Newsletter Commercial

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Content

Dear Readers,

We are delighted to bring you Luther's first Commercial and Distribution Law Newsletter for 2023.

This issue covers a wide range of topics. Dr Johannes Teichmann and Rebecca Romig discuss a recent decision by the European Court of Justice on consumer protection in the law governing terms and conditions, which is likely to lead to a change in the legal situation in Germany as well. Volker Steimle and Dr Christian Rabe present the requirements and limitations posed by data protection law when it comes to the assertion of claims for authorised dealer compensation. Jens-Uwe Heuer-James evaluates the new option of a digital instruction manual under the new EU Machinery Regulation. Dr Steffen Gaber and Sandra Schüle-Bausch report on the latest developments regarding the Supply Chain Act. Ole-Jochen Melchior provides an overview of the legal situation following the tenth EU sanctions package against Russia. In his article, Gunner Müller-Henneberg takes a look at the legal situation regarding over-indebtedness.

The authors aim to get to the heart of developments and explain them in straightforward terms, despite the complexity and the various legal entanglements. We would be happy to provide you with an in-depth view and advice on these or any other legal matters.

We hope that reading our newsletter gives you some new insights and wish you a wonderful spring !

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Commercial.Consumer law: ECJ: no falling back on statutory law in case of invalid b2c T&Cs

Introduction

In its ruling of 8 December 2022, C-625/21, the European Court of Justice (ECJ) had to decide on an important case: What happens if a traders grant themselves rights vis-à-vis the consumer in their general terms and conditions (T&Cs) that violate the law governing T&Cs? Does the trader then fall back on the rights of non-mandatory statutory law, in other words on the legal situation that would exist without the T&C clause? Or does the trader have no rights at all? The ECJ is strict, and in principle denies the trader rights under non-mandatory statutory law.

In Germany, this leads to the question of whether Section 306 German Civil Code (BGB), which governs the legal consequences of invalid T&C clauses, is compliant with EU law.

Facts of the case

An Austrian consumer purchased a kitchen from a furniture shop for a house he was yet to buy. The house purchase never took place. Since the consumer had lost interest in the kitchen as a result, he declared his rescission from the kitchen purchase contract. The furniture shop then claimed damages for loss of profit.

The kitchen purchase contract was based on the T&Cs of the furniture shop. According to these, if the customer rescinds from the contract without cause, the furniture shop may, at its discretion, claim either damages at a lump-sum of 20% of the purchase price or the actual loss incurred. The latter alternative reflects non-mandatory Austrian statutory law.

The furniture shop sued for damages on the basis of actual loss incurred, as this was higher than the lump-sum.

The Austrian courts ruled that the T&C clause was invalid. The ECJ now had to decide whether the gap in the contract created by the invalidity of the clause could be closed by recourse to non-mandatory statutory law.

Decision

The ECJ ruled that the commercial seller cannot claim damages on the basis of non-mandatory statutory law if a damages clause in the consumer contract has been declared invalid and the contract can continue to exist without this clause (Art. 6 (1), Art. 7 (1) of Directive 93/13/EEC on Unfair Terms in Consumer Contracts (“Directive”)).

Art. 6 (1) of the Directive states that unfair terms are not binding on the consumer, but the contract remains binding if it can exist without the unfair terms.

According to Art. 7 (1) of the Directive, member states shall ensure that adequate and effective means exist to prevent the continued use of unfair terms in the interests of consumers and competitors.

The ECJ justified its decision as follows:

The damages clause is indivisible and invalid in its entirety. It cannot be upheld insofar as it refers to the legal consequence of non-mandatory statutory law. The ECJ rejected a partial upholding because the furniture shop had a choice: it could demand either the excessive lump-sum or the actual loss incurred, depending on which was more favourable for the furniture shop. The mechanism allows the furniture shop to demand compensation that may exceed the actual loss it has incurred. This leads to a significant imbalance to the disadvantage of the consumer. The invalidity of the lump-sum therefore also infects the claim for the actual loss.

The ECJ also confirmed its previous adjudication, according to which an invalid b2c T&C clause may not in every case be replaced by non-mandatory national law in order to close the supposed gap.

The decision does not, however, mean that reverting to statutory law is always excluded. Rather, the ECJ defines the assessment steps that a national court must take to replace a clause with non-mandatory national law by way of exception:

- Is the clause invalid?
- Does the invalidity of the clause mean that the contract as a whole is null and void?
- If the entire contract is null and void, is this particularly disadvantageous to the consumer, causing the consumer to incur a loss?

Only if all of these questions can be answered with “yes” the national court can replace the invalid clause with non-mandatory law, provided that the contract can be upheld as a result. In all other cases, recourse to the provisions of national law is inadmissible. An invalid clause may therefore actually only be replaced by a non-mandatory legal provision if the contract would otherwise be null and void in its entirety.

The Austrian court must now examine whether the continued existence of the purchase contract is legally possible now that the damages clause has been removed. If this is the case, which is likely, the furniture shop shall have no claim for damages, although the requirements for such a claim would actually be met under Austrian law.

According to the ECJ, it is irrelevant that the consumer is released from any liability for damages by the clause being declared null and void. This safeguards the objective of preventing the continued use of unfair contract terms stated in Art.7 (1) of the Directive.

Evaluation

The decision is in line with previous ECJ case law. The decision is intended to effectively deter traders from using unfair terms in consumer contracts. This decision brings the ECJ one step closer to this objective.

One point for criticism, however, is that the ECJ disregards the contractually agreed principle of equivalence: the consumer rescinds without cause; the trader is left with the resulting loss. There is no fair balancing of interests. On the contrary: the consumer is better off than the customer would be on the basis of statutory law, which seeks to strike a fair balance. As a result, this leads to a sanctioning of the trader. From the ECJ’s point of view, however, this is a logical consequence in order to give full effect to EU law.

Effects on German law and B2B contracts

The ECJ ruling impacts Section 306 BGB.

