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Dear readers,

Time flies and the year 2023 is already drawing to a close - the third quarter is over and we are happy to provide you with our third newsletter in 2023.

Dr Kuuya Chibanguza and Benedikt Stücker look at the current development regarding the question of a managing director's possible liability in the company's recourse for fines in the event of failure to develop cybersecurity in the company as part of the company's internal compliance system.

Dr Christoph von Burgsdorff and Luisa Kramer present the latest legislative developments on the introduction of the so-called BGH guideline decision procedure and its impact on the civil procedure for asserting claims.

Dr Boris Ober draws attention to the threat of legal uncertainty from 1 September 2023 with regard to the period to be observed for the necessary over-indebtedness test and going concern forecast.

Dr Thomas Hufnagel and Jan Zimmer report on a current legal development regarding work permits and a new application procedure for a work permit for foreign employees in Singapore.

Dr Marcus Backes and Artur Winkler provide an insight into the EU's current standard-setting process for the Europe-wide harmonisation of insolvency law.

As usual, if you have any questions or need advice on these and other topics, please do not hesitate to contact us. We wish you new insights from reading these articles and a successful end to 2023!

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Commercial.KI: Managers' liability for corporate fines – New approaches in case law and legislation also for product-related practice

1. Background

Comprehensive product compliance can generally only be achieved by means of a centrally controlled and well-organised compliance management system. For this reason, it has traditionally been an executive matter. In the past, however, if a company's top management failed to integrate such a system properly into the corporate structure and, as a result, the company was fined for violating the requirements under product safety law, this regularly led to the question of whether and how the company could hold its managing directors liable internally. To a lesser extent, this also applied to other people in management positions.

While most lower courts – just recently, for example, the 6th Cartel Senate of the Düsseldorf Higher Regional Court (case no.: VI-6 U 1/22 (Kart), cf. in this respect the discussion of said decision by our colleagues *Dr Sebastian Janka and Martin Lawall* in the Luther blog) – deny companies the right to recover administrative fines in such circumstances, the Dortmund Regional Court expressed not long ago, in its decision of 21 June 2023 (case no.: 8 O 5/22), its preliminary legal opinion that such recourse could come into consideration. The draft bill implementing the Network and Information Security 2.0 Directive (NIS 2 Directive) also states clearly that the liability of managing directors provided for therein includes liability for administrative fines.

There are, hence, current endeavours by both judiciary and legislature to make managing directors personally liable internally for corporate fines. In the following, we will start by giving a general description of the problem (2.) and then go on to discuss the line of reasoning followed by the current proponents of managing directors' liability (3.) before setting out the consequences for product-related law in practice (4.).

2. Principles governing the liability of managing directors and management board members for corporate fines

Intentional violations of compliance obligations are generally classified as administrative offences by the laws applicable in the particular case and are thus subject to administrative fines. The amount of these fines has deliberately been set high, especially at Union level, in order to ensure that also large companies are actually bound by the law, by preventing them from buying their way out of the statutory obligations. In some cases, fixed (absolute) amounts have been stipulated in

this context: the German Product Safety Act and the German Market Surveillance Act, for example, provide for administrative fines of up to EUR 100,000, depending on the kind of violation. In other cases, a relative scale has been chosen: the German Act incorporating the NIS 2 Directive into national law, for example, provides for administrative fines of up to 2% of worldwide annual turnover (not profit!). Under the Draft AI Regulation, the upper limit of the scale of fines is even as high as 6% of worldwide annual turnover, pursuant to Article 71. Even the largest companies cannot afford, and do not want, to incur an administrative fine in this amount. As a result, especially in cases where the scale of fines is determined in relative terms, particularly stringent requirements for product compliance should be defined.

One of the central tasks of any company's management is, therefore, to organise, structure and optimise the company in such a manner as to ensure that it acts in compliance with the applicable statutory provisions. In addition to observing the general obligation to comply with statutory obligations (obligation of lawful conduct), a company's management is also required to ensure that the individual employees, too, act in a lawful manner (obligation to monitor lawful conduct). For the purposes of stricter monitoring of compliance with these obligations, the German legislator has not only significantly increased the investigative powers vested in market surveillance authorities under the German Market Surveillance Act, but has also enacted a new Whistleblower Protection Act which is intended to give whistleblowers the opportunity to uncover internal compliance violations and other maladministration with as little risk as possible.

