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# German News Flash



## GERMAN NEWS FLASH

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## English language before German courts – Is the pilot project in Cologne just the beginning?

On 1 January 2010, the Higher Regional Court Cologne (*Oberlandesgericht Köln*) has launched a pilot project in which hearings may, under certain requirements, be conducted in English. To that effect, the Higher Regional Court Cologne as well as the Regional Courts (*Landgerichte*) within its district (Aachen, Bonn and Cologne) have established a senate respectively chambers that will hear such cases, provided that both parties have requested an English hearing and have waived the use of interpreters, and that the case is an international one. Judges sitting in these cases have acquired their skills in the English language during LL.M. programmes, other studies or traineeships abroad or while working in international law firms prior to their work as judges.

A further reaching proposal has been developed by the Ministers of Justice of North Rhine-Westphalia and Hamburg in collaboration with the German Judges' Association (*Deutscher Richterbund*) and the German Lawyers' Association (*Deutscher Anwaltsverein*), aimed to change the law governing German court procedures so that cases can be conducted in English completely before special chambers for international commercial matters consisting of one professional judge and two lay judges (businessmen). A correlating bill was introduced by the Hamburg Minister of Justice into the German Federal Council (*Bundesrat*) in February 2010.

Currently, the German Judicature Act (*Gerichtsverfassungsgesetz*) contains a mandatory provision that the language before the courts is German. Already now, however, there are exceptions to this rule,



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which the Cologne pilot project reverts to. But these exceptions do not refer to the parties' filings, protocols of the hearings or court orders and judgments – hence the Hamburg bill.

Both the pilot project in Cologne and the Hamburg bill aim to prevent the “flight into English law” respectively the “flight to arbitration” in cases involving international parties, and to enable the benefits of German court proceedings – i.e. the principle that the losing party bears the costs of the proceedings, or the lack of large-scale discovery – to be further appreciated on the international playing field. Another initiative driven by the same concerns had been taken by the “alliance for German law” when introducing the brochure called “Law made in Germany”, promoting the German legal system as being cost and time efficient and transparent.

The two initiatives have been discussed controversially within Germany. While there is accord to a great extent that the testimony of witnesses or declarations by the disputing parties in English during the oral hearing may be very useful, several critics find that it is unnecessary – if not harmful – that German lawyers make their arguments before German judges in the English language. In turn, it is again considered to be valuable that English evidence may be submitted with the filings – i.e. contracts such as lengthy Share Purchase Agreements or contracts in the financial sector, which are usually drafted and concluded in English. Critics emphasize that German law, usually playing the leading part in proceedings before German courts, is not “fluent” in English, entailing the risk of important details getting lost in translation.

Considering the fact that disputes in international business transactions are usually decided upon the provisions of the detailed and lengthy contracts underlying the transactions rather than substantive law provisions of a legal system (other than the provisions regarding the interpretation of a contract), the latter argument does not seem to represent a major concern with regard to the relevant cases. In fact, the translation of contracts and witness testimonies may even entail a greater risk of details being lost in translation than the scenario of German lawyers applying the law they have been trained in another language. All in all, the most important benefit of the discussed initiatives is that they expand the parties' autonomy

and add further possibilities when it comes to deciding on a certain dispute settlement mechanism in an international contract.



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## The draft Demerger Act – A new measure to combat anti-competitive behavior?

The coalition agreement of last year's elected government includes the intention to empower the German Federal Cartel Office to force market dominant companies to sell or spin off assets as a last resort measure. National cartel offices in other jurisdictions such as the

United States, Great Britain and Switzerland have had such competence for a long time, but it is an instrument that is new to German competition law. However, there are hardly any cases where the instrument has been applied by other competition authorities.

