GIBSON DUNN

January 14, 2021

2020 YEAR-END GERMAN LAW UPDATE

To Our Clients and Friends:

In 2020, the COVID-19 pandemic taught the world another lesson about the unpredictability of life. Each country responded to the challenges posed by the pandemic in its own way. The German Government in its familiar technocratic and sober approach quickly unlocked massive financial resources to mitigate any immediate economic damage. It supported a further relaxation of the purse strings at EU level and put legislative acts in place that helped manage the uncertainty in the most affected industries for now. Hit by a second wave of the pandemic in an unexpectedly hard way, Germany is now left wondering whether the country really was smart in the spring or just lucky. The new year 2021 will provide the answer to this question.

The disruption caused by the pandemic is not over; it has just started. On a positive note, we have seen an unprecedented move towards more efficient means of communication through the use of new media and the leveraging of technology in general. For example, long overdue changes to the handling of annual shareholder meetings of German joint stock corporations were implemented within weeks to facilitate the annual reporting season under lock-down conditions. By providing short term work allowances to compensate for losses in remuneration resulting from temporary cuts in working hours, the German system helped employers to hold onto their highly-skilled work force in the hope of a quick recovery thereby avoiding immediate hardship for those hit hard by the imposed restrictions. A speedy process to amend legislation addressing topics from suspending rent payments and interest payments to the temporary relaxation of insolvency filing obligations flanked by a coherent communication strategy added to the sentiment of most Germans of having been governed well, so far.

2021 will be different and bigger challenges certainly lie in wait. Instead of throwing hundreds of billions of Euros at the problem, German politicians will now have to explain to the public who is going to pick up the bill for all the important measures taken. The inadequate accords reached with the twenty-seven European Union members states that remain after Brexit designed to stabilize the weakest member state economies will require rigorous implementation and oversight. To date, hope rests on what has been a series of blink-decisions taken in face of an imminent European crisis coupled with the expectation that this will all result in a more aligned and more integrated European Union. A very optimistic scenario, indeed.

Apart from the emergency measures triggered by the COVID-19 pandemic, the EU and Germany have set and started to implement an ambitious agenda with regard to the regulation of international trade (by the introduction of tightened rules on foreign direct investments), antitrust laws (responding to the topics of market dominance in the digital age), consumer protection (with the introduction of collective redress within the EU), increased corporate responsibility in the white collar area (with the long-discussed introduction in Germany of criminal corporate liability), and the fight against money laundering and tax evasion.

And, finally, Angela Merkel's term ends in the fall of 2021. She will have been the longest serving Chancellor in German history. This brings a 16-year era to an end that served Germany well and also helped Europe to navigate through difficult waters. She is expected to leave a temporary vacuum in German and European leadership that comes at the wrong time and is difficult to be filled in the short term.

Is this a dramatic crisis? No. Should we be concerned? Maybe. Should we act? Yes.

There are many things that each of us can do to turn the many challenges ahead into something new and potentially better. Here is our favorite list: First, stay healthy, look after yourself and your loved ones. Second, take informed and careful decisions each day to tackle the problems ahead, instead of rushing to beat "long-term-trends" with blurry visionary steps or short-sighted activism. Third, stay connected with the world, avoid narrow-minded thinking and a further fragmentation of the world, while staying connected to your local community. Learn where you can, challenge where you can, and help where you can. We are all in this together and only when we join forces, will we navigate the challenging times ahead of us.

At Gibson Dunn, we are proud and honored to be at your side to help solve your most complex legal questions and to continue our partnership with you in the coming year in Germany, in Europe and the world. We trust you will find this German Law Year-End Update insightful and instructive for the best possible start in 2021.

Table of Contents

---

1. Corporate, M&A

1.1 Next Round - Virtual-only Shareholder's Meetings of Stock Corporations in 2021

The temporary COVID-19-related legislation of March 2020 allowing to hold virtual-only shareholders' meetings of stock corporations in 2020[1] has been extended until the end of 2021 by means of an executive order of the German Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*) issued in October 2020. While the legal framework of the temporary regime for virtual-only meetings remained unchanged, the regulator strongly appealed to the management of the relevant corporations to use the emergency instrument of a virtual-only meeting in a responsible manner, taking into account the specific individual circumstances due to the pandemic situation.

In addition to this mere moral appeal by the executive branch, just before year-end and somewhat surprisingly, the parliamentary legislator modified the March 2020 legislation with regard to the shareholders' right to information in virtual-only meetings as a concession to the widespread criticism in the aftermath of the March 2020 legislation. The March 2020 legislation had reduced the shareholders' right to information to a mere possibility to submit questions in electronic form prior to the meeting, leaving it up to management in its sole discretion as to whether and in which manner to answer such questions. Additionally, it allowed management to set a submission deadline of up to two days prior to the meeting.

The October legislation, addressing widespread criticism raised not only by shareholder activists and institutional investors but also by legal scholars, restored the shareholder's right to ask questions in the 2021 season for shareholders' meetings taking place after February 28, 2021: It will again constitute a genuine information right requiring management to duly answer all shareholders' questions submitted in time prior to the meeting. In addition, the cut-off deadline for the submission of shareholders' questions may not exceed one day.

Furthermore, the parliamentary legislator also clarified in its last minute amendments that counter-motions by shareholders that are submitted for publication with the company at least 14 days prior to the shareholders' meeting must be dealt with in the virtual-only shareholders' meeting if the submitting shareholder has duly registered for the virtual shareholders meeting.

The virtual-only format is available to shareholders' meetings of stock corporations which are held by December 31, 2021. In light of the current pandemic, the extensive use of the virtual-only format and the frequently observed extraordinary high participation-rate of shareholders in 2020, it can be expected that most stock corporations will again hold their shareholders' meetings in a virtual-only format in 2021.

Back to Top

1.2 Legislative Initiative to Strengthen Market Integrity after the Wirecard Scandal

In the aftermath of the spectacular collapse of German payment solutions provider Wirecard last summer, the German Government on December 16, 2020 presented a draft bill (*Regierungsentwurf*) for an Act on the Strengthening of the Financial Market Integrity (*Finanzmarktintegritätsstärkungsgesetz - FISG*) which aims to restore and strengthen trust in the German financial market.

The draft bill provides for new rules designed to bolster both the internal (in particular, via the supervisory board) and external (e.g. by strengthening the independence of external auditors and their supervision) corporate governance of companies of public interest, including listed companies.

This includes, in particular, the explicit obligation for the management board of a listed stock corporation to implement an adequate and effective internal control and risk management system. Furthermore, the draft bill also aims to strengthen the accounting and audit expertise present in the supervisory board of listed companies: Whereas the law currently only requires that, at least, one supervisory board member shall have expertise in the fields of accounting and auditing, the draft bill requires that, at least, one board member has expertise in the fields of accounting and, at least, one other board member has expertise in the fields of auditing, thus increasing the minimum number of experts to, at least, two board members. In addition, the establishment of an audit committee by the supervisory board shall no longer be discretionary but becomes compulsory for companies of public interest, including all listed companies.

In order to strengthen the independence of the auditor as part of a company's external safeguards, the draft bill suggests the tightening of the mandatory external rotation. The external rotation of the auditor shall occur no later than after ten years for all companies of public interest, including listed companies, thus eliminating national exemptions from the EU audit regime, which currently allow for a maximum term of 24 years, and introduces further restrictions on non-audit services that can be provided by the auditor.

In reaction to the widespread criticism leveled at the response of Germany's Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, *BaFin*) to the events that led to Wirecard's collapse and the perceived failure of the supervisory and enforcement procedures and mechanisms in financial reporting, the draft bill also proposes revisions to the current supervisory and enforcement procedures, including further-reaching competences for the financial regulator *BaFin* itself.

Last but not least, the draft bill provides for increased civil liability for damages caused by auditors as well as a tightening of criminal and administrative penalties for misrepresentations made by company representatives and statutory auditors in connection with the preparation and audit of company accounts.

The Government's draft bill essentially corresponds to a joint ministerial draft of October 26, 2020 by the Federal Ministry of Finance (*Bundesministerium für Finanzen*) and the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*), which had been met with widespread criticism arguing that the proposals were not going far enough and failed to address the shortcomings of the current system which were also identified by the EU's securities market regulator, the European Securities and Markets Authority (*ESMA*), in its special report on the Wirecard collapse published in November 2020. It remains to be seen whether and to which extent this criticism will be taken up by the lawmaker in the upcoming parliamentary process by providing for more fundamental changes and reforms.

Back to Top

1.3 German Foreign Direct Investment Control – Rule-Tightening in Light of COVID-19 and the EU Screening Regulation

In December 2020, for the very first time, the German Federal government officially prohibited the indirect acquisition of a German company with specific expertise in satellite/radar communications and 5G millimeter wave technology by a Chinese state-owned defense group. The decision is the culmination of an eventful year which has seen various changes to the rules on foreign direct investments (the "**FDIs**") in light of, *inter alia*, COVID-19 and the application of the EU Screening Regulation[2].

Below is an overview of the five key changes that have become effective over the course of 2020:

1. Extension of the catalog of select industries triggering a mandatory filing with the German Ministry of Economy and Energy (*Bundesministerium für Wirtschaft und Energie*, *BMWi*) upon acquisition of 10% or more of the voting rights in a German company by a non-EU/non-EFTA acquirer to include (i) personal protective equipment, (ii) pharmaceuticals that are essential for safeguarding the provision of healthcare to the population as well as (iii) medical products and in-vitro-diagnostics used in connection with life-threatening and highly contagious diseases.