Section 306 BGB governs the legal consequences of invalid T&C clauses:

- Section 306 (1) BGB stipulates that the contract remains valid if individual T&Cs are invalid.
- Section 306 (2) BGB states that the content of the contract shall be governed by the statutory provisions if T&Cs are invalid.
- Section 306 (3) BGB states that the contract as a whole shall be invalid if adherence to it would constitute an unreasonable hardship for one of the contracting parties, even taking into account the amendment provided for under Section 306 (2) BGB.

Section 306 (1) BGB is in line with Art. 6 (1) of the Directive and the ECJ ruling.

However, it is a different matter when it comes to Section 306 (2) and (3) BGB.

According to the ECJ, recourse to statutory law to close gaps in the event of an invalid clause, as provided for in Section 306 (2) BGB as a rule, is precisely not permissible. This legal consequence – according to the ECJ – may only occur if the invalidity of the clause would lead to the entire contract becoming null and void and this would be disadvantageous to the consumer.

Section 306 (3) BGB is not in line with the ECJ ruling either. This provision also takes into account the interest of the trader by considering whether the invalidity of the contract would constitute an unreasonable hardship for one of the contracting parties. According to the ECJ, however, this does not come down to the trader, but only the consumer, as this is the only way to achieve the intended deterrent effect and the maximum effectiveness of the terms.

Both paragraphs are therefore not compliant with EU law. They must be interpreted in compliance with the Directive for b2c T&Cs. The extent to which this is possible at all given the different wording seems doubtful. However, this would not be the first time that an interpretation in compliance with EU law has gone beyond the wording. Otherwise, the German legislator will have to adapt Section 306 (2) and (3) BGB for b2c T&Cs.

We do not believe that an impact on b2b contracts is likely at present. Neither in the literature nor in the case law is there any evidence for such a trend. The Directive referred to by the ECJ only concerns consumer law. The German courts will therefore only interpret Section 306 (2) and (3) BGB in compliance with EU law in the case of consumer contracts. For b2b contracts, on the other hand, such an interpretation is neither necessary nor required. The courts should continue to follow the wording and the previous interpretation of Section 306 (2) and (3) BGB. Anything else would be contra legem. Hopefully, the German legislator will also adapt Section 306 (2) and (3) BGB for b2c T&Cs only and not also for b2b T&Cs.

Consequences in practice

The consequences of breaching the law governing T&Cs are becoming increasingly severe for companies in the b2c segment. In addition to the invalidity of the clause and actions for injunctions under the German Act against Unfair Competition, statutory rights are cut off. This is clearly punitive for companies. They will have to be careful not to use clauses that have not yet been tested in court and could pose a risk. All the more so as the German case law on the law governing T&Cs is unforeseeable to some degree.

Traders should review their consumer T&Cs to check whether they have taken a more aggressive approach at any point, supposedly safe in the knowledge that in the worst case scenario they would have statutory law to fall back on. They might now come to regret this.

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Commercial.Distribution law: Defence against compensation claims with data protection?

Will authorised dealers lose their post-contractual claims to compensation if customers do not consent to the disclosure of their data?

The post-contractual claim to compensation granted to authorised dealers by an analogous application of Section 89b HGB (German Commercial Code) is a regular point of dispute after dealer contracts have been terminated. For the principal, this typically leads to substantial costs; for the authorised dealer, on the other hand, claims to compensation represent an important part of assets. A further defence against these claims might be available for the principal if the dealer has not paid sufficient attention to establish the needed consent for the use of his customers' personal data. This may particularly be the case if after the contractual relationship has been terminated the authorised dealer asserts a claim to compensation for customers acquired by him without being able to present written consent by these customers to the disclosure of their data to the principal and the use of their data for advertising purposes by the principal.

Background

The post-contractual claim to compensation of the authorised dealer as provided by Section 89b HGB represents compensation and additional remuneration for the benefit that the principal can derive from the customers acquired by the authorised dealer even after the authorised dealer contract has been terminated. Given the application of the General Data Protection Regulation (GDPR), however, the question arises as to whether this benefit also includes customers who have not previously consented in writing to the principal using their data for advertising purposes transmitted by the authorised dealer to maintain the business relationship after the authorised dealer contract has been terminated. This is because the crucial criterium of any claim to compensation by an authorised dealer according to Section 89b HGB is that the principal must be able to continue to derive a benefit directly from the customer base of regular or repeat customers built up by the authorised dealer during the term of the contract even after the dealer contract has been terminated. Therefore, only a regular or repeat customer acquired by the authorised dealer with whom the principal can actually continue the customer relationship established by the dealer constitutes an entrepreneurial benefit (and it is only this that a claim to compensation may remunerate). Data protection restrictions may stand in the way of this.

GDPR not applicable to data of legal entities

The GDPR only governs the protection of personal data and thus covers all information relating to an identified or identifiable natural person, whereas the data of legal entities are not protected by data protection law. When individual companies belong to the authorised dealer's clientele, this therefore does not constitute personal data, but instead technical data that is irrelevant from a data protection perspective. At most, information about a specific contact person at the customer's business and its contact details are personal data, but only if the contact details allow the identification of an individual person.

If the data subject has given its written consent to the use of its data by the company, for example for advertising purposes, processing is permissible in accordance with Art. 6 (1) Clause 1 a) GDPR. Even if there is no explicit consent to the transfer of personal data, an implied consent of the customer's employees can often be assumed.

Based on his accountability under Art. 5 (2) GDPR, however, the business owner bears the burden of proof that his employees have consented to the processing of their personal data. Relying on implied consent is therefore risky, so from a data protection perspective it is preferable to obtain written consent.

Legitimate interests of the authorised dealer as justification for data processing?