In the beginning of 2010, Rainer Brüderle, the German Minister of Economics and Technology, has submitted a first draft Demerger Act (*“Entflechtungsgesetz”*). According to the bill, the new instrument shall not be limited to certain sectors, but it is believed to mainly aim at the energy, media, rail and mail delivery sectors. Germany's Federal Cartel Office would be empowered to break up companies if two requirements are fulfilled, namely if (1) the market in question is a highly concentrated, economically important market with no or hardly any competition due to the dominating market presence of one or several companies, and (2) an improvement of the market conditions is not to be expected in the foreseeable future.

Companies that have been ordered to sell or spin off assets shall have the opportunity to make suggestions as to which assets to be sold. The company keeps the proceeds of the sale, but the purchaser must be approved by the German Cartel Office. In case the company refuses to sell or spin off certain assets, the German Cartel Office determines a Public Trustee who takes over the power of disposal and manages the sale.

The bill has caused mixed reactions. Whereas representatives of family and medium sized businesses appreciate the approach, many antitrust law experts and the industry representatives oppose it. Teaser of the criticism is in particular the envisaged competence of the German Cartel Office to break up companies without any proved misuse of a dominant market position. Under German competition law, the holding of a dominant market position is not anti-competitive as such, only when it is misused e.g. by discriminating trade partners, predatory pricing or denying an essential facility.

Some experts consider such competence to be an interference with the right of ownership and thus in violation of constitutional law. Moreover, so the critics, the intended measures would empower the German Cartel Office to pursue “industry politics”, something the German Cartel Office is neither qualified nor authorized for.

Apparently, the Federal Ministry for Economics and Technology itself does not seem to expect a regular use of the intended instrument, should it come into force. The Ministry has announced in the draft bill that no additional expenditures of the German Cartel Office are to be expected. Mr Brüderle said that “the Cartel office shall receive a sharp sword, even if it will not be used in a battle.” It therefore remains to be seen whether the bill, should it be enacted, will actually have relevance in practice.

For several months, however, the draft bill has been pending between the different ministries. The Federal Ministries of the Interior, for Finances and Health oppose the proposition, and even the Chancellery has objections. It is therefore expected that the German Minister for Economic Affairs will at least have to slow down the realization of the new law, if its implementation can be achieved at all.



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## Modernized accounting principles – Financial covenants to be renegotiated?

The law on the modernisation of accounting principles (*“Bilanzrechtsmodernisierungsgesetz”*), which entered into force on 29 May 2009, is generally applicable on accounting years starting after 31 December 2009. It is designed to help small and medium sized companies to save on accounting costs and modernizes German accounting standards. Some of the most important changes are: Self-acquired know how as well as research and development work can in future be displayed in the balance sheet. In addition, financial instruments will – other than before – enter the balance sheet at fair value. And reserves for anticipated liabilities have to be made at the anticipated future costs.

Depending on the type of business this might lead to a change in the key figures of a company, in particular equity ratio and in some cases net debt. One of the areas being affected by such changes are

external financing arrangements as they usually contain financial covenants. Financial covenants are calculated and documented in accordance with financial key figures of the borrowing company. In case of breach of covenants the lender usually has various rights, in the worst case entitling it to terminate the whole financing arrangement which might lead to liquidity shortage or even insolvency.

However, the borrowing companies do not need to fear sudden terminations: Some financial agreements contain provisions concerning changes in accounting standards and usually provide for the parties' mutual obligation to negotiate in good faith new terms and conditions for the financing. And even if the agreement does not contain such clause, financial covenant terms do represent a material basis of contract so that both the lender and the borrowing company are in principle entitled to request an adjustment of the relevant terms and conditions by renegotiating them in good faith. Still, both lending and borrowing entities should be aware that the need for renegotiating their financial covenants may arise within short.