2. No more gun-jumping: All transactions falling under the cross-sector review that require a mandatory notification (*i.e.*, FDIs of 10% or more of the voting rights by a non-EU/non-EFTA investor in companies active in one or more of the conclusively listed select industries) may only be consummated upon conclusion of the screening process (condition precedent).

3. Introduction of penalties (up to five years imprisonment or criminal fine (in case of willful infringements and attempted infringements) or an administrative fine of up to EUR 500,000 (in case of negligence)) for certain actions pending (deemed) clearance by the BMWi, namely: (i) enabling the investor to, directly or indirectly, exercise voting rights, (ii) granting the investor dividends or any economic equivalent, (iii) providing or otherwise disclosing to the investor certain security-relevant information on the German target company, and (iv) the non-compliance with enforceable restrictive measures (*vollziehbare Anordnungen*) imposed by the BMWi.

4. Implementation of the EU-wide cooperation mechanism as required under the EU Screening Regulation.

5. Expansion of the grounds for screening under German FDI rules to include public order or security (*öffentliche Ordnung oder Sicherheit*) of a fellow EU member state as well as effects on projects or programs of EU interest, and tightening of the standard under which an FDI may be prohibited or restrictive measures may be imposed from "endangering" (*Gefährdung*) to "likely to affect" (*voraussichtliche Beeinträchtigung*) the public order or security, so as to reflect the EU Screening Regulation.

For additional details on these and other changes in 2020 to foreign investment control and an overview on the overall screening process in Germany, please refer to our respective client alerts published in May 2020[3] and November 2020[4].

Further changes to the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*, *AWV*) are announced for 2021. In particular, the catalog of critical industries are to be extended further. Based on earlier announcements by the BMWi, artificial intelligence, robotics, semiconductors, biotechnology and quantum technology will likely be added to the catalog of critical industries.

Back to Top

1.4 Gender Quota for (Certain) Management Boards on the Horizon

Five years after the (first) Management Position Act (*Führungspositionen-Gesetz*) for the first time implemented a mandatory female quota for the composition of supervisory boards of certain German companies in 2016,[5] the German government coalition parties now support a mandatory quota also for management boards. In the future, under the contemplated Second Management Position Act (*Zweites Führungspositionen-Gesetz*) (i) listed companies, (ii) which are subject to the 50% employee co-determination under the Co-Determination Act (*Mitbestimmungsgesetz*) and (ii) whose management board consists of more than three members, must appoint at least one female management board member whenever a position becomes vacant.

The new management board quota will only apply with regard to the rather limited number of companies who meet all of the above criteria. However, it is nevertheless a strong signal by the German coalition parties to a German business community in which voluntary commitments to increase gender equality have failed to gain significant momentum in the past. Under the 2015 Management Position Act which had introduced the mandatory gender quota for supervisory boards, companies were, in addition, requested to set themselves gender targets for the composition of their management boards. Rather than taking the opportunity to consider voluntary targets in line with the specific circumstances of a company, a large number of affected companies simply set the target at "zero" year after year. By contrast, the mandatory 30% gender quota for the composition of supervisory boards has not just been met but even exceeded and is currently polling at approximately 37%.

For all companies in which governmental authorities hold a majority, the contemplated Second Management Position Act will also (i) provide for a mandatory 30% female quota for the composition of supervisory boards and (ii) introduce a minimum number of mandatory female management board members. In addition, public law corporations (*Körperschaften des öffentlichen Rechts*) primarily active in the health and insurance sectors which typically employ a large number of female staff, will be required to appoint at least one female board member if the board is composed of two or more members.

The draft legislation was approved by the cabinet in early January 2021 and will now be submitted to the German Parliament. The new gender quota should in any event come into force prior to the German federal elections in autumn 2021.

While a number of corporations welcome the move towards more gender equality as Germany is lagging behind in comparison to, in particular, Scandinavian and UK companies, others oppose the quota law arguing undue interference with the right of the supervisory board to appoint the best available candidate. It will be interesting to see if and how investors position themselves.

Back to Top

1.5 New Developments on Taxation of Remuneration for Supervisory Board Members

As a consequence of a ruling by the German Federal Fiscal Court (*Bundesfinanzhof*, *BFH*) late in 2019, the tax classification of compensation paid to supervisory board members has been modified in terms of value-added tax (VAT). In order to avoid potential adverse tax effects based on the incorrect tax treatment of supervisory board compensation, both individual supervisory board members and the companies they serve should be familiar with the ruling.

Previously, the tax authorities presumed without further differentiation between fixed or variable supervisory board compensation that members of supervisory boards were engaged in independent entrepreneurial activity and their remuneration was to be charged with VAT. It was irrelevant whether the respective member of the supervisory board was an elected member, served on the board as a shareholder delegate or in a capacity as an employee representative. At least in those cases where supervisory board members receive a fixed compensation for their service, future invoices will no longer be permitted to charge a VAT component.

The respective ruling by the *BFH* applied an earlier decision of the European Court of Justice (*ECJ*) taken on June 13, 2019 at the national level and confirmed the *ECJ's* view that supervisory board members who receive fixed remuneration are not qualified as independent. The *ECJ* held in its decision that supervisory board members, who act on behalf of and in the sphere of responsibility of the supervisory board, do not bear any economic risk for their activities and therefore do not perform entrepreneurial activities due to a lack of independence. The *BFH* followed the argumentation of the *ECJ* and agreed that supervisory board members who receive a fixed remuneration which is neither dependent on their attendance at meetings nor on the services actually performed, cannot be classified as entrepreneurs. The *BFH* left it open whether independent entrepreneurial activities can be deemed to exist in cases where a variable remuneration is agreed with the individual member of the supervisory board.

For the individual supervisory board member, such classification as a dependent activity means, at least, in the case of fixed remuneration, that he or she may no longer add a VAT element to the remuneration in invoices issued to the company. Otherwise the supervisory board member would owe such tax, while the company would not be able to deduct such an incorrectly added tax component as an input tax deductible. Likewise, input tax amounts incurred in connection with the activity as a supervisory board member (e.g. VAT on travel expenses or office supplies) would no longer be recoverable due to the lack of independence of the supervisory board member.

If the supervised company is entitled to an unrestricted input tax deduction, this new jurisprudence should not have any adverse economic impact on the company, provided correct invoices are issued.

Industries which are not entitled to deduct input tax or only entitled to deduct it to a limited extent - such as banks, insurance companies or non-profit organizations – actually benefit if the supervisory board member issues invoices without VAT.

The tax authorities have so far not yet published any guidelines in response to the new case law. It therefore remains to be seen whether the tax authorities will draw a distinction between fixed and variable compensation when qualifying the activities of a supervisory board member for VAT purposes. It would also be conceivable that the tax authorities would now generally assume that a supervisory board member's services are deemed to be a dependent activity which is generally not subject to VAT.

However, since a short-term response to the case in the administrative guidelines is to be expected in the near future, the ruling should be applied to fixed compensation and VAT should not be included in any future invoice. In the case of variable compensation and in view of the previous administrative practice, the invoicing of a separate VAT component would continue to be required until the tax authorities have communicated their new position on the matter or - if variable compensation is also to be accounted for without VAT - legal action may become necessary. It also remains to be seen whether the tax authorities will apply the new case law retrospectively and whether and how it would take into account considerations of the protection of legitimate expectations (*Vertrauensschutz*).

Back to Top

2. Tax

2.1 Taxation of Transactions involving German Registered IP

In a decree issued on November 6, 2020, the German tax authorities expressed their opinion that transactions between non-German parties, which relate to IP registered in a German register, are subject to tax in Germany. The tax provision the German tax authorities are referring to has been in existence for almost 100 years but in practice this provision has not been applied to transactions where both contracting parties reside outside of Germany. The German tax authorities now deviate from past practice and take the view that such extraterritorial transactions with German registered IP are taxable in Germany. In essence, such interpretation of the German tax authorities creates a taxable nexus in Germany only by virtue of the German registration of IP. As a consequence, royalties paid by a non-German licensee to a non-German licensor for German registered IP are subject to German withholding tax at a flat rate of 15.8%. A potential upfront tax relief under European directives or applicable double tax treaties may be applicable but requires a formal application by the licensor and a certification by the German tax authorities prior to payment of the royalties. If the withholding tax was not withheld, which is the typical case for German registered IP, the licensee as well as the licensor may be held liable for the payment of the withholding tax.

Only two weeks after the issuance of the decree, the German government released a draft tax bill on November 20, 2020 recognizing the far reaching interpretation of the tax authorities. Under the draft tax bill German tax for registered IP in Germany would only apply if the IP is exploited through a German permanent establishment or facility of the licensee; the pure registration of IP in a German register would not be sufficient anymore to become taxable in Germany. It is still unclear if and to what extent the draft tax bill becomes effective and, therefore, the November 6 decree remains for now the only currently valid administrative guidance on the taxation of IP registered in Germany.

Affected tax payers are well advised to closely monitor the further legislative process.

