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2021 YEAR-END GERMAN LAW UPDATE

To Our Clients and Friends:

Once more, 2021 demonstrated that constant change should become your friend and ally. After a second year of global uncertainty caused by the formidable challenges of the COVID-pandemic, we all long for a return "back-to-normal." However, chances are that 2022 will continue to present drastic and unpredictable challenges.

Let us start with the consequences of the pandemic that are already visible: Instead of bringing the world together to fight the global challenge, each country has chosen its own approach, ranging from very restrictive policies with modest vaccination rates such as in China to an approach that strives to push vaccination rates to the maximum in order to stay open for business such as in Israel.

The pandemic has also brought back big government: State-imposed restrictions significantly impact our private lives and the business community. Hundreds of billions of dollars have been disseminated to mitigate the effect of the crisis, all managed through state aid or state subsidies. Further do's and don'ts are imposed by the national sanctions regimes which have become the new weapon of choice in the battle for economic and military supremacy.

As if this was not enough, at a time when Government budgets have exploded and corporate debt levels are at historic peaks in various countries, inflation – a term forgotten for almost a generation – made a spectacular comeback. While experts still disagree whether this is an episode or a trend, the economy and private consumers are already suffering from rising asset prices, and it would seem only a matter of time until the party of cheap and easy money will be a thing of the past.

You still want more? Add some autocratic and eternal state leaders to the mix (China, Russia, Belarus), a few more instable countries striving to achieve nuclear arms capacities (Iran, North Korea), countries plagued by armed conflict (Afghanistan, Iraq), then raise the world's temperature levels by two or more degrees through climate change, and you might be heading for the kind of explosive cocktail that could make your nightmares come true.

As lawyers, nonetheless, we truly believe that change is our friend. We consider ourselves agents of change: In our Corporate Transactions and related practices, we help transform the corporate world through acquisitions, mergers and disposals. Our Data Privacy & Technology practices explore the boundaries of new technologies whilst protecting vulnerable data and our Regulatory practices and litigators help shape the legal and regulatory landscape that will become the level playing field for tomorrow's businesses.

We must resist the sort of short-term fears that others might justifiably feel in light of all the threats around us. We also are well-advised to fight any complacency that comes with decades of peace and prosperity that most of us have enjoyed until now.

We embrace the opportunities of change and seek to influence developments that will make the world a better and fairer place, through good lawyering of positions that we believe are proper and just, by facilitating the transition from one technological era to another, but also through our many pro bono efforts that focus on other important matters that fall outside of the scope of big business or big law, and we fight for cases and causes which could easily be forgotten without pro-bono efforts.

With this in mind, we have again prepared this year's legal update on German law developments, which are equally reflective of significant changes: The advent of a new coalition government under Chancellor Olaf Scholz inaugurated on December 8, 2021 after sixteen years of Angela Merkel's tenure, the fundamental change of the German economy to a more climate friendly industry, and the awakening to long forgotten security threats posed by Russia and other aggressive autocracies and kleptocracies.

As one of the largest economies in the world, Germany cannot and should not stay passive and wait for others to shape the future. Therefore, embrace the legal changes we present below as a sign of things to come and as good faith efforts to shape the future in times of great uncertainty. Amidst all the change and the many challenges we face, some things remain as they were, however. We have therefore again focused our topical updates on three questions: What's new? Why is it relevant? What's next?

We hope you will find this update helpful in all your dealings with Germany next year and beyond. We are grateful for all the opportunities you gave us in the past year to work with you to solve your most important and sensitive issues. We look forward to continue changing the world together with you in the years to come.

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9. International Trade / Sanctions

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1. Corporate, M&A

1.1 Recent Reform of the Legal Framework for Civil Law Partnerships and other Commercial Partnerships

On June 25, 2021, the German legislator adopted the Act on the Modernization of the Law on Partnerships (*Gesetz zur Modernisierung des Personengesellschaftsrechts – MoPeG*). While the new law will only enter into force on January 1, 2024, this reform will result in a number of changes which civil law partnerships (*Gesellschaft Bürgerlichen Rechts, GbR* – "**Civil Partnership**") and their partners, but also other forms of commercial partnerships and their partners, ought to be aware of in order to be prepared for the new legal regime.

Consequently, we highlight below a number of selected changes which we would consider to be of particular interest for general industrial players but also for real estate investors who often choose to operate via partnership structures in Germany:

a) Registration of Civil Partnerships

Under the new law, Civil Partnerships will have the option, and in some cases the need, to seek registration in a newly introduced company register (*Gesellschaftsregister*) maintained by the local courts (*Amtsgerichte*). Such registration in the public commercial register (*Handelsregister*) is already mandatory for both (i) corporations such as the *GmbH* (private limited liability company) or the *AG* (stock corporation), as well as (ii) commercial partnerships such as the *OHG* (commercial open partnership with only personally liable partners) or the *KG* (limited partnership).

This new company register will be particularly relevant for Civil Partnerships that own real estate because their registration in the new company register will be mandatory after January 1, 2024, the current grace period, as soon as there are any legal changes triggering registration in any of the existing registers (e.g. encumbrances or changes in real estate ownership in the land register (*Grundbuch*)).

Newly incorporated Civil Partnerships who acquire real estate will always require registration in the new company register after the entry into force of the *MoPeG* based on the above rationale.

Similarly, the position of a Civil Partnership as a shareholder of a limited liability company or as a named shareholder (*Namensaktionär*) in a stock corporation will trigger the need for registration in the new company register for the Civil Partnership.

If registered, Civil Partnerships must use the abbreviation "eGbR" (*eingetragene Gesellschaft bürgerlichen Rechts* – Registered Civil Partnership). The registration in the new company register will also increase the level of information available to the public on such registered Civil Partnerships significantly: The filing for registration will have to contain full personal or corporate details of all partners, the details of their representation powers and a confirmation that the relevant partnership is not yet registered in the commercial register or the partnership register (*Partnerschaftsregister*).

In particular in real estate transactions, where the use of Civil Partnerships is relatively common, such increased transparency on the particulars of the partners and their representation powers will be welcome.

Finally, the registration of a Civil Partnership in the new company register will also result in the need for its partners to disclose information on the registered Civil Partnership's ultimate beneficial owners in or to the German transparency register (*Transparenzregister*).

b) Confirmation of Permanence of the Seat of Partnership

The *MoPeG* brought another welcome and long overdue clarification: The new law clarifies that all German partnerships have their corporate seat either at the place where their business is actually conducted (*Verwaltungssitz*) or – in case of both registered Civil Law Partnerships and commercial partnerships – at a contractually fixed place in Germany (*Vertragssitz*), irrespective of the place where the relevant partnership's business is actually conducted.

Due to the specifics of German partnership law, there had always been some doubt over whether commercial partnerships, which are registered as such in the existing German commercial register, might lose their status as German commercial partnerships (and thus potentially their liability limitations) if they are managed entirely from abroad because they are deemed to no longer be German-based. This statutory confirmation of the permanence of a partnership's chosen seat means that this dogmatic discussion is now settled. German corporate law remains applicable to partnerships for as long as their chosen contractual seat remains in Germany, irrespective of the factual place where managerial decisions are taken. Consequently, limited partnerships with foreign partners or managed from abroad no longer have to fear that such foreign management may invalidate or otherwise question their limitation of liability under German law. Going forward, the German partnerships concerned are thus free to operate predominantly or entirely abroad.

c) Qualification under the German Conversion Act (Umwandlungsgesetz, UmwG)

The reform also clarifies that Civil Partnerships can in the future be transformed into other corporate formats or merged into other entities by way of universal legal succession. One requirement for such conversion will, however, be a prior registration of the Civil Partnership in question in the new company register.

d) Key Changes for Commercial Partnerships

The reform also introduces certain changes that apply to commercial open partnerships or limited partnerships in Germany. Chief among them are increased information rights for limited partners, new rules on the determination and distribution of profits to the partners and provisions on the taking of partner resolutions and the consequences of defective partner resolutions.

e) Outlook

Existing Civil Partnerships should familiarize themselves with the reform with a view to (i) identifying any necessary or opportune amendments to their partnership agreements and (ii) potential issues related to a future registration in the respective company register. They should assess whether their business activities are of a nature that makes registration either opportune or legally required.