BY VERENA BEHNKE,  
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# Facilitating access to company information throughout the European Union

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The European Commission has published a green paper on the interconnection of business registers in the Member States of the European Union. The publication of this document marks the beginning of a process aimed at determining how the official information on companies stored in such registers can be made more readily accessible to interested parties, in particular creditors, consumers and business partners, throughout the EU. The measure is the most recent action by the Commission in this regard, not least against the background of the increase in cross-border mergers and acquisitions and other forms of international business. Uncomplicated access is also necessary in view of rulings handed down by the European Court of Justice according to which businesses can now incorporate in one Member State and conduct their business activities, partially or entirely, in another one.

An amendment from the year 2003 to the First Company Law Directive (2003/58/EC), which made electronic business registers mandatory in the Member States as of 1 January 2007, has already considerably promoted cross-border access to information. However, while the fact that registers are online technically facilitates a search, the different languages, search conditions and structures of the web portals can make it difficult for a user to find the particular piece of information on a company he or she is looking for. Some forms of voluntary cooperation are already in place, such as the European Business Register (EBR), the EU's e-Justice project, and the Internal Market Information System (IMI), which are supposed to facilitate the communication between registers in order to enhance transparency. But these existing networks do not yet enable the kind of broad and simple access to information now envisaged by the Commission. The interconnection of European business registers seems vital not least in view of the current financial crisis, which according to the Commission has highlighted the importance of transparency across financial markets. Improving access to current and official information on companies can contribute to the effort to restore confidence in markets across Europe. It would also reduce the administrative burden for companies and save them costs.

In the long term, the European Commission may try to push for single access point to legal and financial information in all official languages of the EU, at least as far as listed companies are concerned. Short-term, working to improve the exchange between trade regis-

ters across Europe and thus to enhance the flow of company related information is the more important cause. What form such an interconnection may take will be determined by the Commission once it has heard the views of the different institution of the European Union as well as other interested parties who have been invited to share their thoughts on the subject.



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## Inside Mannheimer Swartling

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### SEMINAR ON EMPLOYMENT LAW IN SWEDEN ON 4 MAY 2010

Christian Bloth, partner at the Frankfurt office, and Kerstin Kamp-Wigforss, Senior Associate at the Stockholm office, will hold a one-day seminar on "Employment Law Sweden" on 4 May 2010 in Frankfurt/Main organised by Management Circle. The seminar will cover all aspects of Swedish individual and collective employment law and will be held at Le Meridien Parkhotel. For more information please refer to [www.managementcircle.de/05-63848](http://www.managementcircle.de/05-63848).

### CONFERENCE ON "GREEN REAL ESTATE" IN BERLIN ON 6 MAY 2010

Hosted by the Swedish Chamber of Commerce in Germany, Dansk Business Forum Berlin and the Danish Club Berlin/Brandenburg, real estate experts from Mannheimer Swartling, Kristensen Properties, Vattenfall Europe Immobilienmanagement, Sulfurcell and SEB will meet in the "Vattenfall Management Lounge" on Berlin's famous Gendarmenmarkt for a panel discussion on "Green Real Estate – Investment Opportunities for the Property Industry". The debate, which will be moderated by Thomas Kaiser-Stockmann, will focus on new investment approaches for the real estate industry including renewable energy projects as well as strategies to improve existing real estate portfolios and green aspects of real estate development projects. Coming from different fields within the industry, the panelists will contribute their own practical experiences and provide their views on the increased importance of a "green approach". This is the third annual property conference organized by Mannheimer Swartling, which last year attracted some 200 participants. If you would like to join, please feel free to contact Carsten Schippmann at [cnb@msa.se](mailto:cnb@msa.se).

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Mannheimer Swartling is the leading Nordic commercial law firm. Our clients range from many of Sweden's and the world's leading companies to medium-sized businesses and organizations. Common to all our clients is that the law plays an integral role in their commercial success. This drives us to continuously maintain our position at

the forefront of our industry and attuned to the needs of our clients.

Mannheimer Swartling has offices in Stockholm, Gothenburg, Malmö, Helsingborg, Frankfurt, Berlin, Moscow, St. Petersburg, Shanghai, Hong Kong, Brussels and New York.