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GERMAN CORPORATE LAW UPDATE – 2023

To Our Clients and Friends:

In no small part owing to the recent momentous economic and political challenges facing Germany, Europe and the world, the past years have seen several ambitious legislative projects come to fruition in Germany that will shape German corporate law and the M&A transactional landscape in 2023 and beyond.

Several of these reforms, but also the jurisprudence of the German courts and decisions of governmental agencies, have repercussions beyond the borders of Germany and are of great interest for international investors and the world-wide M&A community. This is certainly true for the changing regulatory landscape in Germany, where (i) the ongoing drive to re-define and calibrate the German rules on foreign direct investment law (**FDI**) and (ii) the new directly applicable EU Regulation on foreign subsidies distorting the internal market (**Foreign Subsidies Regulation**), which will introduce yet another transaction-relevant pre-clearance procedure besides traditional merger clearance proceedings and the existing FDI procedures, will require up-to-date, cutting edge German legal know-how for any investors looking at German inbound investment.

In much the same vein, the details of the traditionally very strict mandatory reason for filing for insolvency in Germany on account of over-indebtedness continues to be tweaked periodically by the law-makers with a view to softening the economic blows to German companies faced with macro-economic volatilities and crises not of their own making.

Finally, both Parliament and the German courts also feel the need to deal more flexibly with the pressing needs of digitalization and globalization of German corporate formalities, in particular as far as the incorporation of new entities or the certification of signatures of parties located outside of Germany or via video conferencing tools is concerned.

Our Munich office (Birgit Friedl, Marcus Geiss, Sonja Ruttmann and Lutz Englisch) have published a German-language article in the "M&A Review" in February 2023, an English translation of which is now available for our international colleagues and client base.

Originally published in the German language by the M&A Review on February 11, 2023, © M&A Media Services GmbH: "Deutsches Gesellschaftsrecht 2023: Ein turbulentes Jahr"

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1. Foreign Direct Investment Law in the Focus of Protectionism and Geopolitics

The constant changes and steady expansion of the scope of application of foreign direct investment control under the German Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*, *AWG*) and the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*, *AWV*) remain utterly significant for M&A practice. AWV filings have increasingly become an almost regular feature of most cross-border M&A transactions in Germany.

This trend is evidenced by the figures released by the Federal Ministry of Economics and Climate Protection (*Bundesministeriums für Wirtschaft und Klimaschutz, BMWK*) for the year 2022: Compared to 2020, the number of review cases has increased from 160 to 306.[1] If the cases with purely EU notifications[2] are factored in, the increase is even more marked from 189 to 570 cases. In purely statistical terms, this underlines the considerable importance of EU-wide investment screening, in the main based on the Screening Regulation (EU) 2019/452, which entered into force in 2020. However, measures restricting a proposed acquisition, such as prohibitions, ancillary provisions or public-law contracts and orders, were issued or concluded in only seven[3] of the 306 screened cases under the AWV.[4] Amongst those seven cases are the three recent cases described below in which the BMWK did not grant an unrestricted clearance following a decision by the Federal government (*Bundeskabinett*):

Initially, the participation of the Chinese (state-owned) group Cosco in the Port of Hamburg's Tollerort container terminal was only approved in the range of 24.9% of the voting rights, and thus below the 25% of the voting rights considered to be the relevant limit for a blocking minority, instead of the 35% originally sought by Cosco, after intense discussions between the Chancellor's Office and the BMWK, which were also reflected in public discourse.[5] In addition, the proposed right of Cosco to appoint a member of the management board was prohibited, contrary to the original agreement with the selling terminal operator Hamburger Hafen und Logistik AG (HHLA).

In another case, the acquisition of the wafer production of the semiconductor manufacturer Elmos Semiconductor SE by Silex AB from Sweden, which in turn is held by the Chinese (state-owned) group SAI Micro-Electronics, was even completely prohibited by the Federal government (*Bundeskabinett*). This, too, was met with criticism because this decision was said to be a strategic one rather than a step taken to protect important technologies in Germany as a business location. After all, the technology for sale was an obsolete technology which Elmos itself no longer used for its products.[6]

The second prohibition related to the planned acquisition of ERS electronic GmbH, a company which develops solutions for thermal wafer tests and is therefore also active in the semiconductor industry, by a Chinese investor. Details of this prohibition are not published.

