in its judgement dated 17 June 2009 (Az. IV ZR 43/07) that the transfer of building insurance under statutory law does not exclude a transfer of insurance coverage by way of agreement between the purchaser and the insurer prior to transfer of ownership. Herein we will also give a brief overview of the legal situation in relation to the building insurance in connection with a real estate purchase.

### Facts

Seller and purchaser entered into a sale and purchase agreement regarding a property which transferred commercially to the purchaser on 07 June 2004. The application for registration of the transfer of ownership arrived at the land registry only on 10 December 2004. The seller informed its insurance company in August 2004 that it would like to terminate the existing insurance agreement due to the sale of the property. The insurance company reverted to the seller, stating that the purchaser stepped into the insurance agreement under statutory law and that the seller therefore would not be in the position to terminate the agreement. The insurance company informed the purchaser that it would transcribe the insurance agreement formally to the purchaser if it would not terminate the agreement within one month. The purchaser did not terminate the agreement. On 8/9 December 2004 fire damage occurred and the purchaser made a claim against the insurance company for this fire damage.

The BGH decided that the transfer of insurances under statutory law, which in general awards an own insurance claim of the purchaser against the insurance company only as of transfer of ownership, does not conflict with an own claim of the plaintiff for coverage even before transfer of ownership on the grounds of an agreement with the insurance company.

### Reasons

Statutory law which specifies that the purchaser steps into the insurance agreement upon the transfer of ownership did not conflict with an agreement pursuant to which the purchaser steps into the existing insurance agreement with own rights and obligations as insuree – initially jointly with the seller – even before the transfer of legal title. For this purpose it was irrelevant if the insurer erroneously assumed that the purchaser already was the legal owner. The BGH justified this by stating that the purchaser had an interest to have coverage independent from the seller prior to the decisive point in time pursuant to statutory law. It is accepted that the purchaser has an interest to preserve the property which is co-insured by the insurance of the seller for the time between passing of the risk, i.e. the commercial transfer of the property, and the legal transfer of ownership by registration in the land register, however, the purchaser bears the risk that coverage is lost due to the seller's behaviour.

The plaintiff had to understand from the letter of the insurance company that it would become insuree unless it terminates the agreement within one month. Since it did not give a termination notice, it consented to the offered continuation of the insurance agreement. Hence, the purchaser stepped into the insurance agreement with an own claim – initially jointly with the seller – after lapse of one month.

Consequently, the purchaser had an own claim against the insurance company prior to transfer of ownership as insuree under the insurance agreement. However, the BGH left the question whether the insurance company was released from its obligation to be decided by the court of appeal to which the matter was referred back to.

### Comment

In the case decided by the BGH the purchaser benefitted from mistakes made by the insurance company but the facts on which the decision was made do not reflect the usual procedure. Therefore we would like to briefly set out the possibilities of the purchaser to protect itself.

In general the purchaser has the following possibilities:

(1) it effects a new insurance agreement regarding the property with a different insurer, or

(2) it steps into the insurance agreement entered into between the insurer and the seller.

In case the purchaser wants to go for the first option, it should arrange for a new insurance with a different insurer well in advance in order to ensure coverage without interruption.

The second option takes place automatically. Under statutory law the purchaser automatically steps into the insurance agreement upon transfer of ownership, i.e. as of registration of the purchaser as owner in the land register. Purchaser as well as insurance company have a termination right which is to be exercised within one month. This period starts for the insurer as of becoming aware of the sale and for the purchaser as of the purchase. In the time period between commercial transfer and legal transfer of the property, the interest of the purchaser to preserve the property is covered by the existing insurance agreement of the seller. However, one should bear in mind that during this time the purchaser is not an insuree itself and that its preservation interest is not protected anymore in case coverage is lost due to a fault of the seller, e.g. due to delayed payment of the insurance premium by the insuree at the time of occurrence of an insured event. Hence, from the purchaser's perspective the sale and purchase agreement should provide for an explicit obligation of the seller to continue the insurance agreement. Adequate sanctions for breach of this obligation should be provided for in the sale and purchase agreement as well. Furthermore, it should be clearly set out in the sale and purchase agreement which party shall internally bear the insurance premium as of commercial transfer since this question has not been fully clarified by the courts yet. Moreover, it is advisable for the purchaser to have the claims of the seller against the insurance company assigned to the purchaser.

## Renewable Energy

**Increased feed-in tariff for photovoltaic modules which form the roof of a building**



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**Pursuant to the German Renewable Energies Act (EEG), the remuneration (feed-in tariff) payable by the electricity grid operator is increased in case the solar electricity is generated by solar power systems which are exclusively affixed to buildings. The Higher Regional Court of Düsseldorf (*Oberlandesgericht – OLG Düsseldorf*) has substantiated the requirements for this increased claim in its judgment dated 16 September 2009 (1 O 85/08).**

### Facts

The plaintiff maintained a shade hall for the culturing of sun sensitive plants. The plaintiff replaced the dilapidated wooden construction of the shade hall by a steel construction on which he had installed a shading fabric which let through rainwater for the watering of the plants. On top of the shading fabric he had affixed photovoltaic modules. The OLG Düsseldorf decided that it is sufficient for an increased feed-in tariff that only the modules of the solar power system form the roof of the building.

### Reasons

In the opinion of the OLG Düsseldorf it is not necessary that a building already exists to which the solar power system is affixed. The OLG

Düsseldorf founded this with a reverse conclusion resulting from § 11 sub-para 2 sentence 2 EEG (old version) pursuant to which the increased feed-in tariff is further increased if the solar power system is not installed at the roof or *as* the roof of a building and forms an integral part of the building.