Irrespective of whether consent to the transfer of contact details from the authorised dealer to the principal has been granted, the disclosure of this data may often be justified by Art. 6 (1) Clause 1 f) GDPR. According thereto the processing of personal data is permissible if this is necessary to safeguard the legitimate interests of the data controller or a third party and the interests of the data subjects in the exclusion of data processing do not outweigh these.

The authorised dealer could have a legitimate interest as defined by said provision if he transfers the customer data to the principal after the contract has been terminated to secure a claim to compensation in accordance with Section 89b HGB. This economic interest, being important for the authorised dealer, since the authorised dealer and the principal have equally benefited from long-term cooperation and the post-contractual claim to compensation represents both compensation and remuneration for the establishment of a customer base by the authorised dealer. If the personal data processed only concern professional contact details and the disclosure of the data is customary in the industry, it stands to reason that the customer's interest in the exclusion of data processing does not outweigh the dealer's interest in data processing.

However, in order for weighing the mutual interests to come out in favour of the use of the data by the dealer/principal, customers must be informed about the disclosure of their data to the principal by the authorised dealer in accordance with Art. 13 GDPR. In this case, the disclosure of customer data meets the legitimate expectations of customers. Consequently, the transfer of the customer's personal data to the principal can be based on Art. 6 (1) Clause 1 f) GDPR, meaning that no explicit consent is required.

The principal, in turn, may also use the customer data on the basis of the balancing of interests clause in Art. 6 (1) Clause 1f) GDPR for direct marketing to continue the business relationship with the customers. This authority applies, for example, to direct postal mailing, as there are no special consent requirements under competition law for this channel. Direct marketing is a legitimate interest recognised by the GDPR, provided, however, that the business owner who receives the data from the authorised dealer informs the data subjects about his own data processing, observing the deadlines specified in Art. 14 (3) GDPR.

Contact by e-mail is still prohibited without the prior consent of the recipient. This is stated in Section 7 (2) No. 2 UWG, which requires the prior consent of the recipient for advertising by electronic mail.

Disclosure of data in business practice

Only rarely do companies obtain written consent to disclose contact details. De facto, companies use the data transferred by authorised dealers to initiate business even after the authorised dealer contract has been terminated, thereby relying on that data processing is permissible based on the need to safeguard legitimate interests. From a data protection perspective, it is advisable, however, to inform data subjects about data processing, to comply with the requirements of data protection law and avoid substantial fines.

Without the prior written consent from customers, the principal is restricted to contacting the acquired customers by post. To avoid the accusation of undue harassment under competition law, it is advisable to ensure that the authorised dealer obtains the customer's consent for the principal to subsequently contact him by e-mail.

As a result, a post-contractual claim to compensation will often have to be paid also for those customers who have not provided a written declaration of consent. However, this needs to be determined on a case-by-case basis and may well lead to disputes between the distribution partners after the dealer contract has been terminated.

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Commercial.Compliance: Digital instruction manuals for machines

Forests for machines: instruction manuals for complex machinery can fill many pages of paper. It is understandable that there has long been a desire to digitise instruction manuals. The revision of the Machinery Directive now offers a starting point.

Legislative process on the home straight

On 25 January 2023, the European Council, together with the European Parliament and the European Commission, presented the final compromise proposal for a Machinery Regulation to replace Directive 2006/42/EC (the "Machinery Directive") in what is known as a "Trilogue" procedure. The legislative process should be completed before the end of the European Parliament's legislative period this year.

Requirements for instruction manuals to date

According to the current legal situation, manufacturers must enclose detailed paper instruction manuals with their machines. The instruction manuals must also be in the language of the user country. If the manufacturer does not know in advance which country this is, the only option is translation into all official languages of the EU. This naturally increases the printing effort considerably.

Digitisation of instruction manuals under the future Machinery Regulation

In accordance with Art. 10 (7) in conjunction with Annex III Point 1.7.4. of the final compromise proposal for the Machinery Regulation, instruction manuals can also be provided digitally in future. This is undoubtedly a step in the right direction that many have hoped for. However, there are still a number of pitfalls.

According to the proposal, Art. 10 (7) Subparagraph 2, the manufacturer shall continue to provide in paper format the safety information that is essential for putting the machine or related product into operation and for their safe use. This applies insofar as the machine or related product is intended for non-professional use or if it could be used by non-professional users under reasonably foreseeable circumstances, even if it is not intended for them.

In practice, however, it is not possible to separate safety-relevant from non-safety-relevant instruction manual content. According to the current, final compromise proposal, digital instruction manuals will in future primarily be permissible for the distribution of machines in the B2B sector and not in the B2C sector.

In addition, according to the current draft, the possibility of supplying digital instructions is softened by Art. 10 (7) at the end of Subparagraph 1, which states that the manufacturer must subsequently supply paper versions of instruction manuals free of charge within six months of the machine's purchase at the request of the end customer. According to the current wording of the draft, it will have to be assumed that this period begins when the end customer purchases the machine. This would mean that the manufacturer may have to expect to provide a paper version of the instruction manual subsequently long after the machine has been placed on the market, if the end customer has purchased the machine and requests a paper version within the next six months. This circumstance would lead to considerable legal uncertainty for the manufacturers concerned, as in case of doubt they would have to keep the analogue instruction manuals in all possible languages for a long time, possibly even after they no longer sell the machine themselves.

The restriction according to Art. 10 (7) Subparagraph 2 of the draft, whereby the machinery manufacturer must continue to provide instruction manuals in paper format for B2C transactions, addresses the concern of some member states that it may not always be possible to ensure that consumers take note of instruction manuals in digital format only.

Thus, according to the draft, consumer protection shall take precedence over relieving the burden on manufacturers. Accordingly, the instruction manual in paper format in the B2C segment is not the exception, but the rule without exception. Therefore, there will certainly be no relief for machinery manufacturers in this segment under the current draft.

What does digitisation of instructions mean?

The current draft leaves what exactly is meant by the digitisation of instruction manuals open. Art. 10 (7) a-c) of the final compromise proposal of the Machinery Regulation only provides requirements on how the manufacturer must provide the instruction manual in digital format.