Back to Top

2.2 Anti-Tax-Avoidance Directive

In 2016, the EU enacted the Anti-Tax-Avoidance Directive (ATAD) containing a package of legally binding measures to combat tax avoidance to be implemented into national law by all EU member states by 2018/2019. Germany has so far delayed implementation, exposing itself to EU infringement proceedings for failure to implement ATAD into national law in time. Almost one year after publication of the first draft bill, Germany is now considering implementing ATAD requirements in early 2021. Implementation has been delayed because Germany wanted to introduce several measures beyond a one-to-one implementation of the Directive, such as new rules on cross-border intercompany financing or exit taxation for individuals.

As part of the most relevant gap between existing German tax rules and ATAD requirements, Germany will introduce rules which limit the deduction of operating expenses for certain hybrid arrangements between related parties. Significant changes under ATAD regarding the current controlled foreign corporation (CFC) rules (*Außensteuergesetz*) will be a new control criterion and introduction of a shareholder-based approach. Control shall be deemed to exist if a German-resident shareholder, alone or jointly with related persons, holds a majority stake in the foreign company. The current concept of domestic control by adding up the participations of all German taxpayers will be abandoned. The current CFC rules, according to which a foreign company is considered as lowly taxed if the income tax is below 25%, shall, however, be retained.

This has evoked strong criticism by commentators since even in many developed countries the income tax rate is below 25% and CFC regulations in Germany can therefore be triggered too easily.

Back to Top

2.3 New Anti-Treaty Shopping Rule

The European Court of Justice (*ECJ*) has consistently declared Germany's attempts at creating a treaty-overriding anti-abuse provision to be a violation of EU fundamental freedoms. On November 20, 2020, the German government released a draft tax bill and launched another attempt at making the anti-abuse provision compatible with EU law. The draft law takes into account recent ECJ case law and provisions under the ATAD. Under the new wording of the anti-abuse provision a foreign company has no claim for relief from withholding tax to the extent that it is owned by persons, which would not be entitled for such relief, had they been the direct recipients of the income, and as far as the source of income is not materially linked to economic activity of this foreign company. Receiving the income and its onward transfer to investors or beneficiaries as well as any activity that is not carried out using business substance commensurate with the business purpose cannot be regarded as an economic activity. Withholding tax relief shall be given in so far as the foreign company proves that none of the main purposes of its interposition is obtaining a tax advantage or if the shares in the foreign company are materially and regulary traded on a recognized stock exchange.

If the new rule becomes law, it could in the future be harmful for a holding company to be interposed between its parent and a German income source even if the holding company and the parent are in different countries and both German tax treaties applicable to the holding and the parent company provide for the same withholding tax benefits. In such case it may be required to create a sufficient economic link between the German income source and the economic activity of the holding company in order to avoid the application of the anti-treaty shopping rule. An active management holding company should be regarded as a sufficient economic activity and such holding company should not to fall under the new rules. Further clarifications in that respect by the German tax authorities are expected in the first half of 2021.

Back to Top

3. Financing and Restructuring

With the COVID-19 pandemic hitting the German economy hard, the areas of financing and restructuring saw some of the most significant changes and sustained reform in 2020. The initial legislative response focused, in particular, on providing new sources of emergency funding and a temporary relaxation of the traditionally strict German insolvency filing obligations for companies perceived to be in financial disarray through no fault of their own due to the effects of the pandemic.[6]

On December 17, 2020, the German Parliament then adopted the Act on the Continued Development of Restructuring and Insolvency Law (*Sanierungs- und Insolvenzfortentwicklungsgesetz – SanInsFoG*) to address (i) the fear of a large-scale "insolvency wave" upon the originally scheduled expiry of the COVID-19 pandemic triggered partial suspension of the insolvency filing requirement due to over-indebtedness on December 31, 2020,[7] and (ii) the implementation of the European Union Directive (EU) 2019/1029 of June 23, 2019 on preventive restructuring frameworks, the discharge of debt and measures to increase the efficiency of restructuring and insolvency proceedings (the "**Restructuring Framework Directive**") into German law which would have been due by July 2021.

This reform of German restructuring and insolvency law, which was pushed through the parliamentary process in a very short period of time, has been labeled by many commentators as potentially the most significant reform of the German restructuring landscape since the introduction of the German Insolvency Code (*Insolvenzordnng*, *InsO*) in 2001.

A selection of key changes introduced by the *SanInsFoG* reform which came into effect on January 1, 2021 are highlighted in the below sections:

3.1 Reform of the German Insolvency Code (*InsO*) by the *SanInsFoG*

- The insolvency reason of over-indebtedness (*Überschuldung*) was modified in such a way that the period for the necessary continuation prognosis (*Fortführungsprognose*), during which a mathematically over-indebted company must be able to meet its obligations when they fall due, was shortened to twelve months only. Before the reform, the relevant period was the current and the following business year.

- If certain special requirements during the period of the pandemic are met, the prognostication period is shortened further to only four months in order to deal with the economic effects of the pandemic which makes reliable long term planning difficult if not impossible. This provision is designed further to soften the effects of the pandemic and applies only from January 1, 2021 to December 31, 2021.

- The suspension of the insolvency filing obligation under the COVInsAG was further extended for all of January 31, 2021. The suspension applies to all over-indebted and/or illiquid companies (i) who filed an application for public support under the "November and December COVID-relief funds" (*November- und Dezemberhilfen*) but the respective funds were not yet paid out or (ii) such application was not possible for technical or legal reasons even though a business was entitled to apply. The extension does not apply if the receipt of such funds would not be sufficient to cure the existence of the insolvency reason or such application would clearly be unsuccessful.

- For the insolvency reason of over-indebtedness only, the previous maximum period for mandatory insolvency filing of three weeks was extended to a maximum of six weeks.

- The prognostication period for the determination of impending illiquidity (*drohende Zahungsunfähigkeit*) is now as a general rule twenty-four months.

- Certain provisions relevant for the liability of the managing directors in times of distress were removed from various corporate statutes and concentrated in modified form in a new provision of the Insolvency Code (§ 15b InsO). The legislator, in particular, clarified and extended the payments permitted by the management of a debtor company after the time an insolvency reason has already occurred if a timely filing is later made.

- The provisions on future access to own administration by management (*Eigenverwaltung*) and so-called protective umbrella proceedings (*Schutzschirmverfahren*) in the Insolvency Code were modified and partly restricted to address past undesirable developments. However, exceptions apply for entities who became insolvent due to the pandemic: (i) Illiquid entities may rely on the protective umbrella proceedings which otherwise are only available in case of impending illiquidity, and (ii) companies may under certain specific circumstances continue to avail themselves of the less restrictive pre-reform rules on own administration by management if such proceedings are applied for during the year 2021.

Back to Top

3.2 Introduction of a New Pre-Insolvency Restructuring Tool Kit

The core piece of the *SanInsFoG* is the new, stand-alone act called the Business Stabilization and Restructuring Act (*Unternehmensstabilisierungs- und -restrukturierungsgesetz – StaRUG*, the

"**Restructuring Act**"). This Restructuring Act contains the German rules to transpose the requirements of the Restructuring Framework Directive into local German law, but partly goes beyond such minimum requirements.

Without any claims to be complete, clients and their management ought to be aware of the following key items in the Restructuring Act:

- The Restructuring Act introduces a general obligation for management to install continuous supervision and early warning systems that enable management to detect any developments endangering their company's existence or financial wellbeing.

- Once a company is faced with impending illiquidity, and has opted for voluntary pre-insolvency restructuring proceedings, management of the debtor has to conduct the business with the care of prudent business person in restructuring and thus, in particular, has to safeguard the interests of the community of creditors. Conflicting shareholder instructions may not be complied with.

- In voluntary pre-insolvency restructuring proceedings, management of the company must draw up a detailed, descriptive (*darstellend*) and executive (*gestaltend*) restructuring plan in order to restructure the company's business or individual types of liabilities or contractual obligations. Measures may, for example, include haircuts and amendments of the rights of secured or unsecured creditors, but a comparative calculation/analysis needs to be attached which outlines the effects of the restructuring on individual creditors compared to a regular insolvency situation. It should be noted that claims of employees (including pension claims) may not be restructured or changed as part of the restructuring plan.

- Approval of the restructuring plan requires a majority of 75% of the voting rights per creditor group. Subject to additional requirements, non-consenting creditors can be overruled via a court approved cross-class cram-down.

- The court may upon request of the restructuring company further impose a temporary three-month moratorium on individual enforcement measures. Such moratorium may under certain circumstances be extended to a maximum period of eight months.

- The handling of the entire pre-insolvency restructuring can be assisted or facilitated by the involvement of two newly-created functional experts appointed by the competent court, the so-called restructuring agent (*Restrukturierungsbeauftragter*) and the restructuring moderator (*Sanierungsmoderator*). In addition, the competent court may appoint a so-called creditor's advisory committee (*Gläubigerbeirat*) *ad officium* if the proposed restructuring plan affects all creditors (except for creditors of exempt claims such as claims of employees) and, thus, is of such general application to all groups of creditors that the proceedings are akin to universal proceedings (*gesamtverfahrensartige Züge*). Such creditor advisory committee may also include members that are unaffected by the restructuring plan like e.g. employee representatives or others.

- If illiquidity or over-indebtedness occurs during the restructuring proceedings, management is obliged to immediately inform the restructuring court, but the formal duty to file for insolvency is suspended. Such insolvency filings do remain possible, though, and the restructuring court may close the restructuring matter to allow for formal insolvency proceedings. Failure to inform the restructuring court duly or timely may incur personal liability for management.