The changes to the law for commercial partnerships may, at first sight, appear less fundamental or far-reaching. Nevertheless, the interim period until December 31, 2023 should also be used to ascertain to which extent existing partnership agreements may need to be revised to either reflect some or all of these changes or to opt out of the new law that might otherwise apply.

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1.2 Did Brexit Spell the End for UK Limited Companies in Germany?

Once the UK opted to leave the European Union, the continued existence and legal qualification of British private limited companies with an administrative seat in Germany became the subject of intense legal speculation and debate: Would German courts continue to afford such UK companies the protection of the EU Company Law Directive (Directive (EU) 2017/1132 – the "**Company Law Directive**") and the freedom of establishment (Art. 49, 54 AUEV) or would they default back to the "corporate domicile theory" (*Sitztheorie*) for UK companies in the way they do for other non-EU companies that are not governed by relevant bilateral treaties?

On February 16, 2021, the German Federal Supreme Court (*Bundesgerichtshof, BGH*) (no. II ZB 25/17) ruled on the above question for the first time and held that the Company Law Directive and the freedom of establishment (Art. 49, 54 AUEV) will no longer apply to a UK limited company as a result of Brexit. The *BGH's* judgment suggests that the court will continue to apply the traditional German corporate domicile theory to non-Member States and that it now considers the United Kingdom a non-Member State. Accordingly, the choice of the applicable company law for companies from a non-Member State depends, from a German law perspective, on the administrative seat of the company. In other words, German law will apply to UK companies with a German administrative seat.

It then follows that UK companies with a German administrative seat would, due to their lack of compliance with the incorporation formalities applicable to German corporations, regularly be reclassified either as a German civil law partnership (*GbR*) or as a commercial open partnership when operating a commercial enterprise (*OHG*). The partners in both of these partnerships are generally faced with unlimited personal liability. The resulting risks arising from such a corporate reclassification for the owners of UK limited companies which are active in the German market are obvious.

UK limited companies with elements of their decision making powers or administrative headquarters in Germany are thus well advised to restructure their company to avoid personal liability risks for the limited company's shareholders. The required measures may include (i) a transfer of the effective administrative seat to the United Kingdom, (ii) the transfer of the business operations of the UK Limited to another new or existing German limited liability company (i.e. *GmbH*) or a German entrepreneurial company with limited liability (*UG haftungsbeschränkt*) by way of asset deal or (iii) under certain specific circumstances, a cross-border merger of the relevant UK Limited into a limited liability company of one of the other EU Member States.

Which one of the above options is the most suitable approach for any given company must be thoroughly considered in each case and will also depend on tax considerations and/or the business in which the respective company trades in.

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1.3 Further Revision of the German Foreign Direct Investment Law – An Ongoing Exercise?

As already predicted in Section 1.3 of our 2020 German Year-End Alert, 2021 saw another significant expansion of the scope of the German Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*, *AWV*) by incorporating 16 new business sectors into the cross-sectoral review that are considered critical. In addition to the sectors already included in the AWV, a mandatory filing is now also required if a German M&A transaction target operates in one of these new sectors and the investor intends to acquire more than 20% (compared to 10% applicable to the "old" sectors) of its voting rights. These newly introduced sectors include satellite systems, artificial intelligence, robots, autonomous driving/unmanned aircrafts, quantum mechanics, and critical materials and broadly reflects the sectors mentioned in the EU Screening Regulation. The total number of "critical sectors" which require a mandatory filing has now increased to 27.

The revision also extended the sector-specific review (in particular with respect to defense-related activities). This is relevant to all non-German investors, even if they are located in the EU/EFTA. The following are now included: (i) all products of Part I Section A of the German Export List including their modification and handling, (ii) military goods/technologies that are based on restricted patents or utility models and (iii) defense-critical facilities.

In addition to expanding the scope of the foreign direct investment ("**FDI**") review, the 2021 AWV revisions led to certain procedural changes and clarifications, including the following:

- Additional mandatory filings are required, if the investor acquires additional voting rights and exceeds certain thresholds (e.g., 25%, 40%, 50% and 75%, in case of the initial threshold of 20%, or 20%, 25%, 40%, 50% and 75% in case of the initial threshold of 10%).

- The application for a certificate of non-objection (*Unbedenklichkeitsbescheinigung*) is not available if the transaction is subject to mandatory filing requirements.

- The German Ministry for Economic Affairs (*BMWi*) may review transactions falling below the relevant voting rights threshold, if so-called atypical control rights are granted to the investor (e.g. granting the investor an additional board seat or veto rights and/or access to particular information). This, however, does not trigger a mandatory filing requirement but allows the *BMWi* to investigate the transaction *ex officio* for five years post-signing.

- Individual investors may be considered as acting together in certain acquisition structures involving purchasers from the same country.

Since April 2020, the German FDI regime faced three substantial revisions, which led to a significant increase in case load for the *BMWi*. Many EU Member States have implemented or amended their FDI regimes in light of the EU Screening Regulation and the EU cooperation mechanism. This has led to a solid information flow between the European Commission and the EU Member States. Investors are therefore well-advised to conduct a multi-jurisdictional FDI analysis as early as possible in the M&A process. The risk of potentially severe legal consequences for gun jumping (including imprisonment) requires a thorough advance assessment.

For further details please refer to our client alert on the topic from May 2021.

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1.4 German Transparency Register: Expiry of Transition Periods for Registration of Beneficial Ownership Information

Effective as of August 1, 2021, the German transparency register, which was introduced in 2017 as part of EU measures to combat money laundering and terrorist financing, has finally been upgraded to a genuine public register for information on a beneficial owner. A beneficial owner is an individual (*natürliche Person*) who directly or indirectly owns or controls more than 25 per cent of the share capital or voting rights in the relevant entity.

Previously it was not a requirement to file beneficial ownership information with the German transparency register if the information was already available in electronic form in other public German registers – for example through shareholder lists retrievable from the commercial register or because the registered managing directors of the German subsidiary were deemed to be beneficial owners absent individuals controlling the parent. Now all legal entities (*juristische Personen*) and registered partnerships under German private law are required to file beneficial ownership information for registration with the German transparency register. If there is no beneficial owner, the legal representatives, managing shareholders or partners must be registered with the German transparency register as deemed beneficial owners, irrespective of their registration in another German public register.

The (staggered) transition periods for entities that had to file for the first time due to the new rules will expire (i) on March 31, 2022 (for stock corporations (*Aktiengesellschaft, AG*), European stock corporations (*Societas Europaea*, *SE*) and partnerships limited by shares (*Kommanditgesellschaft auf Aktien, KGaA*)), (ii) June 30, 2022 (for limited liability companies (*Gesellschaft mit beschränkter Haftung, GmbH*), cooperatives (*Genossenschaften*), European cooperatives (*europäische Genossenschaften*) and partnerships (*Partnerschaftsgesellschaften*)) and (iii) December 31, 2022 (for all other legal entities and registered partnerships). Although there is a further leniency period of one year following the aforementioned filing deadlines, in which no administrative fines shall be imposed on the relevant entities, international groups in particular should confirm with their German operations to ensure a timely filing of the required beneficial ownership information with the transparency register. It is important to bear in mind that the above transition periods do not apply in case the change occurs after

August 1, 2021: Accordingly, any new managing directors deemed to be beneficial owners should also be registered immediately in the transparency register to avoid an administrative fine.

Finally, in this context it is also important to note that since August 1, 2021, the obligations of foreign entities and trustees residing or headquartered outside of the EU to file beneficial ownership information for registration in the German transparency register have been significantly expanded. In particular, if German real property is involved in a transaction, the rules now not only capture asset deals but also direct and indirect share deals. These new filing obligations should be taken into due consideration by all companies planning to – directly or indirectly – acquire real property in Germany in 2022 in order to avoid any unexpected delays of the transaction due to missing filings.

For a more detailed analysis we refer to our specific client alert on the topic in June 2021.

