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M&A in 2024 – Relevant Legal Changes, An Outlook

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Introduction

This article summarizes some of the most recent upcoming developments and legislative changes in German corporate law that will impact the M&A market in the near future. Once again, the focus is on investment control law where (i) a fundamental reform is on the horizon that will lead to a uniform investment control law and (ii) the European Court of Justice (ECJ) recently clarified various aspects of the so-called Screening Regulation (see section 1). We further outline the changes relevant to transaction practice as a result of the Financing for the Future Act (ZuFinG), a law with the aiming to increase the efficiency of the German capital market and thereby the attractiveness of Germany as a financial center (see section 2). Finally, we provide an overview of the Act on the Modernization of Partnership Law (MoPeG), which has now entered into force after almost two years lead time (see section 3).

1. Investment control law – to be continued

Investment control has been a constant focus of attention in Germany for several years – most recently in connection with the acquisition of the robotics start-up Franka Emika: Before the eventual takeover by Agile Robots AG, two other interested investors had – ultimately unsuccessfully – approached the Federal Ministry of Economics and Climate Protection (BMWK) about Agile Robots' (alleged) connections to China with the aim of ensuring that the acquisition was prohibited.

This case illustrates the area of tension in which investment control operates: Protection of legitimate security interests, on the one hand, and openness to investments in Germany, on the other hand, where not every connection by a (potential) investor to countries that are not only partners, but also competitors and/or systemic rivals, should lead to a ban on intended investments in sensitive technologies. In order to provide guidelines to navigate this area of tension, investment control law has been the subject of various selective reforms in recent years.

1.1 Planned introduction of a uniform investment control law

The German government is now planning a comprehensive reform of investment control law for 2024, with the aim of introducing a uniform investment control act. To date, there are two key papers published on this planned law summarizing its anticipated corner stones. One potentially significant change for M&A practice relates to the expected expansion of the acquisition transactions covered by investment control. The legislator is likely to focus on closing any current loopholes, such as the granting of IP licenses or the sale of IP rights outside of M&A transactions, which can lead to an outflow of sensitive technologies abroad. So-called greenfield investments, i.e. the direct market entry of a foreign investor, for example by founding a company (a structure that is currently not subject to investment control proceedings), are also likely to become subject to German investment control procedures under the new investment control laws.

1.2 "Xella" judgment of the ECJ

To close loopholes may also be a relevant objective in the context of the ECJ's ruling in the Xella Magyarország case: In October 2021, the Hungarian subsidiary of the construction and insulation materials group Xella held by Lone Star based in the USA via a fund from Bermuda was prohibited from acquiring its supplier Janes és Társa by reference to Hungarian investment control law. The prohibition was justified by the investment allegedly posing a threat to the security of raw material supplies in Hungary. The investment was classified as indirectly foreign to the EU by the Hungarian authorities. The Hungarian court that was called to decide on the lawfulness of the investment prohibition referred the case to the ECJ, as it considered the ministry's decision to be a possible violation of EU fundamental freedoms: EU investors enjoy the protection of freedom of establishment when acquiring a stake in a company that guarantees a controlling influence (regularly 20-25 % voting share and higher) and the protection of the free movement of capital when acquiring a lower stake. The freedom of establishment does not apply to non-EU investors. They only enjoy the benefit of the free movement of capital when acquiring a shareholding that does not guarantee a controlling influence.

The ECJ declared the prohibition in the referral proceedings to be unlawful due to a breach of the freedom of establishment, as there was no “actual and sufficiently serious threat to a fundamental interest of society” that could justify the restriction. This decision is interesting inter alia because the ECJ commented for the first time on the so-called Screening Regulation ((EU) 2019/452): The regulation was not relevant in the present case, as the direct acquirer was an EU investor with its own economic activity in the EU. In such cases, investments by EU investors are, according to the ECJ, not covered by the Screening Regulation even if (the) shareholders of the direct EU investor are based outside the EU. Any restrictions regarding the planned investment of an EU investor must therefore meet the high requirements for a justified restriction of the relevant fundamental freedom.