This is in line with decisions already taken in the first half of 2022, such as the prohibition of the acquisition of Heyer Medical AG, a manufacturer of respiratory equipment, by the Chinese company Aeonmed in January 2022 and the failure to approve the public takeover of the wafer manufacturer Siltronic AG by the Taiwanese competitor GlobalWafers in May 2022 within the offer period which thus led to a de facto prohibition.

These decisions and the criticism voiced against them have been recognized by the German government, which has reportedly received the first draft of a "China strategy paper" that is expected to be adopted by the second half of 2023. This draft (in addition to various other changes) also provides for further amendments to the German foreign trade laws. In future, not only the direct or indirect acquisition of shares in existing German companies will be subject to investment control, but potentially also incorporating a company and, if applicable, venture capital financing by non-EU/non-EFTA investors in Germany.

In addition, the introduction of a law is being considered which would allow the German government to examine so-called "outbound investments", i.e. investments by German companies abroad, at least in certain countries and industries and, if necessary, to prohibit or restrict them – an approach that would be comparable, for example, to the rights of the government of the United States or China.

With regard to China, in particular, the German government is planning to engage in a closer exchange with the other G7 member states in order to gain a clearer global overview of Chinese investments and thus be able to identify any Chinese acquisition strategies at an early stage and coordinate the handling of (direct) Chinese investments in any G7 member state. This is designed to prevent future dependencies or threats relevant for public security. The focus lies on so-called critical infrastructures, such as transport and smart city infrastructure, data networks (including 5G and, in the future, 6G), cloud computing and electronic payments, as well as electricity and water utilities and hospitals.

A further tightening of the legal reasons that can justify a prohibition is also on the agenda: In addition to the question as to whether a proposed investment is likely to impair the public security or order of the Federal Republic of Germany, another member state of the European Union or regarding projects or programs in the European Union's interest within the meaning of Article 8 of Regulation (EU) 2019/452, (imminent) risks to European sovereignty in future would also justify the prohibition of an acquisition or clearance subject only to specific conditions.

Even though it remains to be seen which of the measures currently under consideration will find their way into an eventual amendment to the AWG and/or the AWV, we believe that the current strategy paper shows the direction in which the government's thoughts on foreign investment control are heading. The extension of scope and tighter controls introduced in recent years will probably not be eased or scaled back even after the acute COVID-19 crisis is confined to history. On the contrary, the importance of German and European foreign direct investment control laws in cross-border or global transactions by (especially) non-EU/non-EFTA investors is rather likely to increase further. This is in line with comparable international tendencies, especially in the USA and China, to assess in-bound investments by third countries rather restrictively.

Thus, the M&A practice will need to remain vigilant for the time being. Foreign direct investment law will remain a fast-changing area that needs to be dealt with on a routine basis, taking into account constant further developments and mindful of regular reforms.

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2. A New Transactional Clearance Requirement – the EU Regulation on Foreign Subsidies distorting the Internal Market

In the future, it will no longer be sufficient for a number of transactions, even outside the sphere of regulated business activities, to assess only merger control and foreign direct investment law notification requirements at local or EU level. The legal landscape has changed because Regulation (EU) 2022/2560 of the European Parliament and of the Council of December 14, 2022, on foreign subsidies distorting the internal market (**Foreign Subsidies Regulation**, **FSR**)[7] has entered into force on January 12, 2023.

While state aid granted by EU member states to companies has for a long time been subject to scrutiny by the European Commission, there has been no equivalent state aid control for subsidies received from third countries. This will change in the future with the FSR, which provides for three components: (i) third-country subsidy control in the case of mergers, (ii) a review process for bids in public procurement procedures, and (iii) a right to conduct ad hoc ex officio investigations if foreign subsidies are at issue which potentially distort the internal market.