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1.5 New Requirements for the Corporate Governance and External Audit of Listed German Companies in the Aftermath of the Wirecard Scandal

As a reaction to the seismic shake of public confidence in the effectiveness of the internal and external governance and control systems of German public companies following the spectacular collapse of German Dax listed Wirecard, the German legislature has adopted the Act on Strengthening the Financial Market Integrity (*Finanzmarktintegritätsgesetzt – FISG*). The FISG entered into force on July 1, 2021. This law establishes a number of new requirements designed to enhance the corporate governance and external audit of listed German companies as well as other public-interest companies which clients would be well advised to familiarize themselves with as some of them may necessitate changes to the constitutional documents of the affected listed German companies and other public-interest companies.

For a more detailed analysis of these changes, please see our client alert on the topic in June 2021 and Section 1.2 in last year's German Year-End Alert.

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1.6 ESG – What's Next? The Delayed EU Initiative on Sustainable Corporate Governance

Sustainability and social responsibility are continuously attracting awareness and gaining in importance. One encounters these issues in a wide variety of areas, from everyday errands such as grocery shopping to complex processes such as corporate governance. The current legislative initiative on Sustainable Corporate Governance (2020/2137 INI of the European Commission, the "**Initiative**") by the European Commission is aimed at ensuring that companies focus on long-term sustainable value creation rather than short-term benefits and would be subject to a broader set of policies under the EU Green Deal.

The Commission was originally set to adopt the Initiative in December 2021. After public consultation was completed in early 2021, and after an initial delay due to the rejection of the underlying impact study by the EU Regulatory Scrutiny Board, pressure has increased on the Commission to act soon. On December 8, 2021, an open letter signed by 47 civil society and trade union organizations was sent to the President of the European Commission, Ursula von der Leyen. Publication of the proposed legislation is now expected for early 2022.

According to the inception impact assessment (a project plan setting out the elements for new legislation) by the Commission, the Initiative is expected to impose a combination of the following corporate and directors' duties with a view to requiring (i) companies to adhere to the "do no harm" principle and (ii) directors to integrate a wider range of sustainability interests, such as climate, environment and human rights, into their business decisions:

- **Due diligence duty**: The due diligence duty for companies operating in the EU would require them to "*take measures to address their adverse sustainability impacts, such as climate change, environmental, human rights […] harm in their own operations and in their value chain by identifying and preventing relevant risks and mitigating negative impacts*" to identify and prevent relevant risks for climate, environment and human rights; and

- **Duty of care**: The duty for company directors would oblige them to take into account stakeholders' interests "*which are relevant for the long-term sustainability of the firm or which belong to those affected by it ([such as] employees, environment, other stakeholders affected by the business)*". Companies' strategies under these requirements would need to be implemented "*through proper risk management and impact mitigation procedures*".

It remains to be seen how and to what extent the Commission will implement these plans. Especially the suggested duty of care for management was met with criticism from Nordic countries such as Denmark, Finland, Estonia and others.

In Germany, ESG is – at least, to a certain degree – already part of corporate law: Certain disclosure obligations contained in the German Commercial Code (*Handelsgesetzbuch*, *HGB*), which originated from the EU Corporate Social Responsibility Directive, and the new German Act on Corporate Due Diligence in Supply Chains (*Lieferkettensorgalfspflichtengesetz, LkSG*), which will come into effect in 2023 (regarding the *LkSG* see below section 5.2), are two such examples. Furthermore, the – non-binding – German Corporate Governance Code (*Deutscher Corporate Governance Kodex*) covers the issue of sustainability and states that companies have ethical, environmental and social responsibilities for their employees, stakeholders and the community, deviating from the narrow shareholder value towards the broader stakeholder value principle.

The political trends in Germany point towards increased support for an initiative on social corporate governance: the 2021 coalition agreement of the newly elected German government between the Social Democratic Party (SPD), the Green Party (Bündnis 90/Die Grünen) and the Liberal Democratic Party (FDP) has placed strong emphasis on sustainability (the word appears more than 100 times in the 170-page agreement) and the protection of the environment. The document expressly states support for a "Corporate Sustainability Reporting Directive".

Given the suggested scope of the Initiative, companies should be prepared to take not only economic, but also environmental and social responsibility along the entire value chain seriously and implement respective processes throughout their operations. For example, in order to comply with the proposed due diligence duty and the duty of care, companies would likely be required to adapt newly tailored decision-making processes, taking into account aspects such as sustainable corporate governance, climate protection, resource conservation, data responsibility, human rights, integrity and compliance, supply chain and corporate citizenship.

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2. Tax

2.1 Tax Policy Program of the New Coalition

In the coalition agreement presented on November 24, 2021, the incoming government coalition of the Social Democratic Party (SPD), the Green Party (Bündnis 90/Die Grünen) and the Liberal Democratic Party (FDP) presented a tax policy program for the new governmental legislative period.

The program sets out the guidelines and statements of intent for the future tax policy for the next four years, but does not include any detailed or concrete tax law changes. Contrary to what had been announced by the SPD and the Green Party before the election, under the new tax policy program no wealth tax or increase in inheritance tax are anticipated. In addition to minor improvements to the offsetting of losses and to the preferential tax treatment for retained earnings, the coalition announced an obligation to report purely national tax arrangements for companies with sales of more than EUR 10 million. Under current law, a reporting obligation only exists for tax arrangements in cross-border transactions (known as DAC 6 reporting).

Other measures worthy of mention include the addition of an unspecified "interest rate cap" to the interest barrier rule, the expansion of withholding taxation, in particular, through the amendment of double taxation agreements, a renewed legislative amendment of real estate transfer tax in case of share deals, the intensification of the fight against tax evasion, money laundering and tax avoidance, and active support for the introduction of a global minimum taxation under the OECD initiatives.

With the coalition agreement, the coalition made it clear that there is no intention to reduce or increase corporate income tax, the solidarity surcharge or the income tax rate for individuals. Further details are currently unclear and reserved for future legislative initiatives.

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2.2 Revision of the Anti-Treaty Shopping Rule

For the third time in recent years, the European Court of Justice (case C-440/17) has ruled that the German Anti-Treaty Shopping provisions are not in compliance with EU law. The Anti Treaty Shopping provisions are relevant for cross boarder payment of, inter alia, dividends, interest and royalties where the parties of such payments rely on reduced withholding tax rates on such payments under an applicable double taxation treaty.

With effect for all open cases the German legislator amended the existing Anti-Treaty Shopping provisions on June 2, 2021 and implemented a two-step approach and the possibility to rebut any presumption of treaty abuse. The two step approach consists of a shareholder and an activity test. Under the shareholder test (look-through approach) treaty abuse would be presumed where the shareholder of a foreign entity that receives the cross-border payments would not be entitled to the same benefits claimed by the foreign entity if the shareholder of that entity received the payments directly. Under the activity test a foreign entity would not be entitled to treaty benefits if the source of its income subject to withholding tax does not have a material link or connection with the foreign entity's own activity. A simple pass through of income to shareholders or activities that lack physical substance do not qualify as sufficient economic activity. If both tests fail, the presumption of treaty abuse can be rebutted if it can be proven that none of the main reasons for interposing the foreign entity was to obtain a tax advantage.

The new rule results in a significant tightening of the conditions to benefit from a reduced withholding tax rate under an applicable double taxation treaty. The shareholder test to be passed would effectively be limited to shareholders that are resident in the same country as the foreign entity that receives the payment. The preconditions for the activity test are still unclear and require further guidance by the tax authorities. The main purpose exception, under which "none of the main reasons" for the interposition of an entity was to obtain a tax advantage is not limited to withholding tax considerations, or even to German tax considerations, which significantly limits the ability to successfully rely on the rebuttal exception.

Foreign investors with income from German sources should review their structures to determine whether reduced withholding tax rates under an applicable double taxation treaty can still be claimed under the amended rules.