For example, the manufacturer must indicate on the machine product and in an accompanying document how the digital instructions can be accessed. The manufacturer must also provide the instruction manual in a format that allows the end user to print and download the instructions and store them on an electronic device so that they can be accessed at any time, in particular in the event of machinery failure. This also applies if the instruction manual is embedded in the software of the machine. The digital instruction manual must be accessible online for the expected lifetime of the machine or related product and for no fewer than 10 years after the machine or related product has been placed on the market. In addition, Art. 10 (7) of the draft stipulates that it must be clearly stated which product model the instruction manual and information refer to.

The digital instruction manual must also meet the general requirements for instruction manuals that have existed up to now.

According to Art. 10 Para. 7 in conjunction with Annex III Point 1.7.4.1. d), the wording and design of the instruction manual of a machine or a related product intended for use by a lay person must take into account the general level of education and knowledge reasonably expected of operators. In accordance with Art. 10 (7) Subparagraph 3 of the draft, the instructions and information must be clear, understandable, intelligible and legible and must be written in a language that users can easily understand.

The Machinery Regulation therefore intends to be "technologically neutral" and leaves the technical implementation up to the companies. Companies are thus faced with the task of transferring the previous mass of information from the instruction manual into a digital format which at the same time guarantees the usability of the instructions and in particular that they can be understood. Simple digitisation approaches such as creating a PDF file certainly cannot achieve this. The information must be prepared in an educational way, to guide the user through the digital mass of information. This is extremely demanding.

Does this change the requirements on instruction manuals?

Compared to the current legal situation under the Machinery Directive, the requirements for instruction manuals will only change in a few isolated points under the current draft of the Machinery Directive. A distinction must be made between the B2B and B2C segments. In the latter, manufacturers' obligation without exception to enclose the instruction manual with the machine in paper format and in the relevant language will remain in place. Only in the B2B segment will there be changes and a potential easing of the burden on manufacturers according to the current status. Manufacturers can also provide a purely digital instruction manual in this segment but must provide a paper version of the instruction manual at the end customer's request within the first six months of them purchasing the machine, which may be a very long time after the machine has been placed on the market. In the B2B segment, there is therefore a rule-exception relationship, whereby the rule will be digital instruction manuals and the exception analogue instruction manuals.

Thus, according to the status of the final compromise proposal, the regulations on instruction manuals will only be partially changed by the new Machinery Regulation.

Summary

The EU Machinery Regulation is expected to be adopted before the end of 2023. According to Art. 52 of the final compromise proposal, the Regulation will be applicable 42 months after entering into force. Manufacturers will therefore have to implement the new Machinery Regulation from the end of 2026 or beginning of 2027. This deadline is rather tight. Experience shows that digitisation projects in technical documentation require considerable effort and time, simply because of the need to create the technical means necessary. Companies therefore need to start planning and implementing digital instruction manuals now.

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Commercial.Compliance: Supply Chain Act in practice

Stumbling blocks in effectively implementing "due diligence obligations" in the supply chain

Background

The **LkSG**, or Lieferkettensorgfaltspflichtengesetz (Supply Chain Act), came into force on 1 January 2023. This lays down extensive due diligence obligations for companies that have their head office, principal place of business, administrative headquarters or registered office in Germany and generally have more than 3,000 employees (from 1 January 2024 more than 1,000 employees). These due diligence obligations must be observed in an appropriate manner with the aim of preventing or minimising human rights risks or environmental risks and ending or minimising the impact of violations of human rights or environmental obligations. The obligation to pass on the "expectations" defined in the LkSG by companies covered by the scope of the LkSG to their suppliers means that the due diligence obligations established in the LkSG are spread across the entire supply chain. This means that even companies that do not reach the threshold values mentioned are indirectly affected by the requirements of the LkSG.

The list of due diligence obligations in Section 3 (1) Clause 2 LkSG is comprehensive. It starts with the establishment of a risk management system, continues with the performance of regular risk analyses at the company itself as well as its direct suppliers (and in exceptional cases indirect suppliers), the establishment of a complaints procedure, and the taking of *preventive measures both in its own business area and vis-à-vis direct suppliers*, and ends with documentation and reporting. In contrast, the LkSG contains only a few specific instructions as to how these extensive legal requirements are to be fulfilled appropriately in practice.

With regard to the implementation of preventive measures, the government's explanatory notes indicated in any case that, in addition to the creation of a Code of Conduct that concretises the applicable standards for a company's own employees (**"CoC"**), the creation of Codes of Conduct for (potential) contractual partners in the supply chain in which *"human rights expectations are concretised*" is advisable. When drafting or adapting such a Supplier Code of Conduct ("**SCoC**"), it is also advisable to include content in addition to the mere concretisation of expectations in order to fulfil the requirements of the LkSG. Furthermore, utmost care must be taken when drafting the content of the SCoC, for the following reasons:

Scope of the obligation to pass on expectations in the supply chain

For "*appropriate preventive measures*" – based on the findings of the risk analysis – vis-à-vis a direct supplier with whom a contractual relationship already exists or is going to exist, the LkSG first outlines various rule examples in Section 6 (4).

1. "Expectations" are not the same as "due diligence obligations"

According to Section 6 (4) No. 2 LkSG, due diligence obligations cover the contractual assurance provided by the direct supplier that it complies with the "*human rights and environmental requirements demanded by the company's management*" and addresses these appropriately throughout the supply chain. Of particular interest when drafting the SCoC is the fact that the direct supplier is not obliged to fulfil the extensive due diligence obligations as defined in Section 3 LkSG, as the wording is clear in this respect. This would also be surprising. After all, the legislator would then have given companies covered by the scope of the LkSG the task of extending the scope of the LkSG to their direct suppliers by means of a contract.