In the M&A context this new kind of notification requirement applies to proposed mergers whenever at least one of the merging companies, the acquired company or the joint venture is established in the EU, has an aggregate turnover in the EU of at least EUR 500 million in the prior fiscal year, and (i) in the case of an acquisition, the acquirer or the target company, (ii) in the case of a merger, the merging companies, or (iii) in the case of a joint venture, the companies creating the joint venture and the joint venture have received financial subsidies from third countries (i.e. countries that are not member states of the EU) totaling (on an aggregated basis) more than EUR 50 million within the three fiscal years preceding the notification. However, the European Commission may also impose a notification requirement for mergers before the transaction can be completed even if the thresholds are not met.

Comparable to traditional merger control proceedings, transactions subject to notification requirements are subject to a prohibition to close until due clearance is granted (or the expiry of the relevant deadlines). Mergers carried out in contravention of the prohibition to close are void and, under certain conditions, the unwinding of the transaction may be ordered. In addition, a fine of up to 10% of the worldwide group turnover can be imposed on companies involved in a violation of the prohibition to close. The procedure is otherwise based on the EU merger control procedure, with a Phase I (of 25 working days) and possibly a Phase II (of 90 working days) in place.

In principle, the regulation applies from July 12, 2023. Mergers where the relevant agreement was concluded before this date are expressly not covered. However, the notification requirements for M&A transactions do not apply until October 12, 2023, which means they only cover agreements that (i) are entered into after July 12, 2022, but (ii) have not yet been consummated before October 12, 2023. However, since the Commission may also examine third-country subsidies granted in the (as a rule) last three to a maximum of five years before the entry into force of the FSR, the provisions are de facto relevant as of now, at least for planning purposes.

Beyond an actual obligation to notify any given M&A transaction as such, the FSR is furthermore relevant, in particular, in the context of a due diligence review, because third-country financial subsidies must be notified when bidding in public procurement procedures if (i) the estimated total value of the tender amounts to at least EUR 250 million and (ii) the company participating in such a procurement procedure (as well as, where applicable including its economically dependent subsidiaries, its affiliates and, if applicable, its main subcontractors and main suppliers involved in the same tender under the public procurement procedure) has received financial benefits totaling at least EUR 4 million per third country in the three fiscal years preceding the notification. On the one hand, fines may be imposed for violations of this further notification requirement as well, and the European Commission, on the other hand, may take up and review the measure as if a due notification had been made. Irrespective of this, the Commission can always review any competition-distorting effects of third-country subsidies ex officio and in all market situations, including cases otherwise below the thresholds for mergers and public tenders.

In addition to these formal and procedural requirements to be observed in the future, significant complexity and corresponding uncertainties associated with the FSR are currently caused primarily by the definition of the type of financial contributions that are to be considered relevant third country subsidies and in the assessment of a distortion of competition. In this regard, the text of the FSR itself still leaves some questions unanswered. Corresponding guidelines by the European Commission are to be published by January 12, 2026, at the latest.

In the future, it will be relevant for all three components of the FSR that all financial subsidies received by a group of companies (and received in the last three to five years) are documented comprehensively and in sufficient detail. In the context of structuring due diligence reviews, it will also become important going forward to assess the target's compliance with FSR requirements, potentially critical subsidies received by the target and whether the seller has in the past acquired the target company in compliance with the FSR's notification requirement and has thus validly acquired title in the shares or assets, at all.

In addition, the new clearance procedure for mergers must also be duly factored into any proposed timelines, because concrete information on third-country subsidies received will often not be available in the required level of detail on an ad hoc basis, at least during the initial period of application of the FSR. The draft FSR Implementing Regulation including the proposed notification forms suggest that the burden on the parties will be enormous as a vast amount of specific data and numerous documents will have to submitted.

Last but not least, future transaction documents should include appropriate procedural provisions, including a closing condition of due clearance of the transaction (or the expiry of the relevant waiting periods), and specific indemnities or guarantees to safeguard against any past violations should also be considered. In critical cases, the precautionary lodging of clearance proceedings may also be considered if a third-country subsidy granted in the past could be viewed as potentially distorting competition.

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3. The German Notarial System Caught between Tradition and Digitization

Especially in an international context, German corporate law and its relatively strict formalities are often perceived as unwieldy and unduly formalistic in M&A circles. In the context of company acquisitions, foreign parties almost inevitably come into contact with German notaries, be it because a notarial recording is a formal requirement of the actual GmbH share purchase and assignment agreement under German law, or because notarial signature certifications are required regarding certain powers of attorney but also for German register applications, for example when appointing foreign managing directors.