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2.3 New German Check-the-Box Rules

In Germany, corporate entities are subject to corporate income tax and local trade tax. The combined tax load typically ranges between 30% and 33%. Partnerships are subject to trade tax in the same way as corporate entities. However, as partnerships are treated as transparent for income tax purposes, profits of a partnership are automatically deemed to be distributed to the partners and are subject to the income tax rate that may be applicable at the level of an individual partner of up to 45%. Profits of a corporation are taxed at shareholder level only upon dividend distribution, which – in contrast to partnerships - has a tax deferral effect at shareholder level until a distribution is made.

To mitigate such unequal tax treatment, the new check-the-box rules allow for an option for partnerships to be taxed as corporate entities. The election would have to be made before the beginning of the fiscal year for which the election becomes valid. For legal purposes, the partnership would still be treated as a partnership. The election to be treated as a corporate entity for income tax purposes would need to be made by the partnership with approval from all partners (unless the partnership agreement provides for a 75% majority). After the election, the relationship between the partners in the partnership would be governed by the rules regarding the relationship between a corporate entity and its shareholders, i.e., the taxation of dividends and deemed dividends (including withholding tax consequences) would need to be considered.

An election needs to be clearly analyzed in order not to trigger other negative tax consequences. An election may lead to a forfeiture of net operating losses at partnership level and may trigger real estate transfer tax for past reorganizations. Non-EU limited partners may suffer capital gains tax upon election and, even if a capital gains tax upon election is avoided, there would be a seven year holding period for shares after the election becomes effective.

Due to the possible negative side effects of such election, it remains to be seen whether the new check-the-box rules will be a successful tax planning alternative for partnerships in the future.

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3. Financing & Restructuring

3.1 LIBOR Cessation: Impact on Existing Loan Agreements

In most European financings, when calculating interest rates for floating rate loans or other instruments, the interest rate has historically been made up of (i) a margin element, and (ii) an inter-bank offered rate (IBOR). Most prominent IBORs used in European financings are USD LIBOR and LIBOR for loans denominated in USD and GBP, respectively, and EURIBOR for euro-denominated loans. In the aftermath of the LIBOR scandal that surfaced in the year 2016 and the manipulation of this rate by certain market participants, regulators have decided to discontinue and replace such rates by alternative risk-free rates. While IBOR reference rates are determined on the basis of quotations provided by a small group of market participants of their expected refinancing costs (and therefore are look-forward in nature), risk-free rates are based on active, underlying transactions. The cessation of LIBOR for GBP loans will take place by the end of 2021. For USD loans, only the reference rates for certain limited tenors will cease to be published as at such date, while the majority USD LIBOR rates will continue in effect until June 30, 2023, thus giving the market additional time for transition to alternative interest rates.

In the absence of statutory fallback solutions, upon the cessation of the relevant IBOR, the fallback provisions incorporated into the relevant loan documentation (if any) will apply in the first instance. Given that these themselves usually refer to the same IBOR (but different tenors or determined as of a different point in time), it is not unlikely that the applicable interest rate will eventually be based on the costs of funds of the relevant lenders as ultimate fallback provision for lack of other alternatives. From a borrower's perspective, calculating the interest rate on the basis of the actual costs of funds provides much less certainty as regards funding costs than a reference-rate-based approach. Borrowers should therefore seek to enter into negotiations with their lender with a view to amending their financing agreements by replacing IBOR-based interest rates with risk-free rates. Regarding the specific risk-free rates to be used, in the UK financing space, the market has settled on SONIA (Sterling Overnight Index Average) compounded daily on a look back basis as the replacement reference rate to GBP LIBOR while in the U.S., the Secured Overnight Financing Rate (SOFR) appears to be the reference rate of choice for most financings.

However, there is still quite a lot of movement and room for development as these risk-free rates evolve, including the development of a look-forward "term SOFR". Consequently, other or additional rates may yet become customary in the future. Regardless of whether these or other alternative rates are used, amending the interest rate provisions in existing loan agreements generally requires the borrower and the lenders to agree any alternative rate subject to the amendment and waivers provisions applicable to the financing. This will usually require a majority lenders' decision, thus requiring the consent of two thirds of lenders' commitments. Prompt action is thus required for borrowers unless specific contractual safeguards sufficiently taking into account the borrower's interest have already been incorporated.

While discussions have started regarding a discontinuation and replacement of EURIBOR as well, such developments are still in their early stages and no definite timeline for such interest reference rate cessation has been determined. Thus, there currently is no need to specifically address such issue for EURIBOR-based loans at this point in time.

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3.2 Avoidance of Transactions Due to Intention to Prejudice Creditors – A Turning Point?

After years of handing down relatively avoidance-friendly rulings, on May 5, 2021, the German Federal Supreme Court (*Bundesgerichtshof*, *BGH*) tightened the requirements for an insolvency administrator to attempt avoidance in insolvency (*Insolvenzanfechtung*) of transactions based on a debtor's intent to prejudice the insolvent estate's creditors pursuant to Section 133 of the German Insolvency Code (*Insolvenzordnung*, *InsO*) (BGH – IX ZR 72/20).

Prior to the ruling, in general, all an insolvency administrator had to show for a successful challenge was the debtor's knowledge of its (impending) illiquidity (*drohende Zahlungsunfähigkeit*), which then led to a presumption of the debtor's intent to disadvantage other creditors. As far as the counterparty to the contract was concerned, it was sufficient that such party was aware of the (impending) illiquidity. This case law was quite harsh on business partners of a debtor in financial difficulties, as it is possible to contest pre-insolvency performance acts or the completion even of congruent contracts for up to four years. New contracts entered into during a state of imminent illiquidity or incongruent performance actions are even at risk for ten years. The only "safe" way for a business partner to deal with a distressed contract partner under such circumstances was to insist on the submission of a restructuring opinion.

Pursuant to the new *BGH* ruling, the insolvency administrator will now have to show that the debtor - in addition to the (impending) illiquidity - knew or, at least, tacitly accepted that he would also not be able to meet the claims of all the estate's creditors in the future. In addition, the intent to disadvantage creditors can no longer simply be inferred from illiquidity but requires additional evidentiary elements such as, for example, payments prior to maturity, or otherwise payment of creditors outside the ordinary course of business.

It will be interesting to see how insolvency administrators and lower instance courts faced with future insolvency avoidance cases interpret these tightened requirements on a case by case basis. Ultimately, insolvency administrators and creditors alike will likely attempt to appeal cases to enable the German Federal Supreme Court to provide for further guidance. In the meantime, at least in restructuring cases involving a party in a state of impending illiquidity, the almost automatic conclusion from knowledge of the financial situation to knowledge of intent to prejudice creditors should no longer apply.

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3.3 Pre-Insolvency Restructuring – The First Twelve Months and What Next?

Exactly a year ago, the German Business Stabilization and Restructuring Act (*Unternehmensstabilisierungs- und -restrukturierungsgesetz*, *StaRUG*, - the "**Restructuring Act**") was introduced with effect as of January 1, 2021 (see last year's German Year-End Alert in section 3.2). Since restructuring proceedings under the Restructuring Act are in general non-public, official statistics on the number of proceedings applied for or completed are not available. However, publicly available sources suggest that (i) around ten applications were made in the first eight months of the year 2021, (ii) no large multinational company was involved and (iii) most of the companies concerned were local entities rather than international players.

In addition, there already is a somewhat limited body of court orders related to the Restructuring Act. These early cases hint at two critical aspects of any German pre-insolvency restructuring:

- Several cases have honed in on the determination of impending illiquidity (*drohende Zahlungsunfähigkeit*). This key determination works in two ways, namely to prevent premature attempts to make use of the pre-insolvency restructuring regime even though the required liquidity shortfall is not severe enough to meet the legal threshold of impending illiquidity. On the other hand, courts have had to deal with cases at the other end of the spectrum when actual illiquidity (*Zahlungsunfähigkeit*) either existed (and full insolvency proceedings would have to be applied for under mandatory law) or such actual illiquidity later occurred while proceedings under the Restructuring Act were pending (when the continuation of lawfully commenced pre-insolvency restructuring remains the exception).

- A second focal point in the early cases available seems to be the comparative calculation (*Vergleichsrechnung*) where opposing creditors can show that the restructuring plan disadvantages them when compared to hypothetical alternative scenarios. In this context, the courts are grappling with the question of how to pick the appropriate hypothetical comparator ranging from third-party sale options or other forms of business continuation to full liquidation in formal insolvency proceedings which have to be provided by the debtor in support of an envisaged cross-class cramdown.