Rather, according to the government's explanatory notes, the drafting of the contract aims solely to ensure that the "*human rights expectations*" are met by the direct supplier and in the further supply chain – i.e. by upstream suppliers. These human rights expectations are precisely those human rights and environmental expectations that the company – based on the findings of the **risk analysis** – sets out in its policy statement for the very purpose of placing them on its employees, contractual partners and indirect suppliers ("**expectations**").

Furthermore, it follows from the wording of Section 6 (4) No. 2 LkSG that, beyond the concretisation of expectations, a **contractual assurance** must be given that the expectations will be met and passed on appropriately in the supply chain. Since expectations might change based on the risk analysis, which must be renewed on a regular basis, the contractual assurance should be drafted in such a way that expectations can also be dynamically adjusted after conclusion of the contract depending on the results of the risk analysis.

2. Further appropriate preventive measures

To enforce the contractual assurances under Section 6 (4) No. 2 LkSG, Section 6 (4) No. 3 LkSG then provides for the agreement of appropriate contractual inspection mechanisms and the provision of training and further education. Based on these inspection mechanisms, risk-based inspection measures must also be carried out in accordance with Section 6 (4) No. 4 LkSG.

In this respect, too, corresponding obligations on the part of the supplier or (intervention) rights for the company must be explicitly established in the contract. The granting of **audit rights** is one particularly useful option. These can be arranged in various ways, for example by including on-site inspection rights for the company itself, by commissioning third parties to carry out audits and by using recognised certification systems or audit systems, insofar as these ensure that independent and appropriate inspections are performed. In addition, it makes sense to include **corresponding sanctions** for the event that the supplier does not fulfil the obligations thus established in the contract. According to the government's explanatory notes, the inclusion of a contractual penalty, a right to temporarily suspend the business relationship or a possibility to remove the supplier from the approved contractor list are all possible options.

In this respect, the question arises as to the (lower and upper) limits for the drafting of corresponding contractual clauses. The principle of appropriateness offers a starting point. This principle, which is defined in more detail in the LkSG through the appropriateness criteria under Section 3 (2), is, according to the government's explanatory notes, to be applied to all due diligence obligations where reference is made to the word *"appropriate"*. The principle of appropriateness must therefore also be observed when determining the "*appropriate*" preventive measures in accordance with Section 6 (4) LkSG.

3. Notes on appropriateness

With the introduction of the principle of appropriateness, a flexible amount of scope in discretion and action should be established for each company as to *"how"* the due diligence obligations in the LkSG are implemented. Which risks the company has to address in which way, in which order and with which intensity depends largely on the **individual company and risk situation**, and thus on the results of the risk analysis.

According to the criteria as defined in Section 3 (2) LkSG, the appropriateness of the measure is chiefly determined by the type and scope of the business activity, the company's ability to influence the party directly responsible for the violation, the severity of the violation typically expected, the reversibility and probability of the violation, as well as the nature of the company's contribution to the cause of the violation.

The principle of appropriateness is closely related to the principle of effectiveness, which in turn serves the objective of the LkSG. According to Section 4 (2) LkSG, effective measures are those *"which make it possible to identify and minimise human rights risks and environmental risks and to prevent, end or minimise the extent of violations of human rights or environmental obligations, if the company has caused or contributed to these risks or violations within the supply chain."* Therefore, an appropriate selection may only be made from effective measures.

Ultimately, this means that the selection from the measures mentioned as well as the agreement on further preventive measures and their specific drafting can and must vary along the principles of effectiveness and appropriateness. Within these principles, however, companies generally have broad scope for discretion. This poses a particular challenge when it comes to contract drafting.

Of course, companies could take the approach of imposing the most far-reaching obligations possible on the supplier with corresponding intervention rights. But, firstly, the contractual partner is likely to resist this approach. Secondly, when drafting clauses to include such provisions in SCoCs, the existing limits of the law governing terms and conditions (**"T&Cs"**) must be taken into account (see below for more details).

Further useful content in a Supplier Code of Conduct

In addition to the preventive measures resulting from Section 6 (4) LkSG, it may make sense to include further contractual obligations on the part of the supplier to help companies fulfil their own material due diligence obligations as well as to ensure the enforcement of the obligations assumed.

In particular, clauses should be included to make it easier for companies to fulfil the obligation to perform the **risk analysis** at the supplier's premises as well (see Section 5 (1) LkSG). Clauses on the implementation of a company's specific **risk management system**, Section 4 (1) and (2) LkSG should also be mentioned in this context. With regard to the latter, a company could even go so far as to oblige the supplier to set up its own management and inspection system. Since this would mean a significant amount of additional implementation effort for the supplier – unless the supplier itself is a company covered by the scope of the LkSG – such clauses could, however, be considered unreasonably disadvantageous and thus invalid, especially under the law governing T&Cs. Finally, it is advisable to include a **right of extraordinary termination** in line with Section 7 (3) LkSG.

Challenges in drafting effective regulations under German (T&Cs) law

In the event that German law applies to the contractual documents on which the supply relationship is based and thus also to the SCoC, the law governing T&Cs must also be taken into account when drafting the clauses. The content of SCoCs is likely to be the same as for terms and conditions, as these are pre-formulated and are only negotiated individually in isolated cases. As a consequence, their content must meet the standards of Sections 305 et. seqq. BGB (German Civil Code) if the provisions of the LkSG are to be implemented effectively.

If the SCoC has been effectively incorporated into the business relationship, the question of the effectiveness of its content depends largely on whether the provisions put the contractual partner at an unreasonable disadvantage as defined by Section 307 (1) and (2) BGB. This must be examined on a case-by-case basis, taking into consideration the *specific interests* and the overall circumstances.

In this respect, the specific interests of the user of the clause change, insofar as – as is now the case with the LkSG – the *legislator* requires, for example, the contractual agreement and/or passing on of certain obligations including corresponding inspection mechanisms and measures. This means that it must be taken into account when drafting the SCoC that clauses within the scope of the LkSG may be effective under the law governing T&Cs that would be ineffective outside the scope of the LkSG and vice versa.