The ECJ ruling does not directly apply to German foreign trade law and its application by the BMWK. However, the BMWK also regularly assumes an indirect acquisition by a non-EU foreigner and the application of the restriction options pursuant to Sections 55 et seq. of the German Foreign Trade Ordinance (AWV) if the directly acquiring EU investor has at least one shareholder with a relevant shareholding in a non-EU country. Based on this recent ECJ ruling it is doubtful whether this administrative practice meets the strict requirements of ECJ case law. For planned M&A transactions, investments in Germany should preferably be structured in such a way that they are made by subsidiaries already active in the European market. In addition, judicial review of negative decisions by the BMWK could be considered, at least in cases where the ministry’s reasoning is potentially not sufficient to justify any restriction of the relevant fundamental freedom.

2. Financing for the Future Act (Zukunftsfinanzierungsgesetz – ZuFinG) – Strengthening Germany as a financial center

The ZuFinG, which came into effect on December 15, 2023, involves amendments to 34 laws and regulations in the areas of corporate, securities, capital markets, tax and supervisory law. The primary objective of the Act is to enhance the performance of the German capital market and increase the appeal of Germany as a financial center. This will be achieved by facilitating access to the capital market and raising equity for start-ups, growth companies and small and medium-sized enterprises (SMEs), which are the drivers of innovation. Below, we summarize briefly some of the most significant changes to company and capital market law. Also important is the improved tax framework conditions for employee share ownership programs, in particular by increasing the tax-free amount to EUR 2,000 and extending the provisions on deferred taxation.

2.1 Admission of multiple voting shares

In accordance with an international trend towards relaxing the “one share, one vote” principle and in anticipation of the planned EU Listing Act, German stock corporations, Societates Europaeae and partnerships limited by shares will also have the ability to issue registered shares with multiple voting rights in the future, both when the company is founded and in the event of subsequent capital increases. With the authorization of multiple voting shares, company founders in particular can maintain control over the strategic direction of the company even after the IPO. However, it is important to note that the resolution of the shareholders’ meeting to issue multiple voting shares requires the approval of all shareholders, which makes their introduction only realistic before an IPO. To ensure protection for minority shareholders and investors, additional restrictions are also provided. In particular, multiple voting rights are restricted to a maximum of ten times the single voting right, and for votes on the appointment of auditors and special auditors, multiple voting shares only grant one vote. For listed companies and companies whose shares are included in over-the-counter trading, the multiple voting rights expire upon share transfer and no later than ten years after the stock exchange listing or inclusion in over-the-counter trading, unless the articles of association stipulate a shorter period. This period may be extended by up to ten additional years by amending the articles of association, which requires a three-quarters majority of the capital.

2.2 Electronic shares

Since 2021, the German Electronic Securities Act (eWpG) allows for the issuance of bearer bonds as electronic securities. In the future, registered shares can also be issued as electronic shares through entry in a central register maintained by a securities collection bank or a central securities depository or by entry in a crypto securities register. However, the electronic issuance of bearer shares is restricted to central register securities to mitigate money laundering risks.

2.3 Facilitation of capital increases

The volume limit for cash capital increases with simplified exclusion of subscription rights has been raised from 10 % to 20 %. This harmonizes it with the 20 % volume threshold for the listing of new shares without a prospectus, which has been provided for by the EU Prospectus Regulation for several years. Additionally, the volume thresholds for the creation of conditional capital for business combinations and the granting of subscription rights to employees and managers have been increased from 50 % to 60 % and 10 % to 20 %, respectively. Moreover, in the case of capital increases with the exclusion of subscription rights, the resolution for capital increase can no longer be contested on the grounds of a low issue price. The issue price can now only be reviewed during an appraisal procedure after the capital increase has been executed. This reduces the risk of the capital measure being blocked.

2.4 Initial public offering via a shell company (German SPAC)

Following the U.S. model of the IPO via Special Purpose Acquisition Companies, special regulations were created in the Stock Exchange Act for shell companies (so-called Börsenmantelaktiengesellschaften – BMAG), i.e., non-operating companies whose sole purpose is to carry out a company acquisition, as described in more detail in the listing prospectus. The acquisition requires the approval of the shareholders' meeting, following their own IPO. A BMAG will be dissolved and wound up, if the corresponding transaction is not carried out within the period of 24 to 36 months stipulated in the articles of association, which can be extended to a maximum of 48 months by amending the articles of association.