It is still too early for a conclusive evaluation of the Restructuring Act, of course, but restructuring professionals have made the following interim observations after one year of experience with the new law:

- Financing banks seem concerned about the risk of being overruled in restructuring proceedings and are looking for additional safeguards to protect their interests. At the same time, affected companies urgently need reliable (bank) financing also during pre-insolvency restructuring.

- The shift of fiduciary duties of management to primarily safeguard the interests of creditors (rather than shareholders) should already apply when a debtor reaches a state of impending illiquidity to allow for an early restructuring without interference from shareholders.

- The last minute deletion in the legislative process of the option to terminate contracts which are obstacles to a successful pre-insolvency restructuring from the toolkit under the Restructuring Act considerably weakens and limits the scope of application of German restructuring proceedings, in particular in the international competition between other EU, UK and US restructuring laws.

All of the above concerns would require certain amendments to the Restructuring Act. The coalition agreement of the newly elected German government between the Social Democratic Party (SPD), the Green Party (Bündnis 90/Die Grünen) and the Liberal Democratic Party (FDP) has not placed particular emphasis on restructuring in its government program and a cross-party consensus may not be easy to achieve. Having said that, the general goal of "modernizing" Germany would, of course, be sufficiently wide to allow for a prompt response through governmental initiatives or parliamentary discussion if serious frictions became apparent in the continued application of the Restructuring Act.

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4. Labor & Employment

4.1 Purchaser of Insolvent Assets not Liable for Previous Claims

The German Federal Labor Court (*Bundesarbeitsgericht*, *BAG*) has reinforced its existing case law with regard to acquisitions out of insolvency, protecting the buyer of insolvent companies (3 AZR 139/17). The court has ruled that the buyer will not be liable for any employee claims that have arisen prior to the insolvency proceedings. This important clarification particularly affects pension entitlements, which can often impede or complicate a distressed transaction. In this context, a decision by the European Court of Justice in 2020 (C 647/18) had left some loose ends (we had covered this ruling in last year's German Year-End Alert 2020 in section 4.3). The German precedent has now closed the loop on this issue and thus provides legal certainty for purchasers of insolvent companies in Germany.

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4.2 COVID: Employer Entitled to Ask for Vaccination Status

According to a brand-new law which came into force in November 2021 in connection with protective rules designed to combat the pandemic, employers are now within their rights to ask employees for their COVID-19 vaccination status. Consequently, employers can establish a "VRT" regime (vaccinated, recovered, or tested) for their employees. In addition, several large companies have started to devise other creative steps to protect their staff, e.g. by separate cafeteria areas reserved only for vaccinated staff. German employers are also free to decide whether to allow only vaccinated or recovered staff onto their premises. Any employee who can work from home has to be offered the opportunity to do so and has to accept such offer absent any viable counter-indications.

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4.3 Strengthening Female Corporate Leadership (*FüPoG II*)

Germany has continued its efforts in promoting the equal participation of women and men in executive positions by way of the Second Management Position Act (*Zweites Führungspositionen-Gesetz*, *FüPoG II*), the draft of which we already discussed in last year's German Year-End Alert 2020 in section 1.4.

For listed companies subject to the Co-Determination Act (*MitbestG*), the German legislator has introduced fixed gender quotas for boards with more than three members: Such boards must now contain at least one male and one female member. Currently, this applies to approximately 70 of Germany's largest companies. In addition, specific quotas apply for companies in which governmental authorities hold a majority and public law corporations (*Körperschaften des öffentlichen Rechts*).

Another key element of Germany's efforts to strengthen female corporate leadership is the newly created option for board members to take temporary "time off" during maternity leave, parental leave, illness and/or times spent caring for a relative. This provision was a direct response to events in 2020, when the founder of a major listed German online furniture retailer (*Westwing*) was forced to resign from her position as member of the board in order to go on maternity leave. Under the previous legal regime, such a resignation had been the only safe way to avoid serious liability risks also for actions taken in the absence of such board member by the remaining board members.

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4.4 Works Council Rights Extended

Mainly in response to the enhanced digitalization of the workplace, the German legislator has in 2021 adapted and extended the rights of works councils in German companies (Works Councils Modernization Act) in several respects:

(i) The election processes for works councils have been simplified.

(ii) The works councils now have a co-determination right regarding remote work (e.g. work from home) and the use of AI (*Artificial Intelligence*) in personnel processes (e.g. *Workday* or *SuccessFactors*).

(iii) Furthermore, the employer is now responsible for the data processing by works council members, who in return are subject to control by the company's data protection officer.

(iv) Finally, the dismissal protection of works council members and candidates has been extended to cover also employees who only undertake preparatory steps to establish a works council.

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5. Compliance & White Collar

5.1 White Collar: What to Expect from Germany's New Coalition Government

Following Angela Merkel's sixteen-year tenure, Germany will – for the first time in its history – be ruled by a coalition consisting of the Social Democratic Party (SPD), the Green Party (Bündnis 90/Die Grünen) and the Liberal Democratic Party (FDP). While white-collar crime is certainly not the primary cornerstone of their coalition agreement, their joint government program does give an indication of what to expect from the new German government.

Most notably, the coalition agreement does not mention the Corporate Sanctions Act draft bill proposed by the former government (see German Year-End Alert 2020, section 6.1) which ultimately did not pass Parliament. If this draft bill had been enacted, the proposal would have introduced a genuine corporate criminal liability currently unknown by German law. However, the new government wants to revise the existing regime of corporate sanctions, i.e. corporate fines based on the Act on Regulatory Offenses (*Ordnungswidrigkeitengesetz*, *OWiG*), including an adjustment of sanction levels and a more precise regulation of internal investigations.

The federal government is also seeking to implement the EU Whistleblower Directive 2019/1937. Importantly, the coalition wants to make use of the opening clause of the Directive, i.e. have breaches of national law covered by the same legal framework as reports of breaches of EU law (for a more detailed analysis see section 5.3 below).

Digitalization may take hold of Germany's courtrooms as the new government plans to make video recordings of police and criminal court hearings obligatory in order to allow defendants to appeal rulings in a more targeted way. In addition, negotiated agreements in criminal proceedings will be subject to new rules.

Furthermore, the new government aims to strengthen law enforcement inter alia by providing customs authorities, the Federal Financial Supervisory Authority (*BaFin*) and the Financial Intelligence Unit (*FIU*) with further adequate resources. Both BaFin and the FIU had to tackle serious problems in 2020/2021. *BaFin* was accused of having insufficiently exercised its supervisory duties in connection with the possibly fraudulent activities of the Wirecard Group, while the *FIU* encountered significant problems with processing suspicious activity reports based on the Money Laundering Act (*Geldwäschegesetz*, *GWG*). The public prosecutor even opened a criminal investigation against officials of the *FIU* for the offense of obstructing criminal prosecution in public office.

Together with the contemplated new measures to combat tax evasion and tax avoidance more aggressively and consistently to recover tax losses, which shall also be taken by the coalition (see with regard to tax issues also section 2.1 above), it can thus be assumed that there will be an increase in enforcement activities regarding white-collar crime.

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5.2 Germany's New Supply Chain Due Diligence Act

After lengthy negotiations, the German Parliament adopted the Act on Corporate Due Diligence in Supply Chains (*Lieferkettensorgfaltspflichtengesetz - LkSG*) on June 21, 2021 (the "**Supply Chain Law**").

The Supply Chain Law will come into force on January 1, 2023 for companies that have their central administration, headquarters, registered office or a branch office in Germany if they have more than 3,000 employees in Germany. From January 1, 2024 onwards, the Supply Chain Law will be expanded to also apply to companies in the foregoing categories which have at least 1,000 employees in Germany.

The Supply Chain Law introduces a binding obligation for relevant companies to implement dedicated due diligence procedures to safeguard human rights and the environment in their own operations as well as in their direct supply chain, including *inter alia* a dedicated risk management system, an internal complaints procedure as well as taking remedial actions in case a violation has occurred or is imminent. In lower, more remote tiers of supply chains, companies are required to take certain actions only in case they obtain "substantiated knowledge" of violation of human rights or environmental standards.