- The tools, procedures and restructuring measures contained in the Restructuring Act are mostly new and untested. It can thus be expected that the need for specialist advice for distressed companies will generally increase.

The need for additional expert assistance and the relatively heavy load of technical and procedural safeguards may pose a challenge in particular for small and medium-sized distressed businesses who suffer heavily from the pandemic and who may not have the financial and other resources to benefit from the Restructuring Act. It therefore remains to be seen whether and how the new Restructuring Act will stand the test of time in this regard. It can be expected, though, that the Restructuring Act will offer interesting options and restructuring potential, at least, for bigger and more sophisticated players in the German or international business arena. We would thus recommend that interested circles, i.e. German managing directors and board members but also investors or shareholders, familiarize themselves with the fundamentals of the Restructuring Act.

Back to Top

4. Labor and Employment

4.1 Employers' Options during the COVID-19 Pandemic

The German lawmaker has enacted several support measures and subsidies for companies to cope with the ongoing COVID-19 pandemic, especially enhancing short-time work options. In a nutshell, short-time work means that working hours are reduced (even down to zero) and that the state pays between 60% and 87% of the net income lost by the affected employees. Currently, such a scheme can be extended to 24 months with the government even covering the social security costs.

Companies that make use of this generous scheme are not barred from carrying out redundancy measures. However, the narrative for such lay-offs is different: A termination for business reasons requires a *permanent,* not only a temporary loss of work. Regardless of these strict requirements, we have seen an uptick of redundancies during the pandemic.

For a more detailed insight we would refer to our client alert on the topic.[8]

Back to Top

4.2 Reclassification Risk of Crowd-Workers into De-Facto Employees

The German Federal Labor Court (*Bundesarbeitsgericht*, *BAG*) has recently held that crowd-workers, i.e. freelancers hired over an online platform, can be classified as employees of the platform (9 AZR

102/20). This would entitle them to certain employee-protection rights, such as protection against dismissal, continued payment of remuneration and vacation claims.

In this particular case, the crowd-worker was considered an employee because the platform controlled the details of the work (place, date and contents) and featured a rating system that incentivized him to continuously perform activities for the platform operator. In the opinion of the court that sufficed to show that the crowd-worker was integrated in the platform operator's business, making him an employee.

While the ruling will not render the business model of crowd-working platforms entirely impossible, especially platform operators using incentive systems should have these arrangements double-checked to mitigate the risk of costly reclassification of their crowd-workers.

Back to Top

4.3 Pension Claims in Insolvency (Distressed M&A)

The European Court of Justice (*ECJ*) has issued an important ruling concerning the liability of acquirers of insolvent companies for occupational pensions. According to German case law, such acquirers have not been liable for their new employees' rights with regard to occupational pension schemes as far as these rights had been accrued prior to insolvency. Instead, such claims are covered by the German Insolvency Protection Fund (*Pensionssicherungsverein*, *PSV*), which secures them to a certain extent, but not always entirely.

The plaintiffs in the underlying German court proceedings sued the acquirer for acknowledgement of their full pension claims disregarding reductions due to the insolvency. The ECJ now ruled on September 9, 2020 that the limited liability of the acquirer regarding occupational pension claims was only in line with European Union law if national law provided a certain minimum protection regarding the part not covered by the acquirer (C-674/18 and C-675/18). Regrettably, the ruling does not make it entirely clear who would be liable for a possible difference in benefits – the acquirer or the PSV. According to the few publications available so far, it appears more convincing that the PSV would have to cover said deficit. However, due to the lack of certainty, investors ought to take this potential risk into account when acquiring insolvent businesses.

Back to Top

5. Real Estate

5.1 Conveyance requires Domestic German Notary

The transfer of title to German real estate requires (i) the agreement *in rem* between the transferor and the acquiror on the transfer (conveyance) and (ii) the subsequent registration of the transfer in the competent land register. To be effective, the conveyance needs to be declared in the presence of both parties before a competent agency. While a notary appointed in Germany fulfills this criterium, it is disputed among German scholars whether the conveyance may also be effectively declared before a notary public abroad.

In its decision of February 13, 2020, the German Federal Supreme Court (*Bundesgerichtshof – BGH*) held that the conveyance may not be effectively declared before a notary who has been appointed outside of Germany. Engaging a notary abroad for the conveyance to get the benefit of (often considerably) lower notarial fees abroad, is thus not a viable option. In case of a sale of real estate under German law, additional notarial fees for the conveyance, however, may be avoided if the conveyance is included in the notarial real estate sale agreement recorded by a German notary.

The feasibility of a notarization before a notary public abroad is still disputed with respect to the notarization of the sale and transfer or the pledging of shares in a German limited liability company (*GmbH*). It remains to be seen whether this decision on real estate conveyance may also impact the dispute and arguments on the permissibility of foreign notarization of share sales and transfers or pledges.

Back to Top

5.2 Update regarding Commercial Lease Agreements

Further developments of potential relevance for the real estate world, which were triggered by the COVID-19 pandemic, are discussed in the context of the continuing legal impact of the pandemic in sections 12.3 and 12.4 below.

Back to Top

6. Compliance / White Collar

6.1 Corporate Sanctions Act: Extended Liability for Criminal Misconduct

The German Federal Government is still pursuing its plan to implement a corporate criminal law into German law. After the Federal Council (*Bundesrat*) had demanded some changes to the previous draft bill, the Federal Government introduced its draft to Parliament on October 21, 2020. Unlike many other countries, German criminal law does not currently provide for corporate criminal liability. Corporations may only be fined for an administrative offense. Based on the draft bill, corporations will be responsible for business-related criminal offenses committed by their leading personnel and will be liable for fines of up to 10% of the annual – worldwide and group-wide – turnover. In addition to this fine, profits can be disgorged and the corporation will be named in a sanctions register as a convicted party for up to 15 years.

Furthermore, if implemented, public prosecutors would be legally obliged to open investigations against the corporation on the basis of a reasonable suspicion (currently, it is in their discretion), and a written legal framework for internal investigations will be established. A corporation will benefit from considerable mitigation of the sanction if it carries out an internal investigation that meets certain criteria (such as a cooperation with the authorities in an uninterrupted and unlimited manner, organizational separation between investigation and criminal defense, and adherence to fair trial standards).

In view of these developments, corporations should not only revise existing compliance systems to prevent corporate criminal misconduct, but also set up an action plan to be prepared for criminal investigations under the planned Corporate Sanctions Act. Considering that the current legislative period will end in the autumn of 2021, it is expected that a final resolution on the Corporate Sanctions Act will soon be reached by the legislator.

Back to Top

6.2 Money Laundering: The German Government's Intensified Fight for AML Compliance

In the past, the FATF (Financial Action Task Force) and others have often portrayed Germany as being too lenient in its efforts to combat money laundering, and the German regulatory framework was branded as containing too many loopholes. Recent developments surrounding the collapse of German pay service provider Wirecard have done little to assuage such views.

In response to such criticism, Germany has recently increased its efforts towards introducing a more forceful AML framework. A prime example of Germany's new-found vigor in this regard is the fact that the German government opted not only to implement the 5th EU Money Laundering Directive, but to go above and beyond the minimum requirements set by the EU. As already discussed in sections 1.4, 5.2 and 6.2 of last year's client alert, a number of legislative changes came into effect.[9]

In addition, the German government issued two distinct resolutions, namely the eleven points "National Strategy Package" and – in direct conjunction with the Wirecard collapse – the "16-Points Action Plan". The corresponding changes are not limited to the German Criminal Code and the Anti Money Laundering Act (*Geldwäschegesetz, GwG*), but extend to establishing an improved organization of the German AML authorities.

The provision on money laundering in the German Criminal Code (section 261) will, according to the current Ministry of Justice draft bill, undergo a fundamental change. Pursuant to the intended legislation, the scope of section 261 of the German Criminal Code will be significantly broadened as any criminal wrongdoing may in the future constitute a predicate offense for money laundering.

Under the current state of the law, only a limited set of criminal offenses may give rise to money laundering. Importantly, criminal acts committed abroad may serve as predicate offenses for money laundering as well. The new legislation extends the scope of relevant prior offenses to certain acts which under EU law is required to be rendered punishable under the respective local criminal laws of the member states, irrespective of whether such act is in fact punishable in the jurisdiction at the place it is committed. Moreover, the offense of grossly-negligent money laundering has been re-introduced into the draft after a heated debate in this regard.

As supporting measures to the amended Anti Money Laundering Act, the German government decided to subject numerous economic players to (new or partially enhanced) AML requirements, including private financial institutions, crypto currency traders, real estate agencies and notaries who would be burdened with extended new obligations to disclose AML-related concerns regarding their customers and clients. These measures are mainly reflected in this year's draft of a regulation on obligations to report certain facts surrounding real estate (*Verordnung zu den nach dem Geldwäschegesetz meldepflichtigen Sachverhalten im Immobilienbereich).*

Key German AML institutions were – as a direct result of the aforementioned government's resolutions – significantly strengthened:

- The Financial Intelligence Unit's (FIU) personnel was more than doubled, and its data access rights were significantly expanded. In addition, a high level government body was established between German federal and local state authorities.
- The German Federal financial supervisory authority *BaFin* was requested to ensure that companies and persons under its supervision implement any statutory obligations, and *BaFin's* related supervisory competences were broadened.
- The transparency registry which may be accessed by members of the public was established, collecting key relevant data including the UBO. Registration in the transparency register is mandatory for all companies with business activities in or related to Germany.

