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Act on the Modernization of Partnership Law in Germany (MoPeG)

With the Act on the Modernization of Partnership Law (*Modernisierung des Personengesellschaftsrechts* (MoPeG)) of 10 August 2021, the German legislator has undertaken a comprehensive reform of the law on civil law partnerships (*Gesellschaft bürgerlichen Rechts* (GbR)) and commercial partnerships (OHG (*Offene Handelsgesellschaft* – general partnership) and KG (*Kommanditgesellschaft* – limited partnership)). The MoPeG came into force on 1 January 2024 and aims to make the legal forms of partnerships more appealing and flexible.

Below we would like to give you an overview of the most important legal changes and address the potential tax implications of the MoPeG.

Legal Capacity for the GbR

As the legal capacity of GbRs participating in legal transactions has long been recognized in case law and literature, it is now also legally standardized by Section 705(2), alternative 1 of the new version of the BGB (*Bürgerliches Gesetzbuch* – German Civil Code), according to which the GbR itself can acquire rights and incur liabilities if it is to participate in legal transactions according to the common will of the shareholders. Unlike the previous regulation in Sections 718 and 719 of the old version of the BGB, the new version of Section 713 stipulates that the shareholders' assets are no longer allocated to the shareholders jointly but to the company itself.

This statutory allocation of assets means that enforcement from a writ of execution against the company may only be carried out against the company's assets in accordance with Section 722(1) and (2) of the new version of the BGB. However, the personal liability of the shareholders remains, as they continue to be personally, jointly and severally liable for all of the company's liabilities in accordance with Section 721 of the new version of the BGB.

Companies Register for the GbR

The MoPeG also introduces a companies register for GbRs at the local court, where a GbR can voluntarily register. The advantage of registration is, for example, the publicity effect of the register. Just like the shareholders and the representation of the company in legal transactions, the information entered is protected by good faith. However, being registered also means that the reporting obligations under

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money laundering law must be met by regularly obtaining information on the beneficial owner of the company and submitting it to the transparency register. In addition, credit institutions are required to collect information on the beneficial owners of the GbR and verify it against the information entered in the transparency register if they intend to carry out transactions with the GbR.

Ability to Transform the GbR

The MoPeG also provides for a change in the German Transformation Act. Once the GbR has been entered in the companies register, a demerger under Section 124 of the new version of the UmwG (*Umwandlungsgesetz* – German Transformation Act), a merger under Section 39(a) to (f) of the new version of the UmwG or a change of legal form under Section 214 of the new version of the UmwG are now possible. The ability to transform the registered GbR also applies under the German Transformation Tax Act.

Moreover, according to the new provisions of the MoPeG, it is possible to change the status of a registered GbR to an OHG (general partnership), KG (limited partnership) or PartG (partner company) or vice versa in accordance with Section 707(c) of the new version of the BGB, Sections 106 and 107 of the new version of the HGB (*Handelsgesetzbuch* – German Commercial Code) and Section 4(4) of the new version of the PartGG (*Partnerschaftsgesellschaftsgesetz* – German Partnership Act). In order to avoid duplicate entries in the respective companies register and to document the identity of the company changing register, every change of status must be reported to the register in which the registered company is currently registered. Going forward, a change of legal form of a GbR pursuant to Section 191(1) no. 1, Section 214 of the new version of the UmwG to a GmbH (limited liability company) or another company with a different legal form is also possible.

Voting Rights and Profit Distribution Based on Shareholdings

Under the MoPeG, the distribution of profits and losses in the GbR is also governed by law. Until now, shareholders were required to share profits and losses equally, unless they had agreed otherwise. This former principle is only to be applied in cases of doubt in accordance with Section 709(2) of the new version of the BGB and is replaced by a new principle. The new version stipulates that the distribution is based on the shareholdings determined by the ratio of the shareholders' contributions. However, this rule only applies if the shareholders have not reached an agreement to the contrary or if the circumstances do not suggest otherwise. If, for instance, no shareholdings have been specified, the distribution of votes and profits is based on the ratio of the agreed values of the contributions. If the value of the contributions has not been agreed either, each shareholder has the same voting rights and an equal share of the profit and loss regardless of the value of their contribution.