Consequently, if German law is applicable, the content of an SCoC used by companies covered by the scope of the LkSG must be drafted differently to the content of an SCoC for companies in the supply chain not directly affected by the scope of the LkSG.

Relationship to other international standards

In future, SCoCs are likely to contain guidelines for the supplier derived from the agreements listed in Numbers 1 to 11 (**"Protected legal positions"**, see Section 2 (1) LkSG) and Numbers 12 to 14 ("**Environmental obligations**", see Section

2 (3) LkSG) of the Annex to the LkSG which thus comes under the scope of the LkSG, as well as guidelines for other aspects, in particular "ESG compliance". The term "**ESG**" stands for the three pillars "environmental", "social" and "governance" and has established itself as an umbrella term for categorising Corporate Social Responsibility (**"CSR**") issues.

Given the above-mentioned considerations regarding the law governing T&Cs, consideration should be given in future to drafting the content of the corresponding implementation and sanction clauses differently for the expectations derived from the protected legal positions and environmental obligations on the one hand, and for the other ESG standards on the other, and thus separating them. This is recommended if nothing else because the principle of "double content checking" is likely to apply. This principle states that both the clause binding on a certain standard (for the LkSG the specific expectation) itself and the (sanction) clause referring to the standard must be effective.

Risks associated with the group-wide use of a uniform Supplier Code of Conduct

From the above considerations, it follows that the drafting of the content of an SCoC will vary depending on:

- whether the company using the SCoC is covered by the scope of the LkSG;
- whether German law regularly applies to the content of the SCoC; and
- which measures are deemed *appropriate* based on the risk analysis.

In a group of companies, there will often be companies for which these criteria apply to varying degrees. One consequence of this, at least if German law applies, could be that blanket provisions in SCoCs will not stand up to scrutiny under the law governing T&Cs. In the event that German law does **not** apply to the SCoC, blanket provisions could indeed be effective under the legal system in question, but it is questionable whether such an SCoC will be accepted by downstream suppliers in the supply chain. Against this background, it is not advisable to uniformly use an SCoC that has not been adjusted to the differences between group companies.

Recommended action

As a result, all parties in the supply chain, in particular company purchasing departments, are advised to implement the requirements of the LkSG appropriately by adapting the relevant contractual documents based on a risk analysis. The Supplier Code of Conduct is the tool of choice, but care must be taken to ensure that this is embedded within the existing contractual structure in a meaningful way.

When selecting the content of the Supplier Code of Conduct, on the other hand, a different approach is recommended for companies covered by the scope of the LkSG than for suppliers affected indirectly or directly. Furthermore, particular care is called for in formulating expectations, selecting preventive measures and the specific drafting of implementation and sanction clauses, especially with regard to the limits of the law governing T&Cs.

Aspects of the latter could also have an impact on the systems of SCoCs that aim to implement further national or international standards in the supply chain in addition to the agreements named in the Annex to the LkSG. This could lead to a general need for companies to adapt their compliance structures.

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Commercial.Compliance: Russia embargo: basic principles and recent tightening measures

Introduction

Following the ninth sanctions package of 16 December 2022 and further adjustments at the end of January and beginning of February 2023, the EU adopted what is now its **tenth sanctions package** on 25 February 2023, thus once again tightening the embargo measures against Russia. The sanctions are aimed first and foremost at putting further pressure on Russia and weakening the Russian economy, its political elite and thus also its military. This article intends to provide a brief (non-exhaustive) overview of the sanction measures relevant to distribution and commerce and the most recent changes.

Background

As early as 2014, the EU responded to the annexation of the Ukrainian peninsula of Crimea and Russian support for the separatists in the fought-over territories in eastern Ukraine by imposing sanctions, which are laid down primarily in Regulation (EU) 269/2014 of 17 March 2014 and Regulation (EU) 833/2014 of 31 July 2014. While Regulation (EU) 269/2014 imposed **person-related measures** against a large number of natural and legal persons, entities and bodies meaning that practically no business relations are allowed any more, Regulation (EU) 833/2014 contains, among other things, **goods- and sector-specific measures**, mainly in the form of export, import and service bans. In response to the Russian government's recognition of the self-proclaimed Donetsk and Luhansk People's Republics in eastern Ukraine and the deployment of troops to the separatist regions at the end of February 2022, both bills have since been continuously expanded and the existing embargo measures tightened significantly. An additional Regulation was adopted specifically with regard to the Donetsk and Luhansk regions in Regulation (EU) 2022/263 of 23 February 2022. This also contains goods- and sector-related measures and was extended to the Kherson and Zaporizhzhia regions in the eighth sanctions package of 6 October 2022. Finally, due to its support of the Russian-led war of aggression against Ukraine, the EU embargo against Belarus (Regulation (EC) 765/2006) has also been tightened several times.

Scope

What all regulations have in common is that they apply a) within the territory of the EU, including its airspace, b) on board any aircraft or any vessel under the jurisdiction of a member state, c) to any person inside or outside the territory of the EU who is a citizen of a member state, d) to any legal person, entity or body inside or outside the territory of the EU founded or registered under the law of a member state, and e) to any legal person, entity or body in respect of any business conducted in whole or in part within the EU. The regulations therefore also cover, for example, EU citizens who work abroad for foreign companies and have to personally observe the EU sanctions in the course of their work. Via this indirect route, Russian or other foreign (subsidiary) companies, to which EU law would not apply per se, can therefore be indirectly covered by the scope of the EU sanctions to a certain degree.

