

## REAL ESTATE

# Sale of Publicly Owned Real Estate Subject to Procurement Law

» A ruling of the Court of Appeal in Düsseldorf may lead to a significant expansion of the requirement to carry out a formal award procedure prior to the sale of publicly owned real estate.

According to the ruling, a transaction has to be considered as a public contract subject to public procurement law, wherever the sale of real property is connected to the construction of buildings in accordance with criteria pre-

termined by the public awarding authority – regardless of who owns the land to be sold. As a consequence, public authorities – as well as private investors intending to acquire real property from the state – will have to examine carefully whether future transactions must be considered as a public contract.

In the matter at hand, the Federal Republic of Germany intended to sell a piece of land formerly used as a military airport. Prior to the transaction, the Federal Republic of Germany

and the municipality had developed a marketing concept to ensure a long-term economical use of the land. As a part of this concept, the potential investor was supposed to enter into an urban development contract with the municipality, obliging it to carry out certain development measures. With its decision, the court enjoined the Federal Republic of Germany from awarding the contract without previously carrying out a formal procurement procedure.



## GERMAN*NewsFlash*

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# Request for Rent Increase: Reference to Local Rent Index is Sufficient

»» The German Federal Court of Justice has ruled that a landlord's request for a rent increase is sufficiently substantiated, if it refers to the local rent index (Mietspiegel). The Court did not agree with the lessee's argument that a proper request for a rent increase requires the landlord to indicate the applicable rent margin. Rather, the tenant can be expected to determine on his own the rent margin by consulting the rent index the landlord referred to.



## SECURITIES



# Liability for Incorrect Prospectus – No Copy Required

»» In an action for damages brought against the former board members of an insolvent stock company, an investor had argued that the prospectus describing the offered securities in the company had been incomplete in significant respects.

The court of appeal dismissed the claim, reasoning that the incorrect prospectus could not have constituted the basis for the investor's decision to purchase shares since the investor undisputedly had never seen a copy of the prospectus. Upon appeal against the decision, the German Federal Court of Justice deemed the question of possession of

the prospectus to be irrelevant, arguing that the prospectus constituted the basis for the information of potential investors by the brokers in accordance with the intentions and marketing concept of the company. Thus, the mistakes in the prospectus were deemed to have had the same impact as if the prospectus had been directly handed out to the investor.

# Insider Trading: Federal Financial Supervisory Agency must Provide Investors with Access to its Files

» Subsequent to the acquisition of shares in Volkswagen AG by Porsche AG, investors intended to investigate whether rules on insider trading and disclosure of information had been violated in the context of the acquisition.



For this purpose, the investors applied for access to the files of the Federal Financial Supervisory Agency (Bundesaufsichtsamt für das Finanzwesen – BaFin). Since BaFin denied access, the investors filed a lawsuit before the Administrative Court in Frankfurt. The court ordered BaFin to provide access to the files, merely restricting such access where personal data was affected. The court stated that BaFin had failed to prove that access to the files would have an adverse effect on the agency’s efficiency.

## Draft Act on the Prevention of “Undesirable” Activities of Investors

» The Federal Government’s draft of the so-called risk Limitation Act (Risikobegrenzungsgesetz) is now ready for parliamentary proceedings and debates.

Containing a number of different measures, the draft act aims at increasing transparency and preventing investors from carrying out “undesirable” transactions. The act stipulates that sharehold-

ers holding 10 percent or more of the voting rights in a stock company shall disclose their investment aims and the source of their financial funds. At the same time, investors shall be prevented from concealing their identity by way of using trustees or banks as representatives. Any person registered in the share register will have to disclose upon request whether he or she owns the shares for own purposes or, if not, for whom the shares are held. The act further aims

at complicating so-called “acting in concert” of multiple shareholders, i.e. the coordinated purchase of shares as well as coordinated actions prior to shareholders’ meetings. Furthermore, shareholders attempting to secretly increase their voting rights before a shareholders’ meeting by not complying with their obligation to register shall be banned from exercising their voting rights for six months.

# Two Judgments on AdWord Advertising

» In two recent decisions, the Courts of Appeal in Braunschweig and Stuttgart had to deal with so-called AdWord advertising. An AdWord campaign is a means of advertising on websites of Internet search engines, such as Google, where specific advertisements are triggered by the search words entered by the user. The advertisements are then displayed on the screen together with the search

hits. In both cases, the respondent had linked his advertisement to a search word that represented a competitor's trademark. Both courts considered this to be a trademark infringement. It is noteworthy that other German courts of appeal had not considered AdWord campaigns to be trademark infringements, so that it is to be expected that the German Federal Court of Justice will soon render a decision on this disputed issue.



CORPORATE / M&A

# MoMiG – the Future of German law on Private Limited Companies

» The Federal cabinet has adopted a government bill, the *Act to Modernise the Law Governing Private Limited Companies and to Combat Abuses* (“MoMiG”), which will lead to a dramatic reform in German corporate law once adopted by the German Parliament.

The act aims at modernising and deregulating the corporate law in Germany and at the same time turning the German *Gesellschaft mit beschränkter Haftung* (“GmbH”) into a corporate form fit for international competition. The MoMiG is likely to be adopted by

the summer of 2008 and will lead to a considerable amount of changes.

## Accelerating incorporation

Firstly, MoMiG will provide model articles of association for standard GmbH start-ups. Where the model articles are used, a notarial deed will no longer be necessary. Secondly, the minimum nominal capital for a GmbH is to be reduced from the current EUR 25,000 to EUR 10,000. Thirdly, the process of registration and administrative approvals required to run the business will be separated, which will simplify the establishment of companies for businesses that are subject to official permits.

## Making the GmbH more attractive as a legal structure

MoMiG will make it possible for companies to have administration headquarters that are not necessarily at the seat of incorporation and that can even be abroad. Furthermore, persons registered as shareholders will be deemed to be the actual owners of the shares, which makes the acquisition of shares in good faith possible and which significantly facilitates corporate due diligences in M&A transactions, since the purchaser can rely upon the registered seller to be entitled to the assignment of the shares. Finally, MoMiG seeks to clear the legal uncertainty currently existing in relation to cash pooling.

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