3.1 News on the Suitability of Foreign Notarial Certifications for Use in Germany

The notarial certification of signatures executed abroad always requires a certain lead time and careful preparation with the foreign signatories and their local legal advisors. Otherwise, the overall process runs a certain risk of unpredictable adversity with the registry courts and possible interim orders and, therefore, avoidable delays.

In this regard, notarizations under German law concern both (i) the actual identity of the actual signatory and (ii) the authenticity of a signatory's signature on the document in question. In cross-border cases involving international signatories, these foreign signatories routinely have their signatures notarized by a foreign notary in their home country in order to save them a potentially arduous and expensive trip to Germany or to a German foreign embassy or consulate in their home country that is deemed equivalent to a German notary.

Such foreign notarial certification of signatures for use in Germany is accepted by the German courts and authorities if the foreign notaries - in addition to certifying the signature as such - also confirm their own public authority to act by means of an apostille or a legalization stamp.

In an important decision in 2022, which is also of great interest to foreign investors and their local notaries and advisors, the Berlin Appellate Court (decision of March 3, 2022, case no. 22 W 92/21) further specified the necessary scope and content of the actual certification language used by non-German notaries in this context:

In particular, the court clarified that foreign certification language and procedures - even if they are typical for and legally effective under the local laws of the originating state - are not automatically sufficient, equivalent and acceptable to German register courts or other public authorities under German law, but must be closely aligned with the specifics of German law. The concrete certification language used by the foreign notary must, as a minimum, convey that (i) the signature was issued in the personal presence of the notary public and (ii) that the notary public verified the identity of the signing person.

As a consequence, various typical foreign law short form signature certifications like "vue par legalization" in French-speaking countries or "sworn to before me" in Anglo-Saxon jurisdictions will face a real risk of rejection by German register courts or other authorities as not adequately covering both of the above components which are required for the full equivalence of a foreign notary's certification language.

Similarly, common practices in some of the Benelux countries where the notary public certifies new signatures provided by the signatory ad hoc by simply comparing them to pre-collected signature samples maintained on the notary's files are also at risk of being rejected due to the fact that the notary public does not personally witness the actual signature process in person.

This decision of the Berlin Appellate Court is not automatically binding for the whole of Germany, but it is a key precedent that should always guide German lawyers and their foreign clients when preparing signature procedures abroad that require the form of notarial certification. The exact scope of the German formalities should be clearly communicated ahead of signature and a suitable text for the notarial certification language should be drafted and agreed with the foreign notary in advance. Otherwise the client faces the risk of onerous delays and, in a worst case scenario, having to repeat the signature procedure if a certified and apostilled or legalized document ends up being rejected by the German authorities.

Practical experience with German register courts has always shown a certain unpredictability. In this respect, it is unclear how judicial practice will deal with those foreign notaries who are required under local law to use exactly prescribed template texts when certifying documents or signatures. In any event, the decision clearly highlights that the sword of German formalities remains remarkably sharp even in times of increased globalization. The meticulous preparation of documents and precise communication of potential risks involved in the procedure, thus, are and remain indispensable puzzle pieces in the toolkit of the German M&A lawyer who successfully operates in the international arena.

3.2 Digitization of Formalities as Possible Hope for the Future?

However, the clarification of the details and substantive requirements of the existing German formal requirements by court-made case law and in legal practice is not the only area that has recently seen increased movement. The trend towards increased digitization also tends to reach corporate law and its formalities, and has in the past years called the German legislature into action.

Both the Notarization Act (*Beurkundungsgesetz*) itself and the German Commercial Code (*HGB*) were fundamentally reformed in 2022 as part of the national implementation of the EU's Digitalization Directive[8] into German law. With this reform, the possibility of notarial recordings and notarial signature certifications via special notarial video conferencing systems was introduced selectively into the German notarial system and the commercial register procedures, even though the technical requirements for the necessary qualified electronic signatures and proof of identity and the use of such notarial video conferencing systems at present are naturally still in their infancy in practice.