Person-related measures (Regulation (EU) 269/2014)

The **prohibition of provision** under Art. 2 (2) of the Regulation is at the core of the person-related measures relevant for economic agents. This article states that no funds or economic resources (in particular all (commercial) goods, but also, for example, rights such as patents or licences) shall be made available to the natural or legal persons, entities or bodies listed in Annex I to the Regulation. This applies irrespective of where these persons, entities or bodies are located or based and where the provision takes place, and not only to direct provision, but also to indirect provision, for example by payment or delivery to a non-listed company which is nevertheless owned or controlled by a listed natural or legal person. In conjunction with the more far-reaching measures (freezing of assets, entry restrictions), this ban has the effect of a total embargo on the sanctioned persons, entities and bodies, especially since only a very limited number of exceptions are possible.

Since the end of February 2022, Annex I to the Regulation has been continuously expanded, most recently with the ninth sanctions package of 16 December 2022 (Regulation (EU) 2022/2476), then again on 30 January 2023 (Regulation (EU) 2023/192) and finally in the tenth sanctions package of 25 February 2023 (Regulation (EU) 2023/429), which added, among others, three more Russian banks (Alfa-Bank, Rosbank, Tinkoff Bank) to the sanctions list. Currently, approximately 1,500 natural persons and more than 170 legal persons, entities and bodies are listed in Annex I to the Regulation, and it is unlikely to end there. In addition to this, the sanctions lists for embargoes on other countries have been regularly expanded as a result of the Russian war of aggression or support of this, including not only the Regulation on Restrictive Measures against Belarus (Regulation (EC) 765/2006), but also, in view of the activities of the "Wagner Group", most recently the Regulation Concerning Restrictive Measures in View of the Situation in Mali (Regulation (EU) 2017/1770) and the Regulation Concerning Restrictive Measures against Serious Human Rights Violations and Abuses (Regulation (EU) 2020/1998). Careful and regular screening of the sanctions lists is therefore an essential part of any internal compliance programme in order to avoid accusations of (criminally relevant) violations of embargo regulations.

The tenth sanctions package provides a reason to recall the existing **obligation to report** laid out in Art. 8 of the Regulation. This states that natural and legal persons, entities or bodies are obliged to report all information that would facilitate compliance with the Regulation to the competent authority (in Germany this is the Federal Office for Economic Affairs and Export Control – BAFA) immediately and without being requested to do so. This includes, but is not limited to, information on assets frozen under Art. 2 (1) of the Regulation, as well as such funds or economic resources of listed persons, entities or bodies that should have been frozen but were not treated as frozen. Regulation (EU) 2023 /426 of 25 February 2023 extended this reporting obligation to include information on funds and economic resources of sanctioned persons, entities or bodies that were the subject of a move, transfer, alteration, use, access or dealing, as defined by Art. 1 e) or f) of the Regulation in the two weeks **preceding** their listing in Annex I. This reporting obligation not only applies to banks, which, for example, must provide information about relevant account movements, but to any natural or legal person who is covered by the scope of the Regulation (see above) and has relevant information. A violation of this reporting obligation, even if only through negligence, constitutes an offence in accordance with Section 19 (5) No. 1 AWG (Foreign Trade and Payments Act).

Goods-related measures (in particular Regulation (EU) 833/2014)

Within the goods-related embargo measures, the commonly referred to "**export bans**" are extremely important for commerce and distribution, although this term is misleading, because not only the export of certain goods and technologies is prohibited, but also the sale, delivery and transfer – and not only "to Russia", but also always "for use in Russia", both directly and indirectly. The result is a very comprehensive scope with the aim of ruling out any circumvention of prohibited direct provision of the sanctioned goods to a Russian recipient. This covers not only the actual act of moving goods or transferring technology, including via third countries and possibly even within the EU or Germany, but also the mere conclusion of a contract under the law of obligations ("sale").

With the exception of luxury goods and banknotes, these export bans are then regularly accompanied by a further ban on providing technical assistance, brokering services or other services in connection with the respective sanctioned goods directly or indirectly to natural or legal persons, entities or bodies in Russia or for use in Russia. While the terms “technical assistance” and “brokering services” are explicitly defined in the Regulation, there is no explanation of what “other services” means. Such a general ban on services is not found in the EU embargo of any other country. In case of doubt, however, this term should be interpreted broadly and may also cover services provided by an EU parent company to its foreign, not necessarily Russian, subsidiary, provided there is a concrete connection to the sanctioned goods and technologies.

Depending on the type and use of the sanctioned goods or the relevant industry (e.g. dual-use goods, luxury goods, oil industry, aerospace industry, etc.), the export bans are provided in various articles of the Regulation, including Art. 2, 2a, 2aa, 3, 3b, 3c, 3f, 3h, 3k and 5i, each in conjunction with an Annex listing the relevant goods. In addition to various other tightening measures, the ninth and tenth sanctions packages of 16 December 2022 and 25 February 2023 respectively (Regulation (EU) 2022/2474 and Regulation (EU) 2023/427) added numerous new entries to the existing goods lists and revised them in places. In addition, there is now a ban on the transit of dual-use goods and firearms as defined in Art. 2 and 2aa of the Regulation from the EU through Russia to a third country.

In principle, the opposite applies in the various “**import bans**”, which likewise prohibit not only the direct or indirect import into the EU of certain sanctioned goods originating in or exported from Russia, but also even the purchase (i.e. the conclusion of a contract) as well as the transfer. The goods concerned do not have to have been purchased from a contractual partner in Russia, nor do the goods have to be intended for import into the EU. The purchase of sanctioned goods originating from Russia for direct delivery to a third country without crossing EU borders could already be deemed a violation of the ban. The import ban takes a special position with regard to iron and steel products, because although their import and purchase is also prohibited, only the transport of the goods is prohibited and not their transfer. Fundamental differences also apply to the import ban on Russian crude oil and petroleum products, though these cannot be dealt with in more detail in this article. Like the export bans, the import bans are also accompanied by a ban on the provision of technical assistance, brokering services or (except in the case of iron and steel products) other services, whereby the services here do not have to be related to the goods relevant for the embargo themselves, but to the purchase, import, transfer or transport.