Depending on the severity of the violation, affected companies may be fined under the Supply Chain Law. Large companies with an annual global turnover of more than EUR 400 million (approx. USD 475 million) can be required to pay fines of up to 2% of their annual global turnover. Furthermore, companies that have been fined a minimum of EUR 175,000 can be excluded from public procurement for up to three years.

In parallel, the EU Commission is working on a corresponding proposal for a human rights and environmental due diligence legislation which would introduce a harmonized minimum standard in these areas across all EU Member States. The respective EU legislative initiative has, however, been subject to intense debate and lobbying which has resulted in the respective legislative proposal having been postponed multiple times. It remains to be seen if Germany's Supply Chain Law will serve as model for the respective EU legislation.

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5.3 Whistleblower Protection

The German legislature has missed the deadline for implementing the EU Whistleblower Directive (EU 2019/1937), which lapsed on December 17, 2021. However, the newly elected government has agreed in its coalition contract in December to implement the directive and to also extend it to grave violations against German law. The EU Whistleblower Directive obliges all companies with at least 50 employees to establish internal channels to report violations against certain EU law provisions. Legitimate whistleblowers can report such violations both internally and externally – without giving structural priority to internal reporting as had previously been the case in many jurisdictions. If such reporting is fruitless or in emergency cases, even public disclosure is allowed. In such cases, the whistleblower is protected against any kind of retaliation, including the non-renewal of a fixed term employment contract. If an employee who has reported violations suffers any kind of disadvantage, it shall be presumed that such disadvantages occurred in retaliation to the report, unless the employer succeeds in proving otherwise (reversed burden of proof).

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6. Data Privacy & Technology

6.1 (Private) Enforcement Trends, New Data Privacy Laws and Fines

a) Data Privacy Enforcement Trends

As already highlighted in our German 2020 Year-End Alert in section 7, the trend towards greater data privacy enforcement by the German Data Protection Authorities ("**DPAs**") continues. In 2021, the German DPAs have especially focused on international data transfers with an increased level of scrutiny. For example, in June 2021 several German DPAs initiated a coordinated investigation into international data transfers of several companies within their respective jurisdictions.

We expect this trend to continue well into the new year, in particular since companies cannot simply rely on the new standard contractual clauses issued by the European Commission in June 2021, but need to implement additional safeguards in order to ensure an adequate level of data protection when transferring personal data to third countries (including the US outside of the EU/EEA.

Further, the Administrative Court (*Verwaltungsgericht*) of Wiesbaden just decided on December 1, 2021 (case 6 L 738/21.WI) that it is not permissible for a German university to use the "Cookiebot" service to manage the cookie consent process for the purpose of recording consent or its refusal because personal data (i.e. the IP address and the consent/refusal information) are sent to the United States by Cookiebot without a legal basis.

Private enforcement of data privacy provisions has not lost its momentum in 2021, either. German courts are increasingly pushing the boundaries and are willing to expand the reach of data privacy access requests. For example, the German Federal Supreme Court (*Bundesgerichtshof*, *BGH*) issued a ruling that extends the scope of such requests, noting that access claims are not limited to "essential biographical information". The *BGH* further stated that the data subject can also assert his or her access right even if he or she is already aware of the information requested (e.g., in case of correspondence between the data subject and the controller) and that the access request may also encompass internal notes or internal communications related to the data subject.

b) New Data Privacy Laws

On December 1, 2021, two important new laws came into force: the Data Protection and Privacy in Telecommunications and Telemedia Act (*Telekommunikation-Telemedien-Datenschutz-Gesetz*, or "**TTDSG**") as well as the Telecommunications Modernization Act (*Telekommunikationsmodernisierungsgesetz*, or "**TKMoG**"). Both laws aim to modernize German telecommunications law and are intended to create a comprehensive regulation on data privacy in telecommunications and telemedia while implementing the requirements of the European Electronic

Communications Code ("**EECC**") and the e-Privacy Directive (Directive 2002/58/EC of July 12, 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector) into German law. As a result, so called "over-the-top" ("**OTT**") services are brought into the scope of the German data privacy and telecommunications regime. These OTT services are defined in the new laws as "number-independent interpersonal communications services" and may include messenger services, web-based email services and video conferencing services. Notably, as the last EU Member State, Germany finally transposes into national law the consent requirement for cookies as provided for by the e-Privacy Directive. Consent is thus expressly required for so-called non-essential cookies (and irrespective of whether these cookies process personal data). This resolves the uncertainty under the previous Telemedia Act (*Telemediengesetz - TMG*) and implements corresponding decisions by the European Court of Justice and the German Federal Supreme Court.

c) Update on Fining Activity

In 2021, the German DPAs issued a number of fining decisions, the following of which we would regard as particularly instructive.

In January 2021, the Supervisory Authority of Lower-Saxony imposed a fine of EUR 10.4 million (approx. USD 11.73 million) against a company selling electronic products online for having implemented an excessive and unlawful video surveillance system with regard to its employees and some of its clients without sufficient legal basis. According to the Supervisory Authority, a video surveillance system to detect criminal offences is only lawful if there is a reasonable suspicion towards certain individuals. If this is the case, it may be permissible to monitor these individuals with cameras for a limited period of time. At the company, however, the video surveillance was neither limited to a specific period nor to specific employees.

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6.2 New Copyright Law

On August 1, 2021 the new German Copyright Service Provider Act (*Urheberrechts-Diensteanbieter-Gesetz*, or "**UrhDaG**") came into force, which transposes the requirements of Art. 17 of the European Directive (EU) 2019/790 into German law. This new law introduces the principle of direct intermediary liability into German law and effectively requires online platforms to scan public user content uploaded to their platform and block illegal content. Pursuant to the UrhDaG, the online platform may be exempted from liability if the platform fulfils certain requirements, such as acquiring licenses for copyright-protected third-party content that users publish and distribute. The platform may also use "upload filters" if it does not have the necessary license for the uploaded content.

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6.3 German Legislation on Autonomous Driving

As previewed in our German Year-End German 2020 in section 8.2, on March 15, 2021, the German legislator has proposed a new law on fully automated driving (SAE level 4). The law aims to establish uniform conditions for testing new technologies, such as driverless cars with SAE level 4, throughout Germany. Pursuant to the law, autonomous vehicles will be permitted to drive in regular operation without a driver being physically present, albeit limited to certain locally defined operating areas, for the time being.

The law came into force on July 28, 2021. According to the former German Minister of Transport, Germany is the first country in the world to permit fully automated vehicles in regular operation (subject to local operating areas to be defined by the respective German state authorities).

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7. Antitrust & Merger Control

7.1 Enforcement Overview 2021

The German Federal Cartel Office (*Bundeskartellamt, "**FCO**"*), Germany's main antitrust watchdog, has had another active year.

On the cartel prosecution side, in 2021, the FCO imposed fines totaling approximately EUR 105 million. The fines were imposed on eleven companies and eight individuals for anticompetitive conduct and agreements in the area of specialty steels and steel forging and for vertical price-fixing agreements concerning consumer electrics, music instruments and school bags. However, the total amount of these fines is roughly 70% lower compared to the year 2020 which may reflect both the impact of the COVID-19 pandemic but also the increasing risks associated with private follow-on damage claims that impact on companies' willingness to cooperate with the *FCO* under its leniency regime (see the update on private enforcement below in section 7.4 below).

In a similar downward trend, the FCO only conducted two dawn raids in 2021 - but has indicated that it may soon conduct additional dawn raids and that it has received information from nine companies under the FCO's leniency program. The FCO also continues to focus on the digital economy and opened several investigation against global tech companies under an amendment to Germany's competition law (see below section 7.2).

