Recent Changes to the German Insurance Premium Tax Act (the “German IPT Act”)

On 23 November 2012, the German Federal Council (Bundesrat) passed the Transaction Tax Amendment Act (Gesetz zur Änderung des Versicherungsteuergesetzes und des Kraftverkehrssteuergesetzes – Verkehrsteueränderungsgesetz, cf. Official Records of German Federal Council BR-Drs 634/12). This came into force on 12 December 2012. Not many of the amendments included in the first draft bill of the German Federal Government dated 25 May 2012 (cf. BR-Drucksache 301/12) were adopted by the German legislator. Some of the proposed substantial amendments, e.g. taxation of deductibles (in the case of motor car liability insurance) or the new requirements for the insurance premium tax (“IPT”) exemption (in the case of insurance packages), were abandoned following a last-minute recommendation of the Finance Committee of the German Parliament (cf. Resolution of the Finance Committee of 24 October 2012, Official Records of German Parliament BT-Drs 17/11183). However, the Transaction Tax Amendment Act still contains amendments which are relevant for those active in the German insurance market, either within or outside of Europe.

Extension of the Scope of Application

Besides a complete rewording of Sec. 1 of the German IPT Act (Versicherungsteuergesetz) this provision was amended in the following two respects:

a) Firstly, until now the German IPT Act was only applicable to insurance companies having a seat outside the European Union (“EU”) or the European Economic Area (“EEA”) if (i) the policyholder had its permanent or main residence or its seat in Germany at the time of the payment of the insurance premium or (ii) the insured risk was located in Germany at the time the insurance relationship was established.

From 1 January 2013, the German IPT Act will apply to insurance relationships of insurance companies outside the EU or EEA related to a company, a permanent establishment or any other facility located in Germany, and independent from the question of whether the policyholder resides in Germany at the time of the payment of the insurance premium or whether the insured risk is situated in Germany at the time of the establishment of the insurance relationship. Thus, according to the new legislation, insurance programmes or worldwide policies entered into by a non-resident parent group company may be subject to IPT in Germany if an enterprise, permanent establishments or other facilities are located in Germany and are insured under such insurance programme or worldwide policy. In particular, so-called “group insurance contracts” (echte Gruppenversicherungsverträge), i.e. insurance contracts under which only the respective parent group company is the policyholder but the subsidiary companies are also insured companies, may be affected by the new legislation. In this regard, Sec. 1 of the German IPT Act explicitly refers to comprehensive general liability insurances (Betriebshaftpflichtversicherungen) and professional liability insurances (Berufshaftpflichtversicherungen) which are typically entered into by the parent group company for the entire group.

Recommendation: The amendment to the scope of the German IPT Act may result in the double taxation of insurance premiums. Consideration should be given to whether existing group insurance programmes or worldwide policies should be amended.

b) Secondly, as of 1 January 2014, the scope of the German IPT Act will be extended with regard to its territorial application and will apply to the German Exclusive Economic Zone (Ausschließliche Wirtschaftszone). The German Exclusive Economic Zone extends seawards to a distance of 200 nautical miles (370.4 kilometres) from the baseline. As a consequence, insurance for offshore facilities (drilling rigs, offshore wind parks, fluid flow power plants, etc.) will become subject to the German IPT Act.
Recommendation: Since this amendment does not apply before 1 January 2014, there should be sufficient time to prepare and, if necessary, amend existing insurance policies. In particular, the operator and/or owner of offshore facilities should take into account any additional costs that may result from the taxation of insurance premiums and, if necessary, amend existing insurance policies.

IPT Treatment of Insurance Packages and Separate Disclosure of the IPT

The proposed amendment to the German IPT Act regarding (partial) tax exemption of covers being part of an insurance package was strongly criticised and finally abandoned by the legislator. According to the original draft bill, individual components of an insurance package would only have been exempt from IPT if the respective insurance component was agreed in a separate insurance contract. In abandoning this plan, the legislator cited the decision of the Federal Court of Finance (Bundesfinanzhof, “BFH”) dated 13 December 2011 – Ref. II R 26/10. In the legislator’s view, the decision of the BFH sufficiently clarified the legal position regarding the IPT treatment of insurance packages.

However, we do not agree that the legal position regarding the IPT treatment of insurance packages was settled by the BFH decision. Firstly, the BFH only decided on the tax treatment of so-called combined insurances (combination of several legally independent insurances with separate general insurance terms & conditions in a single insurance policy) and did not deal with the legal qualification for IPT purposes of integrated insurances (combination of several risks in a single insurance contract with combined insurance terms & conditions, e.g. residential building insurance or residual debt insurance) or of supplementary insurances. Secondly, the decision of the BFH has not yet been published in the Federal Tax Gazette (Bundessteuerblatt) and is, therefore, not yet binding on the German tax authorities. As a consequence, it remains to be seen whether or when the tax authorities will follow the decision of the BFH. However, as long as the German Federal Ministry of Finance does not explicitly comment in a contradictory way regarding the IPT treatment of IPT exempt covers being part of an insurance package, the insurance industry should comply with the requirements set forth by the BFH, i.e. that insurance premiums which are (partially) exempt from IPT pursuant to Sec. 4 German IPT Act have to be expressly stated in the insurance contract.

In addition, the German IPT Act requires the separate disclosure of the tax amount and the specification of: (i) the tax rate; (ii) the respective tax exemption rule in case of IPT exempt covers; and (iii) the insurance tax number issued by the Federal Central Tax Office (Bundeszentralamt für Steuern). These specifications may either be included in the premium invoice or in any other document in connection with the insurance relationship (e.g. insurance policy).

Recommendation: In the case of integrated insurances which also include IPT exempt covers, the tax exempt insurance premium should be separately stated in the insurance contract as well as in the premium invoice. Since the IPT treatment has not been finally settled and the separate disclosure of the IPT exempt covers raises new questions (e.g. what happens if the stated tax amount for IPT exempt insurances is not accurate), further development of the legal position needs to be monitored.

The new concept of the Tax Payment Debtor

The legislator has introduced into the German IPT Act a new legal concept called the “tax discharge debtor” (Steuerentrichtungsschuldner). To date, the policyholder owes the insurance premium tax (i.e. the policyholder is the tax debtor) and the insurer has to pay the insurance premium tax to the Federal Central Tax Office for the account of the policyholder. As a consequence, the insurer does not owe the IPT but may be held liable for the IPT payment.

According to the new legal concept, the tax payment obligation shall constitute a separate and legally independent debt of the insurer. Thus, the tax payment obligation of the insurer no
longer qualifies as an accessory liability but rather as an independent tax payment obligation (debt) of the insurer. The insurer may, therefore, be held liable for the IPT payment, even though the IPT may no longer be claimed from the policyholder, e.g. due to the expiry of the limitation period. In case of a tax audit, for example, if the auditor comes to the conclusion that the IPT has not been adequately calculated and/or paid, the fiscal authority may claim payment of the outstanding taxes from the insurer even if the (original) tax payment claim against the policyholder is time-barred and no longer enforceable against the policyholder.

This amendment to the German IPT Act is implemented despite the abovementioned BFH decision where the BFH ruled that the insurer may only be held liable for additional IPT if the tax payment claim (original debt) against the policyholder is still enforceable. This accessory liability has now been abolished by the legislator.

Recommendation: Insurers should consider an adequate contractual indemnity mechanism providing for an indemnity claim against the policyholder if the fiscal authorities claim additional IPT payment from the insurer for completed tax assessment periods.

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