The German business community and relevant AML specialists should, at least, inform themselves or gain an in depth understanding of the new and extended regulatory framework. New monitoring systems need to be put in place to follow up on future predicate offenses. Therefore, relevant risk factors including those arising from new business models such as crypto currency trading have to be evaluated as a first step prior to implementing the new provisions.

While Germany has failed to implement new European AML requirements by December 3, 2020, the corresponding draft bill is expected to come into force soon.

Back to Top

6.3 Cross-Border European Investigations: The European Public Prosecutor's Office

To fight crimes against the fiscal interests of the European Union, the European Public Prosecutor's Office ("**EPPO**") is expected to become operative in 2021. The EPPO will act both on a centralized level with European Prosecutors based in Luxembourg having a supervisory and coordinating function and on a decentralized level with European Delegated Public Prosecutors situated in the participating EU member states having the same powers as national prosecutors to investigate specific cases. Its activities will focus on the prosecution of offenses to the detriment of the EU such as subsidy fraud, bribery and cross-border VAT evasion.

After the originally intended start of the new authority was delayed at the end of 2020, it is anticipated that investigation activities will start in 2021. In addition to the existing national criminal prosecution authorities and European institutions such as OLAF, Europol and Eurojust, a genuine European criminal prosecution authority will enter the stage and possibly bring about a shift in European enforcement trends. It is to be hoped that crimes affecting the EU's financial interests will be pursued in a more robust manner and that international coordination of investigations will be significantly improved.

Back to Top

7. Data Privacy - Regulatory Activity and Private Enforcement on the Rise

The German Data Protection Authorities ("**DPAs**") have certainly had a busy year. While, the trend towards higher fine levels for GDPR violations continues, the German DPAs have also initiated a number of investigations and issued guidance on a variety of issues, such as COVID-19 related data privacy concerns, the consequences of the "Schrems II" ruling of the Court of Justice of the European Union (judgment of July 16, 2020, case C-311/18)[10] and the use of video conferencing services and other technological tools in the context of working from home.

With regard to fines, in 2020 the German DPAs issued fines in the total amount of EUR 36.6 million (approx. USD 44.8 million). In October 2020, the Hamburg Data Protection Authority imposed a record-breaking fine in the amount of EUR 35.3 million (approx. USD 43.2 million) on a retail company for comprehensively and extensively collecting sensitive personal data from its employees, including health data and data about the employees' personal lives, without having a sufficient legal basis to do so. This was the highest fine ever issued by a German DPA.

However, for companies it may well pay off to push back against such fines: The District Court (*Landgericht*) of Bonn largely overturned a fining decision issued by the German Federal Commissioner for Data Protection and Freedom of Information against a German telecommunications service provider in December 2019. While the court confirmed a violation of the GDPR, the court significantly reduced the fine in the amount of EUR 9.5 million (approx. USD 11.6 million) to EUR 900,000 (approx. USD 1.1 million).

Another important trend is the increasing number of private enforcements in the context of data protection violations. In particular, consumers are seeking judicial help to enforce information and access requests as well as compensation claims for material or non-material damages suffered as a result of GDPR violations, especially in the employment context. But German courts are apparently not (yet) prepared to award larger amounts to plaintiffs for this kind of GDPR violations. For example, in a case where an employee requested damages in the amount of EUR 143,500 (approx. USD 175,800) the Labor Court of Düsseldorf has awarded damages in the amount of only EUR 5,000 (approx. USD 6,000). Nevertheless, companies are well advised to keep an eye on future developments as courts may raise the amount of damages awarded if an increasing number of cases were to show that current levels of damages awarded are not sufficient to have a deterrent effect.

Back to Top

8. Technology

8.1 Committee Report on Artificial Intelligence

In November 2020, the German AI inquiry committee (*Enquete-Kommission Künstliche Intelligenz des Deutschen Bundestages*, hereafter the "**Committee**") presented its final report, which provides broad recommendations on how society can benefit from the opportunities inherent in AI technologies while acknowledging the risks they pose. The Committee was set up in late 2018 and comprises 19 members of the German Parliament and 19 external experts.

The Committee's work placed a focus on legal and ethical aspects of AI and its impact on the economy, public administration, cybersecurity, health, work, mobility, and the media. The Committee advocates for a "human-centric" approach to AI, a harmonious Europe-wide strategy, a focus on interdisciplinary dialog in policy-making, setting technical standards, legal clarity on testing of products and research, and the adequacy of digital infrastructure.

At a high level, the Committee's specific recommendations relate to (1) data-sharing and data standards; (2) support and funding for research and development; (3) a focus on "sustainable" and efficient use of AI; (4) incentives for the technology sector and industry to improve scalability of projects and innovation; (5) education and diversity; (6) the impact of AI on society, including the media, mobility, politics, discrimination and bias; and (7) regulation, liability and trustworthy AI.

Back to Top

8.2 Proposed German Legislation on Autonomous Driving

The German government announced plans to pass a law on autonomous vehicles by mid-2021. The new law is intended to regulate the deployment of connected and automated vehicles ("**CAV**") in specific operational areas by the year 2022 (including Level 5 "fully automated vehicles"), and will define the obligations of CAV operators, technical standards and testing, data handling, and liability for operators. The proposed law is described as a temporary legal instrument pending agreement on harmonized international regulations and standards.

Moreover, the German government also plans to create, by the end of 2021, a "mobility data room", described as a cloud storage space for pooling mobility data coming from the car industry, rail and local transport companies, and private mobility providers such as car sharers or bike rental companies. The idea is for these industries to share their data for the common purpose of creating more efficient passenger and freight traffic routes, and support the development of autonomous driving initiatives in Germany.

Back to Top

9. Antitrust and Merger Control

9.1 Enforcement Overview 2020

The German Federal Cartel Office (*Bundeskartellamt*), Germany's main antitrust watchdog, has had another very active year in the areas of cartel prosecution, merger control, consumer protection and its focus on the digital economy.

On the cartel prosecution side, the *Bundeskartellamt* concluded several investigations in 2020 and imposed fines totaling approximately EUR 358 million against 19 companies and 24 individuals from various industries including wholesalers of plant protection products, vehicle license plates, and aluminum forging. It is of note that the fining level decreased by more than 50 % compared to 2019. While the *Bundeskartellamt* received 13 notifications under its leniency program, the increasing risks associated with private follow-on damage claims clearly reflect on companies' willingness to cooperate with the *Bundeskartellamt* under its leniency regime. The authority stressed that it is continuing to explore alternative means to detect illegitimate cartel conduct, including through investigation methods like market screening and the expansion of its anonymous whistle-blower system.

In 2020, the *Bundeskartellamt* also reviewed approximately 1,200 merger control filings (i.e., approximately 14 % less than in 2019). As in previous years, more than 99 % of these filings were concluded during the one-month phase one review. Only seven merger filings required an in-depth phase-two examination. Of those, five were cleared in phase-two (subject to conditions in two of these cases), and two phase-two proceedings are still pending.

Looking ahead to the year 2021, the *Bundeskartellamt* will likely continue to focus on the digital economy and conclude its sector inquiry into online advertising. The agency also announced to go live with its competition register in Q1 of 2021 for public procurement purposes. This database will list companies that were involved in competition law infringements and other serious economic offenses.

Back to Top

9.2 Paving the Way for Private Enforcement of Damages

In its *Otis* decision (C-435/18 of December 12, 2019), the European Court of Justice (*ECJ*) paved the way for private enforcement in cases concerning antitrust damages. The ECJ held that even a party not active on the market related to the one affected by the cartel may seek damages if there is a causal link between the damages incurred and the violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU). The ECJ also reaffirmed that the scope of the right to compensation under Article 101 TFEU, i.e. the "who," "what" and "why", is governed by EU law while the national laws of the member states determine how to enforce the right.

Private enforcement of cartel damages is gaining momentum. Since the Otis decision, German courts, in particular the German Federal Supreme Court (*Bundesgerichtshof*, *BGH*), have further explored the course set by the ECJ in several antitrust damages cases concerning the so-called rail cartel.

The *BGH* held that Article 101 TFEU and, therefore, also the right to damages under German law, does not require the claimant to prove that a certain business transaction has directly been affected by the cartel at issue. Instead, it is sufficient if the claimant establishes that the cartel infringement is abstractly capable of causing damages to the claimant. As a result, courts only need to evaluate one long-lasting cartel infringement instead of individual breaches. The *BGH* further clarified in its decisions that the extent of an impairment by a cartel is a question of "how" a claimant would be compensated and, therefore, subject to German procedural law. As a consequence, the *BGH* encouraged courts to exercise judicial discretion when weighing the parties' factual submissions and assessing cartel damages.

The *BGH* also ruled that the passing-on defense could apply if the claimant had received public grants which otherwise would not or not in such an amount have been paid to the claimant if the cartel had not existed. The court explained, however, that the defense may be barred when the damage is scattered to the downstream market level. In this case, it is inappropriate for the initiator of the cartel to walk free only because the individual damages were too minor to prompt claims for damages.

In the future, businesses will do well to monitor these ongoing developments as private enforcement actions of damages further gather pace and may develop into a sharp sword to police anti-competitive practices of other market players.