As a general rule, it is currently fair to say that notarial recordings or signature certifications via video conferencing are not generally permissible, but only if they are specifically permitted by law in an individual case. Moreover, access to and use of such online services provided by German notarial offices is not open to everyone without restriction, even if they are permitted by law, but are tied to certain expressly stipulated legal requirements.

On the one hand, the question will arise in the future as to whether the incorporation in cash of new GmbHs in Germany, which is now also theoretically possible online, can develop in the medium term into a practical alternative to the acquisition of inactive shelf companies as a transaction vehicle, which has been the common go-to practice for years.

On the other hand, it will be interesting to see to what extent and for whom the now partially permissible online signature certifications can or will replace the physical visit to the notary, e.g. for filing applications to the commercial register.

Even at first glance, however, the new German law appears to contain some high technical hurdles. The verification of the identity of the parties, which the German notary is obliged to carry out even in the case of measures conducted via video conference, is performed in a two-step procedure, firstly by reading out certain enumerative permissible electronic identification documents to establish the electronic identity (eID) of a person and secondly by means of an additional passport photo comparison using a special notarial app on the smart phone of the relevant signatory.

At the moment, for German citizens, this regularly means the valid ID card along with its ID PIN as well as the passport for individual photo comparison.

Nationals of other EU or EEA member states may access the new procedure if they either hold a German eID card (a so-called Union citizen card) or their local eID meets the “high” security level according to the eiDAS Regulation.[9] This is currently the case for many, but not yet all, member states. In addition, they need their local passport for the individual photo matching by the notary.

Third-country nationals, such as citizens of the United States or the United Kingdom, require a formal German residence title together with a PIN or a comparable identification document of another EU or EEA state that again corresponds to the “high” security level.

All in all, the regulation has a strong local-European focus and will exclude genuine third-country nationals without deeper or longer-term residence status in the EU from participation in the individual case. One of the typical interest groups in the M&A sector, e.g. the newly appointed foreign national and resident managing director of a freshly acquired German target company designated by an investor in the United States, the United Kingdom or the Middle East, will thus continue to be dependent upon the certification of their signatures in their home country before local notaries and the time-consuming apostille or legalization procedure.

For EU citizens and managing directors, it remains to be seen whether and how the new procedural options via video conferencing procedure will become accepted in practice and, in particular, whether they will make it possible to save time and effort in the case of repeated notarizations by the same notary via online notarization.

For the moment - and one would assume until further notice - the use of foreign notaries to certify signatures required in Germany and the acquisition of shelf entities therefore will remain, in our practical experience, the preferred alternative and the path routinely chosen. However, it is undoubtedly a worthwhile exercise to monitor the new regulation and the continuous digitization of legal transactions in the future with open eyes and not to reject them out of hand as new, unwieldy or unfamiliar.

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4. Temporary Adjustments of German Insolvency Law in Response to the Energy Crisis

The German legislator had responded to the COVID-19 pandemic by temporarily relaxing Germany's traditionally strict insolvency filing requirements pursuant to the COVID-19 Insolvency Suspension Act (*COVInsAG*) for companies that had fallen into financial distress through no fault of their own due to the effects of the pandemic.

In 2022, the next unexpected macroeconomic crisis followed when the impact of Russia's attack on Ukraine and the effect of the subsequent sanctions against Russia were beginning to be felt. In addition to problems within international energy supply chains, this also led to sharply rising energy prices and an explosion in production costs for numerous companies, which in many cases could not simply be passed on to customers. Not least because of the resulting planning uncertainties, there is a threat of sudden financial difficulties even for otherwise "healthy" companies which are in the process of working on solutions to switch to less scarce energy resources or otherwise reduce costs.