In the domain of merger control, the *FCO* reviewed approximately 1,000 merger control filings in 2021 (which is approximately 16 % down on 2020). As in prior years, approximately 99 % of these filings were concluded during the one-month phase-one review. Fourteen merger filings required an in-depth phase-two examination (which is 50% more than in 2019). Of those, one transaction was prohibited (this concerned the takeover of a newspaper), five filings were withdrawn by the parties, four cases were cleared in phase-two (subject to conditions in one case), and four phase-two proceedings are still pending. For further details, please see the merger control update below in section 7.2.

Also in 2021, the FCO finally launched its public procurement competition register which is accessible to government and other public procurement bodies and enables them to determine whether companies were involved in competition law infringements and/or other serious economic offences that may justify their exclusion from public procurement proceedings.

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7.2 More Surveillance of Digital Companies and Less Merger Control - Reallocating Resources

At the start of 2021, the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*, or "**ARC**") was significantly revised with the aim of creating a more effective regulatory framework for the digital economy.

One of the two key elements of the new regulatory framework is the strengthening of the FCO's powers, in particular to control digital companies. A newly introduced instrument now allows the FCO ex-ante to prohibit companies with "paramount significance for competition across markets" from engaging in anti-competitive practices by leveraging their market power onto new product markets.

The FCO will assess and reach a formal decision on whether the relevant company has, in fact, "paramount significance for competition across markets". If this is the case, the FCO can now address alleged anticompetitive practices early on. The FCO has already initiated antitrust proceedings against several global tech companies on this basis. Companies have standing to appeal the FCO's decision directly to the German Federal Supreme Court (*Bundesgerichtshof*, *BGH*) whose decision represents the final word on the matter. The rationale behind this "fast track" proceeding is to enable the FCO to reach and enforce legally binding decisions in an expeditious manner in order to act effectively in fast evolving markets.

In order to free up resources at the FCO, the second key objective of the most recent amendment of the ARC was to reduce the sheer number of merger control proceedings handled by the FCO and to focus on the (likely) more important cases. Compared to other jurisdictions, the number of merger notifications to the FCO has traditionally been very high due to the relatively low turnover thresholds. The turnover thresholds are now set at a significantly higher value. Mergers now have to be notified to the FCO only if one of the involved parties has generated at least EUR 50 million with customers in Germany (formerly: EUR 25 million) and, additionally, another involved party generated at least EUR 17.5 million with customers in Germany (formerly: EUR 5 million). Notably, the alternative transaction value threshold (Euro 400 million) remains unchanged. Pursuant to the FCO's updated guidelines on the transaction value threshold, however, this threshold will not be triggered regularly if the target company has a domestic turnover of less than EUR 17.5 million which adequately reflects the company's market position and competitive potential. So far, with approximately 1,000 mergers notified to the FCO in 2021 compared to approximately 1,200 mergers in 2020, the effect of the amendments on the FCO's workload has been limited. That said, it may be too early to reach conclusions on the effectiveness of the amendments since the number of mergers notified to the FCO had already declined from approx. 1,400 notifications in 2019 to 1,200 in 2020 due to the pandemic.

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7.3 The FCO's Revised Leniency and Fining Guidelines

First established in 2000 as part of general administrative principles and comprehensively set out in the 2006 leniency program, the FCO's leniency program has received yet another upgrade in 2021: in order to transpose the requirements of the Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018 (ECN+ Directive) into national law, as of 2021, the basic principles of the leniency program are now enshrined in the ARC (Sections 81h – 81n). Against this background, the FCO also published its revised guidelines on the leniency program in October 2021 which, however, left the basic cornerstones of the German leniency program largely untouched.

With its revision of the guidelines on setting cartel fines, the FCO has transferred into writing what had already been the established decision practice for some time: the starting point for calculating a fine within the statutory fine framework continues to be the "duration and gravity of the infringement". However, the FCO clarified that the primary element of establishing the gravity of the infringement shall be the turnover achieved specifically with the products or services subject to the antitrust infringement during the relevant period. With regard to the subsequent balancing exercise of aggravating and mitigating elements, the guidelines on setting cartel fines now include specific criteria linked to the specific infringement and the infringing company to be taken into account when determining the final fine amount. There are some good news for companies which want to or have already established compliance programs: going forward, the FCO will consider such compliance programs – whether already established before the alleged infringement or only introduced as a consequence of or in response to such infringement – as a mitigating factor taken into account in the fine calculation.

In summary, the amendments increase the authority's discretion for setting antitrust fines in the individual case. A substantive change in the scope or level of fines is, however, not expected.

Lastly, the revision of the leniency program falls short of addressing the real elephant in the room: the FCO itself concedes that the number of leniency applications has decreased in past years due to the existential threat of follow-on damages claims from direct or indirect customers or other market players. This threat is not addressed by the leniency program. Leniency applications are, however, an important element for the detection and prosecution of cartels. In order to incentivize companies to apply for leniency, further safeguards will have to be considered, especially with respect to follow-on cartel litigation. The FCO has already stated that it will advocate at the EU level for further incentives for leniency applicants.

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7.4 Private Enforcement Update

The enforcement of antitrust damage claims continues to be one of the "hottest topics" in the German antitrust law arena. Particularly the *Rail Cartel*, fined by the FCO in 2013, and the *Trucks Cartel*, fined by the European Commission in 2016, led to a substantial increase of cases in German courts of lower instance as well as for the Federal Supreme Court (*Bundesgerichtshof*, *BGH*), which established a permanent "Cartel Panel" in 2019.

"Follow-on" damage claims benefit from the broad binding effect of (fine) decisions issued by the Commission or national competition authorities. German courts therefore mainly dealt with questions relating to the substantiation and proof of damages. Thus far in these cases, German courts have been reluctant to issue judgments which award a specific amount of damages. This has not fundamentally changed since the *BGH* encouraged the lower courts to estimate damages by reducing the applicable standard of proof in its *Rail Cartel II* decision in 2020 (Case KZR 24/17). The following developments are particularly noteworthy:

- There seem to be only few recent court decisions in which estimated damages were awarded to customers of a cartel, *e.g.* the District Court (*Landgericht*) of Dortmund in another *Rail Cartel* decision (2020, Case 8 O 115/14), and the Higher District Court (*Oberlandesgericht*) of Celle in a *Chipboard Cartel* decision (2021, Case 13 U 120/16).

- Interestingly, the Regional Court of Dortmund (2020, Case 8 O 115/14) based its estimate on a contractually agreed penalty for competition law infringements of 15% of the net price which it considered the minimum damage. This approach arguably finds support in the recent judgment of the *BGH* in *Rail Cartel VI*, in which the *BGH* held that a contractual clause which provides for a specific percentage of the value of commerce as damages in case of a competition law infringement is generally valid (2021, Case KZR 63/18).

- In its *Truck Cartel II* decision (2021, Case KZR 19/20), the *BGH* re-confirmed the high likelihood that a cartel price is higher than a hypothetical price found in competition. Like in its *Rail Cartel II* decision in 2020 (Case KZR 24/17), the court held that this high likelihood is, however, not sufficient to establish a rebuttable presumption in the sense of *prima facie* evidence.

- In *Truck Cartel II* (2021, Case KZR 19/20), the *BGH* also noted that the passing-on defense, *i.e.* the argument of the defendant that damages have been passed on to the next market level as a damage-reducing factor, can only be successful in exceptional cases. There is no rebuttable presumption to this effect and the defendant must substantiate that the market conditions made a pass-on likely. If the pass-on led to dispersed damages, the pass-on defense can be excluded since claimants with only low-value damages are unlikely to sue (so-called rational apathy). The court also clarified that the suspension of the period of limitations for private plaintiffs begins with the first official measure (*e.g.* dawn raid) and ends when the time-limit to bring a claim against the authority's decision has expired.

Besides loss calculation issues, another important development has been the admissibility of certain collective debt collection business models. In the past, German courts regularly dismissed these claims on the basis that the underlying assignments of the damage claims were void due to an infringement of the Legal Services Act (*Rechtsdienstleistungsgesetz*, *RDG*). This year, the *BGH* clarified in its decision *AirDeal* that this business model does not generally conflict with the Legal Services Act (2021, Case II ZR 84/20).