Back to Top

9.3 Adoption of the "GWB Digitalization Act" expected for 2021

The draft bill for the 10th Amendment of the German Competition Act, also known as "GWB Digitalization Act" endorsed by the German Federal Government on September 9, 2020 is currently undergoing the legislative procedure in the German Parliament. The adoption of the bill is expected for early 2021. Having said that, the final discussions of the bill originally scheduled for December 17, 2020 were postponed until January 14, 2021.

As reported in our Year-End Alert 2019,[11] the draft bill addresses topics such as market dominance in the digital age and introduces a number of new procedural simplifications. For example, the bill currently foresees that companies, which depend on data sets of market-dominating undertakings or platforms, would have a legal claim to data access against such undertakings or platforms. Further, the draft bill introduces a rebuttable presumption whereby it is presumed that direct suppliers and customers of a cartel are affected by the cartel in case of transactions during the duration of the cartel with companies participating in the cartel.

Compared to the draft bill discussed in our Year-End Alert 2019, the governmental revision contains certain changes, in particular in the area of merger control. Thus, the draft bill currently features an increase of the two domestic turnover thresholds by EUR 5 million (approx. USD 6 million), *i.e.* from EUR 25 million to EUR 30 million (from approx. USD 30.6 million to approx. USD 36.8 million), and from EUR 5 million to EUR 10 million (from approx. USD 6.1 million to approx. USD 12.3 million), respectively. Additionally, a new provision was introduced in the legislative procedure, whereby the German Federal Cartel Office (*Bundeskartellamt*,) may require companies, which are deemed to reduce competition through a series of small company acquisitions in markets in which the *Bundeskartellamt* conducted sector inquiries, to notify every transaction in one or more specific sectors provided that certain thresholds are met. This notification obligation can be imposed on a company, if (i) the company has generated global turnover of more than EUR 500 million in the last business year, (ii) there are reasonable grounds for the presumption that future mergers could significantly impede effective domestic competition in the sectors for which the obligation has been imposed and (iii) the company has a market share of at least 15% in Germany in the sectors for which the obligation has been imposed. However, a notification will only be required if the target company has (i) generated turnover of more than EUR 2 million in the last business year and (ii) has generated more than two-thirds of its turnover in Germany. The notification obligation lasts for three years.

In light of the recent publication of the draft regulation on an EU Digital Markets Act by the European Commission, it remains to be seen how the German legislator will react to the proposals put forward by the Commission and how the national legislative procedure will evolve.

Back to Top

10. International Trade, Sanctions and Export Control

10.1 The New Chinese Export Control Law and its Impact on German Companies

The challenges, which German companies, specifically those with a U.S. parent or another U.S. nexus, face in light of the EU Blocking Statute's prohibition to comply with certain U.S. sanctions on Iran and on Cuba, are well documented.[12] While 2021 might see calmer waters in the West due to the expected (yet far from certain) return to a more multilateral focus of the incoming Biden Administration, further complications await the German export business community in the East.

On December 1, 2020, a comprehensive new Chinese export control law went into effect. Generally speaking, the Chinese export control law reflects key elements of U.S. and EU/German export control related law. Particularly, licensing requirements for the export of controlled Chinese goods (including technologies) are determined on the basis of lists of goods and a catch-all clause.

As early as December 4, 2020, China's Ministry of Commerce along with other authorities already published the first such lists of goods in the area of "commercial cryptography", i.e. regarding goods and technologies which can be used for encryption, *inter alia*, in telecommunication applications, VPN equipment or quantum cryptographic devices.

It is likely that any significant restrictions on, *inter alia*, exports of certain U.S. origin items and technology to China will eventually be mirrored in the respective Chinese lists to also impose significant restrictions on the export of certain Chinese origin items and technology to the U.S. For many German-based companies with a diversified supply chain this raises the unenviable prospect that they may use suppliers whose sourced goods originate in the U.S. and in China, respectively, which feature on each of the respective lists. This conflict may eventually limit the number of counterparties the German company can export the final product to without jeopardizing either supply chain. It may also limit the possibility of cooperation (e.g. technology transfer) with U.S. and/or Chinese suppliers and customers alike.

Further, China's new Export Control Law contains regulation comparable to the (U.S.) concept of "deemed export" via the definition of "exports", which applies when a Chinese person transfers listed goods to a foreign person. Depending on how extensively this is interpreted by the Chinese authorities, this could, for example, result in Chinese export control law also applying to transfers by Chinese individuals located in Germany to a German person. Therefore, the details of this potential extraterritorial effect of Chinese export control law, as well as a vague reference to an extension of Chinese export control law to re-exports of listed goods and technologies or goods and technologies covered by the catch-all regime, raises numerous questions that will presumably only be clarified in time by the publication of specific regulations or guidance by the Chinese authorities.

Additionally, the EU is also taking initial steps to further strengthen its defense mechanisms against perceived and potential interference with its sovereignty by the extraterritorial effects of U.S. and Chinese export control laws. Specifically, the EU Parliament requested a study[13] on extraterritorial sanctions on trade and investments and European responses, that, *inter alia*, suggests the establishment of an EU agency of Foreign Assets Control (EU-AFAC) with the aim of more efficient and effective enforcement of, *inter alia*, the EU Blocking Statute, which might also come to include parts of the Chinese export control law.

In any case, any German export control compliance department would be well-advised to update its Internal Compliance Program to be able to identify conflicting compliance obligations early and establish a process to swiftly resolve them - without breaching applicable anti-boycott regulations – in order to avoid the supply-chain-management of the company being negatively impacted.

Back to Top

10.2 Update on the German Rules regarding Foreign Direct Investment Control

For a summary of the recent reforms of German foreign investment control laws, reference is made to section 1.3 above.

Back to Top

11. Litigation

11.1 Establishment of Commercial Courts in Germany - An Emerging Forum for International Commercial Disputes?

Over the past few years, Germany has taken several efforts to become a more attractive forum venue for international disputes. In 2010, three District Courts (*Landgerichte*) in Cologne, Bonn and Aachen had established English-speaking divisions for civil disputes. Since January 2018, the Frankfurt district court has allowed oral hearings in international commercial disputes to be conducted in English, provided the parties agree. The same now applies for the district courts in Mannheim and Stuttgart where two civil and two commercial divisions specially established for this purpose have started their work in November 2020. The civil divisions consist of three professional judges, respectively. The commercial divisions offer a combination of legal and industry-specific expertise and are led by one professional judge and two honorary judges from the local business community. All divisions have been equipped with state-of-the-art technical equipment, allowing for video-conferences and video testimonies of witnesses and experts.

Provided that the district court in Mannheim or in Stuttgart has jurisdiction (or the parties agree), the Commercial Courts in Mannheim or Stuttgart may hear corporate disputes, post-M&A disputes as well as disputes concerning mutual commercial transactions. Additionally, the court in Mannheim is available for disputes resulting from banking and financial transactions. While the Commercial Court in Stuttgart does not limit its jurisdiction to a certain litigation value, the court in Mannheim (its patent division enjoys global recognition) requires an amount in dispute of at least EUR 2 million. To ensure an effective review at the appellate level, the Higher District Courts (*Oberlandesgerichte*) in Stuttgart and Karlsruhe have also established specialized appeal panels responsible for dealing with appeals and complaints against the decisions of the new Stuttgart and Mannheim Commercial Courts.

The new Commercial Courts are supposed to let international litigants benefit from the high quality of the German court system and the advantages of its procedural rules. Overall, the duration of court proceedings in Germany is fairly short. There is no "American-style" discovery process. Costs are moderate by international standards, and must be borne by the losing party. Hearings are usually held in public, but the public can be excluded when business secrets are discussed. Additionally, parties may decide whether or not to allow for an appeal.

Despite these benefits, it remains to be seen whether the Commercial Courts in practice will measure up to these high expectations: Even though oral hearings may be conducted in English and a translation of English appendices is no longer required, every written submission must still be filed in German, and the decisions the court renders are in German as well. In any case, the new Commercial Courts seem to be a further step into the right direction towards a more international business-friendly approach.

Back to Top

11.2 Directive for Collective Redress – Class Action at EU-Level

On December 4, 2020, following an agreement between the EU-institutions in June 2020, the EU-Parliament has approved the "*Directive on representative actions for the protection of the collective interests of Consumers*" (the "**Directive**")[14], introducing the possibility of collective redress across the borders within the EU. The Directive aims to strengthen the protection of EU-consumer rights in case of mass damages, covering both domestic and cross-border infringements, especially with regard to data protection, energy, telecoms, travel and tourism, environment and health, airline rights and financial services. The EU Member States need to implement the Directive into their national laws within two years and six months, i.e. by mid-2023.

Under the Directive, collective legal actions may only be taken by "*qualified entities*" on behalf of consumers against traders, seeking injunction and/or redress measures. For the purpose of cross-border representative actions, the qualified entities may only be designated (by the Member State) if they comply with EU-wide criteria (*i.e.* non-profit, independent, transparent and ensure a legitimate interest in consumer protection). To prevent abusive litigation, the defeated party has to bear the costs of the proceedings ("*loser pays*") and courts or administrative authorities may dismiss manifestly unfounded cases. Consumers can join the action by either opt-in or opt-out mechanisms, depending on the decision regarding procedure which each Member State takes.