In response to the energy crisis, on October 20, 2022, the German Bundestag passed, among a bundle of other measures, the Act on a Temporary Adjustment of Restructuring and Insolvency Law Provisions to Mitigate the Consequences of the Crisis (*Sanierungs und insolvenzrechtliches Krisenfolgenabmilderungsgesetz - SanInsKG*), which came into force on November 9, 2022. Key elements of the new law, which relate exclusively to the insolvency reason of over-indebtedness (*Überschuldung*) under section 19 of the German Insolvency Code (*Insolvenzordnung - InsO*), are:

- **Shortening the period for the continuation prognosis under the Insolvency Code as well as for own-administration proceedings and restructuring plans**

The reason for filing for insolvency due to over-indebtedness can be excluded if a positive continuation prognosis exists, irrespective of mathematical over-indebtedness on the basis of an over-indebtedness balance sheet. The rolling forecast period was previously twelve months in accordance with section 19 (2) of the InsO. During this period, there had to be an overriding probability that the company would be able to meet its liabilities as they fall due. Under section 4 (2) sentence 1 of the SanInsKG, this forecast period is now reduced to four months on a transitional basis. Thus, if a company found itself in a financial crisis on December 20, 2022, it previously had to establish a positive cash-flow until December 20, 2023 in order to establish a positive continuation prognosis under the general rules. Now, a positive forecast period until April 20, 2023 is sufficient under the new regulation.

The government draft[10] justified this reduction of the forecast period with current uncertainties in forecasts due to price volatilities and the continuation of such uncertainty for the foreseeable future as to the nature, extent and duration of the crisis, which means that forecasts can often only be based on uncertain assumptions. Considering that personal liability and criminal law risks for managing directors of such companies can often only be safely avoided by filing for insolvency, such insolvency filings would also affect companies whose ability to continue its business would be beyond doubt under normal circumstances (without the current price volatilities and uncertainties).

In parallel, the SanInsKG shortens the planning periods for own-administration proceedings (*Eigenverwaltungsverfahren*) and restructuring plan proceedings (*Restrukturierungsplanverfahren*) pursuant to section 270a (1) no. 1 of the InsO and section 50 (5) no. 2 of the StaRUG from six to four months. In view of the current forecast uncertainties, this change is intended to facilitate the planning of potential own-administration proceedings and court stabilization orders in cases where out-of-court restructuring measures are no longer sufficient.

- **The extension of the maximum time limit for an insolvency filing**

As a rule, insolvency filings must be lodged immediately after the reason for filing for insolvency has arisen. However, if at the time an insolvency reason first arose, there is a reasonable prospect that such insolvency reason can be overcome, a maximum grace period of six weeks was previously applied in the case of over-indebtedness under section 15a (1) sentence 2 of the InsO. This maximum period has now been increased from six weeks to eight weeks by the SanInsKG. However, as in the past, this maximum grace period may only be exhausted for as long as there is a real and demonstrable prospect that the reason for over-indebtedness can indeed be overcome in the grace period. If this prospect does not (or no longer) exist, the insolvency filing must be lodged immediately, even under the SanInsKG.

- **No causality requirement**

The application of the new rules does not require that the adverse developments on the energy markets and the uncertainty affecting a forecast actually led to the crisis in the individual case. According to the legislator almost all market participants are, at least indirectly, affected by the current conditions and defining a sufficient degree of impact in the individual case would lead to further uncertainties.

- **Temporary application**

The adjustments under section 4 (2) sentence 1 of the SanInsKG only apply for a temporary period until December 31, 2023. However, if these temporary adjustments are not extended beyond December 31, 2023, or are not extended in good time ahead of their expiry, the actual relevant date for examining whether an insolvency filing should be made is likely to be earlier in 2023, namely as early as the beginning of September 2023. If, on September 1, 2023, the management determines that sufficient cash-flow is secured for four months but not for the planning period of twelve months that will again apply from January 1, 2024 going forward, it cannot be ruled out at present that de facto a planning period of twelve months will have to be applied again (and, if necessary, an insolvency filing must be made) as early as the beginning of September 2023 in order to avoid an allegation of a delayed filing at a later point in time.

The new rules have a direct impact on the managers of affected companies. In times of great uncertainty regarding energy and commodity prices, high inflation and difficulties in supply chains, the shortening of the planning period for the continuation prognosis will reduce the liability risk for managers based on a belated insolvency filing due to over-indebtedness. Nevertheless, in view of the fact that the adjustments may only apply for a short period of time and the continuing obligation to identify financial distress at an early stage in accordance with section 1 (1) of the StaRUG, managers must also keep an eye on longer planning periods in parallel and, if necessary, initiate restructuring measures at an early stage.