Recent developments at the EU level will also have a direct impact on private enforcement in Germany. In October 2021, the European Court of Justice ("**ECJ**") decided in *Sumal* (case C-882/19) that a subsidiary can be an addressee of claims for damages resulting from a cartel in which only the ultimate parent entity participated. This judgment expanded the established case law according to which a parent company which exercised decisive influence over its subsidiary could be held liable for competition law infringements of this subsidiary.

Finally, on October 28, 2021 Advocate General Rantos issued an opinion (*Truck Cartel Spain,* Case C-267/20) in which he reasoned that substantive provisions (including those dealing with the statute of limitations) in the EU Directive could not apply to cases in which the competition law infringements ended prior to the date on which the transposing national provisions came into force. If the ECJ follows the line of Advocate General Rantos, the intertemporal application of several provisions of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*) might have to be interpreted in a different way.

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8. Litigation

8.1 A new Role of Courts as Climate Protectors? Latest Developments in German Climate Change Litigation

Climate change litigation is a growing phenomenon around the globe. Since the adoption of the Paris Agreement in 2015, organizations and individuals seeking the implementation of more ambitious climate change measures brought a number of lawsuits against governments and the private sector (for a French landmark decision in 2021, see our client alert prepared by the Paris office of Gibson Dunn). Even though the *Huaraz*-Case brought in 2015 is still pending in the Higher District Court (*Oberlandesgericht*) of Hamm, climate change litigation definitely landed on German shores in 2021: The Federal Constitutional Court (*Bundesverfassungsgericht*) delivered a landmark decision on March 24, 2021 (1 BvR 2656/18; 78/20; 96/20; 288/20), ordering the German legislator to amend the 2019 Federal Climate Protection Act (*Bundes-Klimaschutzgesetz* – the "**Climate Act**"). The court held that the Climate Act violated fundamental freedom rights of the complainants because the – at the time – existing and planned climate protection measures were insufficient to prevent future burdens arising from restrictions that will become necessary in case of unmitigated global warming.

While the German legislator quickly complied by passing amendments to the Climate Act, activists are now trying to transfer the rationale of the decision to the private sector: in the fall of 2021, three directors of a German environmental organization announced that they have filed lawsuits against three car manufacturers and a gas and oil producer, demanding the reduction of their respective carbon emissions to zero by 2030. They claim that the companies' carbon emissions contribute to future restrictions they will have to endure if the world fails to control climate change.

However, it remains to be seen whether German courts will accept this line of argument in the private sector. The claim is based on provisions of general civil law (Sections 1004 para. 1 s. 2, 823 para. 1 of the German Civil Code (*BGB*)) that technically provide for the protection of property and similar rights. The plaintiffs, thus, would need to show that these provisions are applicable to the facts at hand, and that the relevant companies can be held liable even though they comply with all environmental laws and standards. Moreover, it appears difficult to establish a clear causal link between carbon emissions by a single company and future restrictions arising for individuals.

Having said that, the decision by the District Court of the Hague (*Rechtbank Den Haag*) in the Netherlands, ordering oil and gas producer *Shell* to reduce its carbon emissions, indicates that judges may be willing to break new legal ground. Especially companies in market sectors where decarbonization will take longer to achieve are therefore well advised to closely monitor the developments and prepare for potential risks.

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8.2 A More Agile and Digital Judiciary

In 2021, an ever increasing case load due to mass consumer litigation exposed the German civil judiciary's existing Achilles heel: scarce personnel, no or limited equipment for digital hearings, and a traditional dependency on paper files and fax machines. In a number of open letters and workshop proposals, judges from around the country have decried the status quo and called for reform. Academics, too, are proposing to modernize Germany's procedural system in order to allocate judicial resources more sensibly. As of today, in the mass consumer litigation sagas sweeping the German courts, judges have to decide each case individually while knowing fully well that their judgments, regardless of the outcome, will likely be appealed.

In 2018, the declaratory model action was introduced as a first step to bundle mass consumer claims. However, it has proven to be an inefficient tool so far as plaintiffs take little interest in it, in practice. The German legislator anticipated over 400 declaratory model actions per year. Instead, between 2018 and 2021, fewer than 20 model actions were filed.

Germany's new government coalition took notice. In its coalition agreement, the government promises to reform collective redress in Germany. Existing forms of redress shall be modernized and new instruments created. Small businesses will get the opportunity to join collective consumer actions, and specialized commercial courts shall adjudicate international commercial disputes in English.

In June 2021, the Federal States' ministers of justice (*JustizministerInnen der Länder*) discussed and proposed a new procedure allowing to submit previously unsettled legal questions to the German Federal Supreme Court (*Bundesgerichtshof*, *BGH*) in the early stages of mass litigation. We expect such a procedure to feature among the remedies which the new government will ultimately propose.

It remains to be seen, however, whether and how promptly the new government can indeed respond in the required expeditious and efficient manner to address the practical concerns of its over-loaded judiciary. Reforms of the court system in the digital space can, in any event, be expected to rumble on for some time yet, and interested industry circles are well advised to monitor such reforms and their practical implications.

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9. International Trade / Sanctions - Moving Human Rights to Center Stage - the EU's Recast of its EU-Dual-Use Regulation

Already in 2011, the European Union launched a review of EU-wide controls on exports of dual-use items. This review resulted in the "Regulation (EU) 2021/821 of the European Parliament and of the

Council of May 20, 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast)" (the "**New EU Dual-Use Regulation**").

The New EU Dual-Use Regulation forms part of the export control regime which EU Member States apply and, same as its predecessor, concerns dual-use items, i.e. mandates export control restrictions on goods, technologies and software that may be used for both civilian and military purposes. The New EU Dual-Use Regulation is in force since September 9, 2021 and replaced Council Regulation (EC) No. 428/2009 in its entirety.

The New EU Dual-Use Regulation (i) widens the range of export control restrictions on emerging dual-use technologies, specifically by adding cyber-surveillance tools, (ii) specifies new due diligence obligations for exporters, emphasizing their contribution to an effective enforcement of dual-use regulations and (iii) increases coordination between EU Member States and serves as a basis for further global cooperation with third countries.

The New EU Dual-Use Regulation specifically includes a list of certain cyber-surveillance items that are seen as being at risk of misuse for violations of human rights, making such items subject to EU Member State export restrictions. An authorization may be required even for certain unlisted cyber-surveillance items, if the exporter has been informed by the competent authority that the items may be intended for internal repression or violations of human rights. And vice versa, an obligation to inform the competent authority may arise where an exporter is aware that unlisted cyber-surveillance items proposed to be exported may be used for human rights violations.

The New EU Dual-Use Regulation further recognizes as vital the contribution of exporters, brokers, providers of technical assistance or other relevant stakeholders to the overall aim of export controls. In this context, it specifically refers to due diligence obligations to be carried out through transaction-screening measures that must be implemented as part of an Internal Compliance Program ("**ICP**"). This specifically is relevant for the use of general licenses (e.g. for the use of general license EU007 for the intra-group export of software and technology) as well as in the context of possible human rights concerns more broadly.

Finally, the New EU Dual-Use Regulation also provides a strong basis for the EU and EU Member States to engage with each other, but also with third countries, in order to support a level playing field and enhance international security through more convergent approaches to export controls at the global level. An example is the EU-US Trade and Technology Council, which serves as a forum to coordinate their approaches to key global trade and economic relations.

As early as 2019, the EU voiced what it expects from exporters when setting-up their respective ICP (see our corresponding client alert). With the New EU Dual-Use Regulation now enacted and the clearly stated commitment of the new German government to the protection of human rights, exporters would be well-advised to continuously monitor this space and take 2022 as an opportunity to review their respective ICP, focusing specifically on human rights considerations.

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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 Frankfurt and Munich bring together lawyers with extensive knowledge of corporate and capital markets law, M&A, finance and restructuring, tax and labor law, in the area of antitrust and competition, sanctions and export control, data protection and cybersecurity, technology transactions and IP/IT, as well as extensive experience in compliance matters, white collar defense and investigations and corporate and commercial litigation and arbitration. The German offices are comprised of deeply accomplished 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, sensitive investigations and high-stakes litigation. For further information, please contact the Gibson Dunn lawyer with whom you work or any of the following members of the German offices:

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