Even though the legal orders of many Member States already provide for the possibility of collective redress, the Directive assures (i) a **harmonized approach** to collective redress and (ii) **mandatory redress measures** in every Member State such as compensation, repair or price reduction without the need to bring a separate action. Therefore, the Directive goes beyond some existing regulations, which only allow declaratory actions or injunctive relief. At the same time, individual actions by plaintiffs remain possible and unregulated at the EU level. As the diesel emissions lawsuits in Germany demonstrate, this can lead to waves of mass actions and a massive clogging of court dockets.

Even though the deadline for the implementation of the Directive is still sometime down the road, the adoption of laws and regulations in the Member States to implement the Directive will need to be closely monitored by companies and law firms, in particular with regard to the various Member States' chosen path on such issues as opt-in vs. opt-out and discovery or disclosure of documents.

Back to Top

11.3 German Courts and the COVID-19 Pandemic

COVID-19 has affected all areas of life, including the court system. Over the year 2020, German courts had to learn how to litigate despite the pandemic and conduct oral hearings, as well as litigation in general, as safe as possible for everyone involved.

During the first wave of the pandemic in spring 2020, non-urgent matters were mostly postponed. Some courts in areas particularly troubled by the virus were forced to close their buildings to the public. However, the German administration of justice was never completely suspended or paused.

During the summer of 2020, with fewer COVID-19 cases, court proceedings started to normalize and courts developed concepts to continue with litigation despite the pandemic. In appropriate cases, courts tried to avoid oral hearings and, with the parties' consent, conducted the proceedings in writing only. Courts also slowly started to hold oral hearings using video conferencing tools. While the German Rules of Civil Procedure (*Zivilprozessordnung*, *ZPO*) allow this method since 2001, German Courts were reluctant to use it before the pandemic. However, in the vast majority of cases, German Courts still conduct oral hearings despite the COVID-19 situation. Most courts adhere to hygiene concepts for these hearings, such as wearing face masks, keep sufficient distance between the individuals and ventilate the court room frequently.

For the year 2021, we expect that more and more courts elect to conduct the proceedings in writing or by videoconference. If an oral hearing is necessary nevertheless, the courts now have hygienic routines in place. Thus, unless we see a dramatic change in the COVID-19 infection rates, we do not expect that German courts will need to reduce their working speed in 2021.

Back to Top

12. Update on COVID-19 Measures in Germany

As in other jurisdictions, the COVID-19 pandemic has led to a large variety of legislative measures in Germany, which were aimed at mitigating the impact of the pandemic on the economy. These measures included in particular a moratorium for continuing obligations (temporary right to refuse performance under certain contracts), a temporary deferral of payment for consumer loans, the Special Program 2020 set up by the *Kreditanstalt für Wiederaufbau* (*KfW*) and the introduction of the Economic Stabilization Fund **(***Wirtschaftsstabilisierungsfonds***)**. While many of these state measures and programs are still in place unchanged, others have been amended and adapted in time and some have lapsed without replacement. The following summary therefore gives a short overview on the current status of the COVID-19-induced state measures and programs in Germany. Most of the measures mentioned in this alert have already been covered in more detail in previous alerts published throughout 2020, that can be found here.[15]

Back to Top

12.1 Economic Stabilization Fund (*Wirtschaftsstabilisierungsfonds*)

The Act on the Introduction of an Economic Stabilization Fund (*Gesetz zur Errichtung eines Wirtschaftsstabilisierungsfonds - WStFG*) entered into force on March 28, 2020. This act provides the statutory framework for state stabilizing measures, in particular, guarantees and recapitalization measures, like the acquisition of subordinated debt instruments, profit-sharing rights (*Genussrechte*), silent partnerships, convertible bonds and the acquisition of shares. After the introduction of the Economic Stabilization Fund was approved under state aid law by the EU Commission in July 2020 and the legal regulations for its implementation were published in the Federal Law Gazette in October 2020, the Economic Stabilization Fund has become fully operational.

Moreover, in July 2020 the new Economic Stabilization Acceleration Act (*Wirtschaftsstabilisierungsbeschleunigungsgesetz – WStBG*) came into force, which provides for temporary modifications of German corporate law in order to implement the state aid measures by the Economic Stabilization Fund more efficiently. These changes include, *inter alia*, facilitations for capital measures and transactions (capital increases, capital reductions, etc.) in connection with stabilization measures, which significantly relax minority protection.

Since the introduction of the Economic Stabilization Fund, there have been several high profile cases, in which those measures have been effectively put into action: Deutsche Lufthansa (silent participation in the amount of EUR 5,7 billion and subscription of shares by way of a capital increase amounting to 20% of the share capital), TUI (convertible bond and various other emergency support measures in the amount of EUR 1.3 billion), FTI Touristik (subordinated loan in the amount of EUR 235 million), MV Werften Holding (subordinated loan in the amount of EUR 193 million) and German Naval Yards Kiel (subordinated loan in the amount of EUR 35 million).

Originally, (i) guarantees under the Economic Stabilization Fund could only be granted until December 31, 2020 and (ii) the application period for recapitalization measures was set to run until June 30, 2021. These deadlines have now been extended and (i) guarantees can now be granted until June 30, 2021 and (ii) recapitalizations can be granted until September 30, 2021, respectively.

Back to Top

12.2 Corporate Law Modifications pursuant to the COVID-19 Pandemic Mitigation Act

The COVID-19 Pandemic Mitigation Act *(Gesetz zur Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht)* provided for, *inter alia*, (i) a modification of the Limited Liability Company Act (*GmbHG*), which facilitates shareholder resolutions in text form or by written vote (circulation procedure) without requiring the consent of all shareholders to such procedure, and (ii) a modification of the Conversion Act *(UmwG)* with regard to measures requiring the submission of a closing balance sheet, where the balance sheet reference date (*Bilanzstichtag*) used in such filings can now be up to twelve months old at the time of the register filing instead of a maximum of eight months as under the regular statutory rules.

Both of these COVID-19-induced rules were extended by legislative decree dated October 20, 2020 (*Verordnung zur Verlängerung von Maßnahmen im Gesellschafts-, Genossenschafts-, Vereins- und Stiftungsrecht zur Bekämpfung der Bekämpfung der Auswirkungen der COVID-19-Pandemie*) and are effective until December 31, 2021.

Back to Top

12.3 Moratorium for Continuing Obligations and Consumer Loans, Restriction of Lease Terminations

The COVID-19 Pandemic Mitigation Act also introduced a moratorium for substantial continuing obligations (i.e. those which serve to provide goods or services of general interest, such as the supply of energy and water), which allowed obligors to refuse to fulfill their obligations if they were no longer able to meet their obligations as a result of the COVID-19 pandemic. This moratorium was limited to June 30, 2020. It could theoretically have been extended thereafter by legislative decree until September 30, 2020, but the government decided not to make use of the option to extend the moratorium. The moratorium therefore expired on June 30, 2020.

Likewise, the payment deferral for consumer loan agreements, which stipulated that claims of lenders for payment of principal or interest due between April 1 and June 30, 2020 were deferred by three months, was not extended by the government, either. As a result, debtors can no longer defer payment, and in order to avoid a double burden for the debtor, the period of the loan agreement will be extended by three months, unless the lender under such a consumer loan and the debtor have reached another arrangement.

Furthermore, the COVID-19 Pandemic Mitigation Act restricts the landlords' termination right concerning German real estate lease agreements. Until June 30, 2022, a landlord is not entitled to terminate such a lease agreement solely based on the argument that the tenant is in default with payment of the rent for the period April 1, 2020 through June 30, 2020 if the tenant provides credible evidence that the payment default is based on the impact of the COVID-19 pandemic. The landlord's other contractual and statutory termination rights as well as its rental payment claims for such period, however, remained unaffected by the COVID-19 Pandemic Mitigation Act. Likewise, the government did not make use of the option to extend the termination restrictions to backlogs in tenants' payments for the period July 1, 2020 through September 30, 2020.

Back to Top

12.4 Request for Adjustment of Commercial Lease Agreements

The German Parliament (*Bundestag*) passed a bill on December 17, 2020 that is supposed to increase the chances of tenants of German commercial property or room leases to successfully request an adjustment of the contractual lease terms or even termination of the lease pursuant to Section 313 German Civil Code (*Bürgerliches Gesetzbuch – BGB*) due to the COVID-19 pandemic. A request pursuant to Section 313 BGB requires that (i) circumstances that are the mutually accepted basis of the contract have significantly changed since the conclusion of the contract, (ii) the parties would not have entered into the contract or only with different content if they had foreseen this change, and (iii) the party making such a request cannot reasonably be expected to be held to the terms of the contract without adjustments or even at all taking into account all circumstances of the specific case, in particular, the contractual or statutory distribution of risk between the parties.

According to this bill, circumstances that are the mutual basis of the contract are refutably deemed to have significantly changed if the use of such leased premises is significantly restricted due to public measure for the purpose of combating the COVID-19 pandemic. As the tenant still needs to show that the other conditions are fulfilled, in particular, that the balancing of interest under (iii) above is in its favor, it remains to be seen whether this bill has the desired effect. Attempting to find an amicable solution may still be the better option for both the landlord and the tenant.