The import bans are found in Art. 3g, 3i, 3j, 3m, 3n and 3o of the Regulation, also in conjunction with an Annex listing the relevant goods. With the ninth and tenth sanctions packages of 16 December 2022 and 25 February 2023 (Regulation (EU) 2022/2474 and Regulation (EU) 2023/427), these goods lists too were revised and expanded. Two new Annexes – XXXI and XXXII – were added in connection with the oil embargo. Finally, the oil embargo was also the subject of interim adjustments on 4 February 2023 (price cap for petroleum products under Regulation (EU) 2023/250 and Regulation (EU) 2023/251).

Impact and outlook

The EU’s embargo measures against Russia are unprecedented in every respect. Not only in terms of the sheer number of different bans, but also as regards the multitude of vague legal terms, ambiguities and contradictions. Almost every industry seems to be covered by the sanctions and an end is nowhere in sight. On the contrary: an eleventh sanctions package has already been announced. With this, according to the Federal Ministry for Economic Affairs and Climate Action (BMWK), circumvention will be made more difficult.

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Commercial.Restructuring: New legal situation regarding over-indebtedness: the SanInsKG – Crisis Mitigation Act under restructuring and insolvency law

The price explosions seen in the energy market and within many supply chains mean that a great deal of companies are struggling in terms of their ability to plan. This not only presents them with commercial difficulties, but also poses huge liability risks for them.

The recent and ongoing uncertainty in many markets forced the legislator to act in 2022. To counteract the planning uncertainties that exist, the Federal legislator amended the SanInsKG – the Crisis Mitigation Act under restructuring and insolvency law. The original version of this act was intended to counteract the economic effects of the COVID-19 pandemic, especially the significant drop in sales seen by a large number of companies. The provisions have now been made more general to take account of the current crises.

Recognising the duty to file for insolvency

To avoid personal liability, the CEOs of limited liability companies must recognise crises at an early stage and protect the interests of their creditors, in particular by recognising their duty to file for insolvency in time. However, defining when such a duty is deemed to be recognised "in good time" can cause difficulties. There have always been two mandatory grounds for insolvency in Germany for limited liability companies: iliquidity and over-indebtedness.

Illiquidity and over-indebtedness

Illiquidity is quite easy to determine: any CEO can see whether the company has sufficient liquidity to meet payment obligations as they fall due. If it does not, but only for a short period of time (less than three weeks) or to a small extent (less than 10% of the total liabilities due), this is merely what is known as a payment delay (Zahlungsstockung). Otherwise, an application for insolvency must be filed immediately, within no more than three weeks.

Over-indebtedness

Determining over-indebtedness is more complicated, mainly because the data required for this is not readily apparent. In most cases, this data still has to be collected. Moreover, due to the state of crisis the company is in, the data is often based on uncertain assumptions, making data collection difficult. Over-indebtedness exists if the assets of the company (at liquidation values) do not cover its debts. Hidden reserves may be included and liabilities with qualified subordination agreements may be excluded. If this calculation is negative, it depends on whether the company has a positive going-concern-forecast for the next 12 months, in other words it will not become illiquid during this period. Twelve-month liquidity forecast is therefore called for. In the absence of a positive forecast, insolvency must be filed for immediately, within a maximum period of six weeks. It is not necessary, however, for the over-indebtedness to be due to the COVID-19 pandemic.

Changes in practice resulting from the SanInsKG

To account for the unique challenges involved in preparing the going-concern forecast, the legislator has now passed the SanInsKG to ease the burden on companies. Among other things, it has shortened the forecast period. Companies now only have a positive liquidity forecast for the following four months. In addition, the application period for over-indebtedness has been extended to a maximum of eight weeks.

However, caution is advised when considering the changes: the shortening of the forecast period only applies to those whose insolvency filing deadline had not already passed before 9 November 2022. This also means that the company must still have had a positive liquidity forecast for twelve months six weeks before this date, i.e. on 28 September 2022. Therefore, if the insolvency takes effect before 28 September 2023 according to the forecast, the privilege does not generally apply.

If there is an overwhelming probability of a company becoming insolvent before the end of the third quarter of 2023, caution is therefore advised, despite the relief provided by the SanInsKG. This may be the case, for example, if a working capital credit reaches maturity before 28 September 2023. Then a CEO must react immediately to avoid serious liability risks. Ultimately, the duty to file for insolvency already exists today. So the question remains as to how many companies will actually use the privileges provided in the SanInsKG?

Remaining difficulties with liability claims associated with insolvency

Another relevant point to note is that the duty to file for insolvency due to a lack of liquidity is accompanied by the difficulty that the associated CEO liability claims are only asserted after the event by the insolvency administrator. The insolvency administrator benefits from considerable alleviations of the burden of proof. Moreover, he has another advantage: by the time liability claims are asserted, the positive forecast has already failed, which means that he can deduce exactly what caused certain liquidity consequences. CEOs, on the other hand, face a different problem: they have to defend themselves by claiming that a positive course of events and completely different liquidity consequences were “overwhelmingly probable” in advance. It will be virtually impossible to furnish such proof.

Practical tip: liquidity forecast

It is always a good idea to draw up a liquidity plan. The tighter the liquidity coverage in the company, the more detailed this should be. It may be advisable to draw up a plan on a weekly basis and monitor this regularly. Even though the amendments to the SanInsKG only require a four-month forecast, the next twelve months should be covered to be on the safe side. If this plan shows a positive forecast for fewer than twelve months, the company must examine whether the relief provided by the SanInsKG actually applies.

It should also be noted that despite the – somewhat confusing – systematic classification in Section 4 (2) SanInsKG, the shortening of the forecast does not require the provisions of Section 4 (1) to be met at the same time, in other words for the over-indebtedness to be due to the COVID-19 pandemic.

Admittedly, liquidity monitoring ties up management capacities and is sometimes costly if external consultants are required. But planning properly always pays off!

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■ GENERAL INFORMATION

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