The OLG Düsseldorf considers that its judgment complies with the judgment of the Federal Court of Justice dated 29 October 2008 (VIII ZR 313/07) pursuant to which an increased feed-in tariff cannot be demanded if the building only comes into existence by installing roofing material to a load bearing construction which is independent from the building. The case decided upon by the OLG Düsseldorf differed insofar that the photovoltaic modules were affixed to the existing load bearing construction and completed the building.

### Comments

It is important to note that the stipulation of § 11 sub-para 2 sentence 2 EEG (old version) has not been included in the version of the EEG which applies since 01 January 2009. Hence, the main argument of the OLG Düsseldorf is not supported by the currently applicable version of the EEG. It remains to be seen whether the jurisdiction of the OLG Düsseldorf will prevail.

## Banking and Finance

### Capital contributions and cash-pooling



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If a limited liability company is incorporated or its share capital is increased, the shareholder who takes over the shares has to pay a capital contribution or a contribution in kind. By its judgment “Cash-Pool II” of 20 July 2009 (II ZR 273/07) the German Federal Court of Justice (*Bundesgerichtshof – BGH*) has established strict standards for the fulfilment of the capital contribution obligation of the shareholder in connection with capital contributions paid to a cash pooling account of the company. Under those rules the shareholder runs the risk that payment of the capital contribution is to be effected a second time (typically on demand of the liquidator of the company). In addition, the managing director runs the risk of criminal prosecution, in particular if he did not reveal the existence of the cash-pool agreement vis-à-vis the relevant commercial registries.

### Practice and basic legal principles of cash-pooling

As already described in our briefing in October 2008, in case of cash-pooling the parent company would typically open an account (*master account*) and further accounts for each subsidiary (*junior account*).

Real cash-pooling is based on a (in most cases) daily transfer of liquidity from the junior accounts to the master account or vice versa, with balances on all junior accounts being zero at the end of the day (*zero balancing*); i.e. the credit balance of each junior account is transferred to the master account, whereas the debit balance of a junior account will be settled by transferring liquidity from the master to such junior account. From a legal point of view, such transfer of liquidity from and to a junior account is to be regarded as a loan granted by the subsidiary to the parent company and vice versa.

### Fulfilment of capital contribution obligation in case of payment to a cash-pool account

For the obligation of the shareholder to pay the capital contribution, the cash-pooling becomes an issue if the capital contribution is paid to an account of the company which is part of a real cash-pooling arrangement, where the liquidity is transferred to the master account managed by the shareholder.

According to the above mentioned decision of the BGH in such cases,

depending on the balance of the master account at the point of time when the contribution was transferred to the master account, the payment is qualified as a so-called hidden contribution in kind (sec. 19 subsec. 4 GmbHG) or a back and forth payment (sec. 19 subsec. 5 GmbHG), with different consequences as to the applicable requirements for fulfilment of the shareholder's payment obligation. In case of a balance of the master account which from the company's perspective is negative at the time of the transfer, according to the decision of the BGH, the payment is qualified as a hidden contribution in kind, whereby in the contrary case of an equal or positive balance of the master account, the payment is qualified as a back and forth payment. Subject to this qualification, the applicable requirements for fulfilment of the shareholder's payment obligation are as follows:

1. In case of a hidden contribution in kind, the shareholder's capital contribution obligation is fulfilled if the company was solvent at the time of transfer of the liquidity to the master account.

2. In case of a back and forth payment, the shareholder's capital contribution obligation is fulfilled if the cash-pooling agreement has *inter alia* been revealed vis-à-vis the relevant commercial registries. This, however, has in the past often not been complied with, so that in past cases the shareholder often remained obliged to pay the capital contribution. A further requirement for fulfilment of the payment obligation in case of a back and forth payment is that the repayment claim of the company (arising from the transfer of the capital contribution to the master account) is fully valuable (i.e. the shareholder solvent) and due or can be made immediately due by extraordinary termination (without notice) and acceleration, respectively. Due to limitation of extraordinary terminability to certain cases (for good cause) the latter requirement is in practise also often not complied with.

### **Criminal liability of the managing director**

Moreover, the managing director runs the risk of criminal liability in connection with the filing for registration of the newly incorporated company or the capital increase, respectively. In such context, the managing director has to confirm that the capital contributions have been paid by the shareholder and are finally at free availability to the company. In case of a back and forth payment further the existence of the cash-pooling agreement has to be revealed (see above).

In the above mentioned case of a hidden contribution in kind, however, such confirmation by the managing director would be incorrect as the contribution is deemed to be paid from registration in the commercial register, i. e. not already at the time of the (precedent) application for registration and confirmation. In case of back and forth payment this declaration would be incorrect as well if the fulfilment of the payment obligation fails due to limitation of immediate terminability of the cash-pool arrangement to certain cases (see above).

If the confirmation is incorrect or the cash-pool agreement is not revealed, there is the risk of criminal liability of the managing director for misrepresentation pursuant to sec. 82 subsec. 1 GmbHG.

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### **Conclusion**

Exclusion of the capital contribution from the cash-pool would be – from a legal perspective – the simplest solution for the avoidance of civil liability of the shareholder and criminal liability of the managing director, i.e. transfer of the contribution to an account of the company which is not involved in the cash-pool (and which would also not become involved indirectly).

If this and also extraordinary terminability of the cash-pool arrangement and acceleration right re. the company's repayment claim, respectively, is no option, prior to payment of the capital contribution, a respective negative balance of the master account should be effected. This, how-

ever, is only an option if the company is solvent.

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