Back to Top

12.5 Miscellaneous

In addition to the legislative measures mentioned above, Germany has introduced a varied array of additional programs to stabilize and support the German economy. Particularly noteworthy is the KfW's Special Program 2020 (*"KfW Sonderprogramm 2020 für Investitions- und Betriebsmittelfinanzierung"*), which includes the KfW Entrepreneur Loan (*"KfW Unternehmerkredit"*), the ERP Start-Up Loan – Universal (*"EPR Gründerkredit – Universell"*) and the KfW Special Program Syndicated Lending (*KfW Sonderprogramm "Direktbeteiligung für Konsortialfinanzierung"*). The Special Program 2020 was originally set to run until December 31, 2020 and has in the meantime been extended until June 30, 2021. The European Commission has not yet approved the program under state aid law, but this is expected to take place in the near future.

The Immediate Corona Support Program for small(est) enterprises and sole entrepreneurs (*Corona Soforthilfe für Kleinstunternehmen und Soloselbstständige*) was a one-off payment for three months during the first lockdown in the spring of 2020, that has not been relaunched by the government in connection with the second lockdown in Germany in the fall of 2020. However, similar support has been provided to companies which are particularly affected by the lockdown (most notably restaurants and hotels) through the so-called "November and December COVID-relief" program (*November- und Dezemberhilfen*).

Back to Top

12.6 Conclusion

The COVID-19 pandemic is obviously not over yet and it is difficult to predict how things will develop going forward. It is important for companies to keep an eye on the current status of the COVID-19 support measures and programs and how they will be amended or evolve over time. Otherwise, there is the risk that new support programs will be overlooked or deadlines for existing programs will be missed.

The following webpage provides a good overview of the current support measures for businesses in Germany: https://www.bmwi.de/Redaktion/DE/Coronavirus/coronahilfe.html.

Back to Top

---

[1] Also see our alerts dated March 27, 2020, section III., published under https://www.gibsondunn.com/whatever-it-takes-german-parliament-passes-far-reaching-legal-measures-in-response-to-the-covid-19-pandemic/ and dated September 24, 2020, published under https://www.gibsondunn.com/covid-19-german-rules-on-possibility-to-hold-virtual-shareholders-meetings-likely-to-be-extended-until-end-of-2021/.

[2] EU Regulation (EU) 2019/452 of March 19, 2019 establishing a framework for screening of foreign direct investments into the EU, available in the English language version under: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0452&from=EN.

[3] "German Foreign Investment Control Tightens Further", available under https://www.gibsondunn.com/german-foreign-investment-control-tightens-further/.

[4] "Update on German Foreign Investment Control: New EU Cooperation Mechanism & Overview of Recent Changes", available under https://www.gibsondunn.com/update-on-german-foreign-investment-control-new-eu-cooperation-mechanism-and-overview-of-recent-changes/.

[5] In this context, see section 1.6 of 2015 Year End Alert available under https://www.gibsondunn.com/2015-year-end-german-law-update/.

[6] We refer you to our earlier alerts in this regard available at: https://www.gibsondunn.com/whatever-it-takes-german-parliament-passes-far-reaching-legal-measures-in-response-to-the-covid-19-pandemic/ and at https://www.gibsondunn.com/european-and-german-programs-counteracting-liquidity-shortfalls-and-relaxations-in-german-insolvency-law/, as well as more specifically on insolvency filing obligations https://www.gibsondunn.com/temporary-german-covid-19-insolvency-regime-extended-in-modified-form/.

[7] Again see our alert at https://www.gibsondunn.com/temporary-german-covid-19-insolvency-regime-extended-in-modified-form/.

[8] Available under https://www.gibsondunn.com/covid-19-short-term-reduction-of-personnel-costs-under-german-labor-law/.

[9] Available under https://www.gibsondunn.com/2019-year-end-german-law-update/.

[10] See https://www.gibsondunn.com/the-court-of-justice-of-the-european-union-strikes-down-the-privacy-shield-but-upholds-the-standard-contractual-clauses-under-conditions/.

[11] Section 7.2 in the Year-End Alert published under https://www.gibsondunn.com/2019-year-end-german-law-update/.

[12] Available under https://www.gibsondunn.com/new-iran-e-o-and-new-eu-blocking-statute-navigating-the-divide-for-international-business/.

[13] This study is available under: https://www.europarl.europa.eu/RegData/etudes/STUD/2020/653618/EXPO_STU(2020)653618_EN.pdf.

[14] See at https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32020L1828&from=DE.

[15] These earlier alerts are available under https://www.gibsondunn.com/european-and-german-programs-counteracting-liquidity-shortfalls-and-relaxations-in-german-insolvency-law/, under https://www.gibsondunn.com/whatever-it-takes-german-parliament-passes-far-reaching-legal-measures-in-response-to-the-covid-19-pandemic/ and under https://www.gibsondunn.com/corporate-ma-in-times-of-the-corona-crisis-current-legal-developments-for-german-business/.

GIBSON DUNN

■ ■ ■ ■ ■

The following Gibson Dunn lawyers assisted in preparing this client update: Birgit Friedl, Marcus Geiss, Carla Baum, Silke Beiter, Andreas Dürr, Lutz Englisch, Ferdinand Fromholzer, Daniel Gebauer, Kai Gesing, Franziska Gruber, Selina Grün, Johanna Hauser, Alexander Horn, Markus Nauheim, Patricia Labussek, Wilhelm Reinhardt, Markus Rieder, Richard Roeder, Sonja Ruttmann, Martin Schmid, Annekatrin Schmoll, Benno Schwarz, Ralf van Ermingen-Marbach, Linda Vögele, Friedrich Wagner, Frances Waldmann, Michael Walther, Georg Weidenbach, Finn Zeidler, Mark Zimmer, Stefanie Zirkel and Caroline Ziser Smith.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. The two German offices of Gibson Dunn in Munich and Frankfurt bring together lawyers with extensive knowledge of corporate, M&A, finance and restructuring, tax, labor, real estate, antitrust, intellectual property law and extensive compliance / white collar crime experience. The German offices are comprised of seasoned lawyers with a breadth of experience who have assisted clients in various industries and in jurisdictions around the world. Our German lawyers work closely with the firm's practice groups in other jurisdictions to provide cutting-edge legal advice and guidance in the most complex transactions and legal matters. For further information, please contact the Gibson Dunn lawyer with whom you work or any of the following members of the German offices:

General Corporate, Corporate Transactions and Capital Markets
Lutz Englisch (+49 89 189 33 150), lenglisch@gibsondunn.com)
Markus Nauheim (+49 89 189 33 122, mnauheim@gibsondunn.com)
Ferdinand Fromholzer (+49 89 189 33 170, ffromholzer@gibsondunn.com)
Dirk Oberbracht (+49 69 247 411 510, doberbracht@gibsondunn.com)
Wilhelm Reinhardt (+49 69 247 411 520, wreinhardt@gibsondunn.com)
Birgit Friedl (+49 89 189 33 122, bfriedl@gibsondunn.com)
Silke Beiter (+49 89 189 33 170, sbeiter@gibsondunn.com)
Annekatrin Pelster (+49 69 247 411 521, apelster@gibsondunn.com)
Marcus Geiss (+49 89 189 33 115, mgeiss@gibsondunn.com)

Finance, Restructuring and Insolvency
Sebastian Schoon (+49 69 247 411 540, sschoon@gibsondunn.com)
Birgit Friedl (+49 89 189 33 122, bfriedl@gibsondunn.com)
Alexander Klein (+49 69 247 411 518, aklein@gibsondunn.com)
Marcus Geiss (+49 89 189 33 115, mgeiss@gibsondunn.com)

Tax
Hans Martin Schmid (+49 89 189 33 110, mschmid@gibsondunn.com)

Labor Law
Mark Zimmer (+49 89 189 33 130, mzimmer@gibsondunn.com)

Real Estate
Hans Martin Schmid (+49 89 189 33 110, mschmid@gibsondunn.com)
Daniel Gebauer (+49 89 189 33 115, dgebauer@gibsondunn.com)

Technology Transactions / Intellectual Property / Data Privacy
Michael Walther (+49 89 189 33 180, mwalther@gibsondunn.com)
Kai Gesing (+49 89 189 33 180, kgesing@gibsondunn.com)

Corporate Compliance / White Collar Matters
Benno Schwarz (+49 89 189 33 110, bschwarz@gibsondunn.com)
Michael Walther (+49 89 189 33 180, mwalther@gibsondunn.com)
Mark Zimmer (+49 89 189 33 130, mzimmer@gibsondunn.com)
Finn Zeidler (+49 69 247 411 530, fzeidler@gibsondunn.com)
Ralf van Ermingen-Marbach (+49 89 189 33 161, rvanermingenmarbach@gibsondunn.com)

Antitrust
Michael Walther (+49 89 189 33 180, mwalther@gibsondunn.com)
Jens-Olrik Murach (+32 2 554 7240, jmurach@gibsondunn.com)
Georg Weidenbach (+69 247 411 550, gweidenbach@gibsondunn.com)
Kai Gesing (+49 89 189 33 180, kgesing@gibsondunn.com)

Litigation
Michael Walther (+49 89 189 33 180, mwalther@gibsondunn.com)
Markus Rieder (+49 89 189 33 160, mrieder@gibsondunn.com)
Mark Zimmer (+49 89 189 33 130, mzimmer@gibsondunn.com)
Finn Zeidler (+49 69 247 411 530, fzeidler@gibsondunn.com)
Kai Gesing (+49 89 189 33 180, kgesing@gibsondunn.com)

International Trade, Sanctions and Export Control
Michael Walther (+49 89 189 33 180, mwalther@gibsondunn.com)
Richard Roeder (+49 89 189 33 122, rroeder@gibsondunn.com)