Also, measures to monitor and ensure full solvency continue to be relevant, as the obligation to file for insolvency due to illiquidity (*Zahlungsunfähigkeit*) continues to apply unchanged regardless of the SanInsKG. In addition, the adjustments directly affect only the provisions in the Insolvency Code on over-indebtedness as such and the maximum grace period for filing for insolvency on account of over-indebtedness. Other liability risks and criminal law offences, such as deceiving business partners about the possibility of settling future liabilities, are accordingly not excluded.

Business partners could also benefit from the temporary provisions, as they are generally no longer exposed to accusations of aiding and abetting the offence of delaying insolvency during the period in question when dealing with the debtor. However, the next few months will show whether lenders are also prepared to provide "fresh money" to a company that does not have to file for insolvency for the time being merely because of temporary exemptions from the filing obligation. In any case, the risk that new loans granted during the pre-insolvency crisis may be regarded as damages caused contra mores in the event of a subsequent insolvency cannot be eliminated without a sound formal restructuring opinion. The strict requirements for restructuring opinions, in turn, are likely to remain unaffected by the SanInsKG.

However, the shortened forecast period for over-indebtedness offers an opportunity for the scope of application of the stabilization and restructuring framework under the StaRUG. The number of companies that are subject to impending illiquidity (*drohende Zahlungsunfähigkeit*) but not yet over-indebted and can take advantage of the StaRUG could increase while the SanInsKG is in force. A company that is not fully financed for a period of twenty-four months is facing impending illiquidity. Previously, however, it was already over-indebted (and therefore subject to an obligation to file for insolvency) if the cash-flow was not secured for twelve months. The relevant time window for the use of the StaRUG was therefore twelve months. With the reduction of the planning period for cash-flow forecasts in the case of over-indebtedness to four months, the time window during which there is "only" impending illiquidity is therefore temporarily increased to twenty months.

Even if the adjustment of the forecast period makes sense for essentially healthy companies under the current crisis situation, in practice, the SanInsKG is likely to affect only a small group of companies. The insolvency reason of over-indebtedness without the parallel existence of illiquidity has historically always been the rare exception among the reasons for filing for insolvency. In the current situation, however, companies are often also experiencing an (acute) liquidity crisis due to rising production costs. As mentioned above, the obligation to file for insolvency in the case of illiquidity remains unchanged despite the SanInsKG. However, companies that are already working on effective solutions to counter the energy crisis in the medium term may benefit from the adjustment in the longer term.

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[1] These figures are taken from the BMWK website: www.bmwk.de/Redaktion/DE/Publikationen/Aussenwirtschaft/investitionsprufung-in-deutschland-zahlen-und-fakten.pdf?blob=publicationFile&v=10.

[2] I.e. cases in which there is no national screening procedure (for example because the target company concerned does not have a subsidiary in Germany), but the BMWK has been notified exclusively by one or more other EU member states as part of the EU-wide screening mechanism.

[3] Status as of January 9, 2023, 39 cases filed in 2022 were still pending at that point in time, so the number may increase.

[4] This does not include cases where the acquirer withdrew the application for clearance prior to a decision by the BMWK and abandoned the proposed transaction.

[5] See, for example, www.sueddeutsche.de/politik/hamburger-hafen-cosco-china-1.5682148.

[6] See for example: www.zeit.de/wirtschaft/unternehmen/2022-11/elmos-bund-untersagt-verkauf-von-chipfabrik-an-chinesischen-investor?utm_referrer=https%3A%2F%2Fwww.google.com%2F.

[7] EU Regulation (EU) 2022/2560 of the European Parliament and of the Council of December 14, 2022 on foreign subsidies distorting the internal market; available in English at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022R2560&qid=1673254237527.

[8] Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law, OJ 2019 L 186/80.

[9] Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, OJ 2014, L 257/73.

[10] Amendment by the parliamentary groups of the SPD, Bündnis 90/Die Grünen and the FDP to the bill of the Federal Government - printed matter 20/2730, p. 3.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the developments discussed in this article. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's German corporate practice groups as listed below, or the authors:

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