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## *Information Rights of Limited Partners in a German Limited Partnership – Beware of a Rude Awakening*

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### **Introduction**

Information rights play a very important role in German limited partnerships, especially in open investment funds. Information rights of limited partners may contribute to transparency of a project and thus make it more attractive to potential investors and, at the same time, extensive usage of information rights by limited partners may get out of hand and overburden the management and may reduce performance of the entire project.

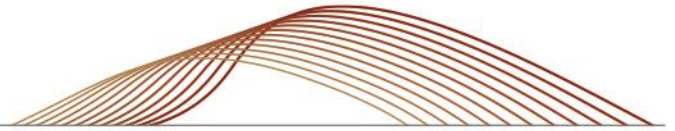
### **Executive Summary**

Access to information (or its restriction) is (and will always be) key in high complex economic transactions. Recent German case law has provided for further clarity about the scope and the pre-requisites of information rights in a limited partnership (*Kommanditgesellschaft*).

Absent of any other contractual information right, the starting point is the statutory information right according to Section 166 para. 1 HGB which entitles each limited partner to request a copy of the financial statement and the respective inspection of the books and records. Based on a judgement of the Higher Regional Court of Munich, this right may be excluded if a public accountant (*Wirtschaftsprüfer*) confirms the correctness of the financial statement in accordance with the statutory provisions and provides an unqualified auditor's statement.

Besides, the German Federal Court of Justice has recently clarified that a limited partner has a general information right in exceptional cases in which such limited partner can demonstrate a good cause (*wichtiger Grund*) in order to give the limited partner the possibility to control the actions of the management. The pre-requisites of an extraordinary information right are met if (i) the legitimate interest of the limited partner is not properly safeguarded by a contractual information right or the information right according to Section 166 para. 1 HGB and (ii) there is a risk of damage. Based on a further judgement of the Higher Regional Court of Munich, the pre-requisites for a good cause are also met in cases of reasonable mistrust, e.g., due to a major error in the prospectus which impacts the economic development of the partnership and which was caused by the management.

Therefore, all judgements give crucial guidance for management teams and investors with respect to German limited partnerships in order to prevent a rude awakening.



## More Detailed Analysis

### A. Statutory Provisions

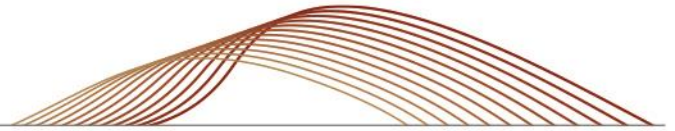
Information rights of limited partners are laid down in Section 166 of the German Commercial Code (*Handelsgesetzbuch*, "HGB"). Pursuant to the information right in Section 166 para. 1 HGB, the limited partner can request a copy of the annual financial statements and check whether these are correct by inspecting the company's books and records.

Moreover and pursuant to Section 166 para. 3 HGB, "certain" information has to be provided upon request if the limited partner can successfully assert the existence of a good cause (*wichtiger Grund*) whereas the law expressly states the balance sheet, the financial statements and the books and records.

### B. Landmark Judgement by the German Federal Court of Justice

In its landmark judgement dated 14 June 2016 (II ZB 10/15), the German Federal Court of Justice (*Bundesgerichtshof*, "BGH") clarified the nature of the information rights pursuant to Section 166 HGB.

- The information rights pursuant to Section 166 para. 1 HGB and Section 166 para. 3 HGB apply alongside each other (in other words: no information right excludes the other).
- The information can either be requested from the limited partnership and/or its general partner.
- Section 166 para. 3 HGB does not establish a general information right. However, to the extent that the limited partner can demonstrate a good cause, a limited partner's information right also covers general information regarding the management actions of the general partner and the respective documents of the limited partnership (which is independent from the financial statements) and which shall provide certain control over the management.
- The BGH has clarified that the extraordinary information right does not grant influence of the limited partners regarding day-to-day management measures.
- Moreover, the BGH has also provided some guidance as to when a good cause is in existence. For example, the pre-requisites of an extraordinary information right are met if:
  - the legitimate interest of the limited partner is not properly safeguarded by a contractual information right or the information right according to Section 166 para. 1 HGB; and
  - there is a risk of damage (either for the limited partnership or the limited partner).
- The burden of proof rests with the limited partner claiming the extraordinary information right.
- The necessity and scope of the information to be provided may vary. When deciding whether and to what extent information is to be provided, the partnership must consider both the limited partner's interest in obtaining the information and the interests of the limited partnership.



## **C. Further Clarification of Good Cause Due to Judgement by the Higher Regional Court of Munich**

Based on the BGH judgement, the Higher Regional Court of Munich has further more elaborated on the pre-requisites of the extraordinary information right (decision dated 22 March 2017 – 7 U 3356/16).

- The belated preparation of financial accounts shall not give rise to the extraordinary information right.
- The same shall apply in case of inadequate information policy (without further specific indications of wrongdoing).
- However, a good cause is shown in case of reasonable mistrust, e.g., a major error in the prospectus which impacts the economic development of the partnership and which was caused by the management.

## **D. Possibility to Exclude the Information Right Pursuant to Section 166 para. 1 HGB**

In this respect, it is noteworthy that the Higher Regional Court of Munich (decision dated 31 January 2018 – 7 U 2600/17) has also decided recently, that it is possible to exclude the information right pursuant to Section 166 para. 1 HGB in the articles of association if and to the extent that a public accountant (*Wirtschaftsprüfer*) (i) confirms the correctness of the financial statement in accordance with the statutory provisions and (ii) provides an unqualified auditor's statement.

The judgement is based on the arguments (i) that Section 166 para. 1 HGB can be excluded by a respective provision in the articles of association given its nature as non-mandatory law (*dispositives Recht*), (ii) that Section 51a GmbH is not (directly or analogously) applicable and (iii) that the limited partners are adequately protected by being provided with the fully audited financial statement.

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*If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings Frankfurt lawyer:*

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