It remains to be seen whether these changes will lead to the desired revitalization of the German capital market and an increase in IPOs of growth companies in Germany in the future.

3. MoPeG – Reform of partnership law

The various forms of partnerships are ubiquitous in German business life. Civil law partnerships (GbR) have always been common in real estate transactions, and many of the "hidden champions" of the SME sector are general partnerships (OHG) or limited partnerships (KG), in particular the widely used GmbH & Co. KG.

On January 1, 2024, the Act on the Modernization of Partnership Law (MoPeG), a significant reform of German partnership law, came into force. In certain areas, the MoPeG mainly implements developments that already were well-established by case law and in practice. In other areas, however, the MoPeG also introduces genuine innovations.

Some of the regulations of general relevance are discussed below.

3.1 Determination of the contractual seat of partnerships

In future, registered partnerships will be able to determine their corporate seat in Germany by contractual choice. Their actual center of administration and/or the principal place of business activities may therefore differ from the corporate seat and be located elsewhere in Germany or abroad. From a German law perspective, a foreign center of administration no longer leads to a loss of recognition as a German partnership in the way it used to. The often tricky assessment of the actual location of a partnership's center of administration and the resulting legal uncertainties have lost most of their relevance under the new law.

Nevertheless, caution is still required when (re)locating the actual center of administration outside of Germany, as such step still requires the recognition of the (German) partnership in the respective foreign country either on the basis of the freedom of establishment under the Treaty on the Functioning of the European Union or on the basis of any other recognition treaty. This must be checked in each individual case in accordance with the laws of the relevant foreign country in advance of any proposed relocation.

3.2 Company register for GbRs

The most visible element of the reform is probably the introduction of a publicly accessible new company register specifically for GbRs based on the model of the existing commercial register. In future, the existence of a GbR, the persons authorized to represent the GbR and its current partners are reflected in the GbR's extract in the new register. Due to this new level of transparency, the legal uncertainties often faced by business partners of GbRs should be eliminated in the future.

Entry in the company register is voluntary in principle. However, for a number of GbRs there is a de facto obligation of prior registration. This follows from the rules that provide that, in future, (i) only registered GbRs can be entered in the commercial register as partners of an OHG or a KG and (ii) only registered GbRs can be included in the shareholder list of a German limited liability company. Also, the registration of a GbR as (iii) owner of real property can only be effected in the land register in case of the partnership's prior registration in the company register. Further, participation of a GbR (iv) in measures under the German Transformation Act also requires its prior registration.

The foregoing considerations should be reason enough for all GbRs to analyze whether such registration should be applied for promptly. However, it should be noted that registered GbRs are in parallel subject to the requirement of disclosure of their ultimate beneficial owner in the transparency register. In the context of corporate law measures or transactions, the failure to effect any required prior registration of a GbR in the company register may result in considerable delays. In the context of M&A transactions, it may be advisable to provide for prior registration as a condition precedent for completion and to contractually ensure the cooperation of all partners of the GbR with regard to the entry in the company register.

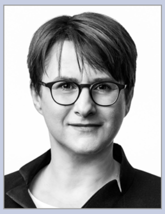
3.3 Other new regulations for GbRs, OHGs and KGs

GbRs that are established in order to participate in legal transactions are now expressly recognized by law as having legal capacity. For these GbRs, the MoPeG provides a secure legal framework. In addition, a purely internal partnership type without legal capacity is also provided for in the law.

General provisions for all types of partnerships will in future be set forth under GbR law and will apply to other commercial partnerships by way of a general reference (e.g. regulations on contributions and voting rights, the prohibition to acquire own interests or the information rights of personally liable partners).

For OHGs and KGs, there are new rules how to handle defective (i.e. void or voidable) resolutions. GbRs may opt-in to the application of corresponding provisions via their partnership agreements.

In summary, the MoPeG generally maintains the high degree of flexibility for partnership agreements. Nevertheless, it must be examined for each partnership type in each individual case whether the new statutory provisions require amendments of existing provisions in the current partnership agreement or whether there is a need to clarify the future precedence of the contractually agreed provisions over the new dispositive (i.e. non mandatory) statutory law.



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