Unified Limited Partnership (*Einheits-KG*)

The MoPeG also contains changes for the limited partnership (KG). With the new version of Section 170(2) of the HGB, the possibility of the so-called unified limited partnership (*Einheits-KG*), a

GmbH & Co. KG, in which the limited partnership holds all shares in the General Partner GmbH, has now been incorporated into law. Section 170(2) of the new version of the HGB renders the principle of excluding limited partners from legal representation of the limited partnership inapplicable in the context of unified limited partnership (*Einheits-KG*) and defines the limited partners' ability to exert influence: The law now stipulates that all limited partners exercise the limited partnership's corporate rights in the general meeting of shareholders of the General Partner GmbH.

Furthermore, the liability of the limited partner in a limited partnership has been newly defined in Section 172 of the HGB. Up to now, the limited partner was only liable up to the liability amount entered in the commercial register. The MoPeG has eliminated the liability amount and replaced it with the limited partner's obligation to pay capital contribution, which can be found in the partnership agreement or in a separate agreement. The limited partner is only liable up to the amount of his/her obligation to pay capital contribution, which can be fulfilled by making payments to the company. The obligation to pay capital contribution does not need to be entered in the commercial register but can be disclosed voluntarily.

Tax Implications of the MoPeG

Income Tax

The MoPeG does not contain any new tax regulations. According to the explanatory memorandum to the law, the MoPeG is also not expected to bring about any changes to the income tax principles for the taxation of partnerships.¹ Partnerships will continue to be treated as fiscally transparent entities whose income is attributed to the shareholders for income tax purposes and is subject to income tax or corporate tax. The joint ownership principle (*Gesamthandsprinzip*) will therefore continue to apply for tax purposes. If there is a liability for trade tax, taxes will continue to be levied at partnership level.

To clarify that the joint ownership principle continues to apply for tax purposes, the Growth Opportunities Act provided for an amendment to the German Fiscal Code (*Abgabenordnung* ("AO")) in Section 39(2) no. 2, the so-called joint ownership fiction (*Gesamthandsfiktion*):

"Assets to which several persons or a partnership with legal capacity are jointly entitled shall be attributable proportionally to the participants or shareholders insofar as taxation requires separate attribution. For the purposes of income taxation, partnerships with legal capacity are regarded as a joint ownership and their assets as joint assets."

The amendment was taken from the Growth Opportunities Act and incorporated into the Secondary Credit Market Promotion Act, where it was adopted on 15 December 2023.

¹ Bundestag printed paper 19/27635, page 107.

According to the explanatory memorandum to the law, where the tax laws refer to joint assets, this is to be understood for partnerships with legal capacity as referring to the assets of the company that are distinct from the assets of the individual shareholders (special business assets). In particular, transfers of individual assets from (special) business assets to joint assets (and vice versa) are therefore still possible at book value in accordance with Section 6(5) of the German Income Tax Act (*Einkommensteuergesetz* (EStG)).

Real Estate Transfer Tax

Potential implications initially anticipated for real estate transfer tax due to the legal elimination of the joint ownership principle did not materialize. Given the entry into force of the MoPeG on 1 January 2024 and since the Growth Opportunities Act was not passed in 2023, the legislator included a provision in Section 24 of the German Real Estate Transfer Tax Act (*Gründerwerbsteuergesetz*, hereinafter “GrEStG”) as part of the adoption of the Secondary Credit Market Promotion Act in order to be able to tax real estate transfers from or to partnerships from 1 January 2024 in the same way as before.

With the introduction of Section 24 of the GrEStG, which is set to be applicable for a limited period until 31 December 2026, partnerships with legal capacity will continue to fall into the category of joint ownership for real estate transfer tax purposes, meaning that the following tax exemptions will continue to apply:

- Transfer of a property from co-owner to joint ownership, Section 5(1) of the GrEStG
- Transfer of a property from sole owner to joint ownership, Section 5(2) of the GrEStG
- Transfer of a property from joint ownership to co-ownership, Section 6(1) of the GrEStG
- Transfer of a property from joint ownership to sole ownership, Section 6(2) of the GrEStG
- Transfer of a property from joint ownership to another joint ownership, Section 6(3) of the GrEStG

The legislator intends to carry out a comprehensive revision of the German Real Estate Transfer Tax Act by the end of 2026. It therefore remains to be seen which regulations will apply from 1 January 2027.