If a managing director violates any of his or her (product-related) obligations, this raises the question of whether the company can hold the managing director liable internally for the administrative fine to be paid. While the prevailing opinion denies companies the right to recover administrative fines, as has already been stated, there is now a case, following the decision of the Dortmund Regional Court, in which it has been considered possible for a company to recover fines from managing directors. As a consequence, the latter, in addition to having a general interest in managing the company properly and efficiently, now also have a stronger personal interest in ensuring product compliance and avoiding any liability of the company for product defects.

3. Decision of the Dortmund Regional Court

The Dortmund Regional Court, in its decision of 21 June 2023 (case no.: 8 O 5/22), expressed its preliminary legal opinion that a managing director's liability for administrative fines incurred, and sought to be recovered, by the company must be affirmed on the merits. In the case at issue, a partner had been involved in an antitrust violation attributable to the partnership.

The Court argued that the sanctions under civil and regulatory law existed alongside each other, making it impossible for the intended function of the administrative fine as a regulatory sanction against the company to be undermined by the company's holding the managing director subsequently liable under civil law. The reasons given by the Court for this view were, firstly, that the company must initially advance the administrative fine, thus being exposed to the risk of the managing director becoming insolvent; secondly, that the administrative fine is generally too large an amount to be fully recoverable from the managing director; and thirdly, that the company additionally suffers reputational damage, which cannot be passed on. As a result, if a right to recover administrative fines were acknowledged, this would not affect the function of the administrative fine as a deterrent and preventive measure. If, on the other hand, the right to recover administrative fines were fully denied, this would mean sending out the wrong signals to managing directors, who could feel encouraged to generate advantages for themselves and the company by violating the law.

Consequently, the decision is not based on an antitrust *lex specialis*, but on the general judgment that a managing director should not be tempted by the internal limitation of liability between the managing director and the company to procure an economic advantage for the company or him- or herself by intentionally violating the law. This judgment could be applied accordingly to product safety law, under which a managing director would most probably also regularly have a heightened individual interest in ensuring product compliance if he or she were required, upon the occurrence of a product incident, to personally bear the administrative fines imposed as a result of such incident.

4. Consequences for practice

The discussion regarding the recoverability of corporate fines is gaining momentum in the light of these current developments.

As of now, the Dortmund Regional Court's decision expresses a minority opinion in case law, which has not been adopted by, for example, the Düsseldorf Higher Regional Court in a recent decision (case no.: VI-6 U 1/22 (Kart)), as already stated. However, as leave has been granted in said matter to file an

appeal on points of law with the German Federal Court of Justice, this issue can be expected to be finally clarified at least for the field of antitrust law.

By contrast, the bill incorporating the NIS 2 Directive into national law will in all likelihood be enacted in the spring of 2024. This means that the right to recover administrative fines will, for this area, be embedded in statutory law in the foreseeable future. In the field of cybersecurity, the responsible managing directors would, therefore, be well-advised to install a comprehensive and effective compliance system in their company now, at the latest, in order to avoid rendering themselves personally liable internally. The establishment of such compliance systems has been provided for by the Union in all Directives and Regulations which, as part of what is known as the "New Legislative Framework", are intended to ensure uniform product compliance in the EU and, to this end, require binding product risk analyses, market monitoring obligations, reporting obligations and risk prevention measures in collaboration with the competent authorities, with administrative fines for compliance violations. Examples of such Regulations are, inter alia, the upcoming AI Regulation, the new Machinery Regulation and the Market Surveillance Regulation, and also the German Product Safety Act has been adjusted now to take account of the "New Legislative Framework". In this context, it would not come as a surprise if the right of companies to hold their managing directors liable for administrative fines found its way into other areas of product liability in the future. Introducing such a right would, for example, be the obvious thing to do in the area of liability for violations of AI compliance, which overlaps in various respects with the field of cyber-security anyway.

Consequently, managing directors must now more than ever ensure compliance with their obligation of lawful conduct and their obligation to monitor lawful conduct by implementing and monitoring comprehensive compliance management systems. Even though the right for companies to recover administrative fines from their managing directors will probably remain an exception for the time being, current developments show that this could change very quickly.

The guidelines regarding criminal product liability that were developed by the German Federal Court of Justice in its "leather spray decision" (case no.: 2 StR 549/89) and according to which not only a company's top management, but also other staff with responsibility in a particular field within the corporate structure can be personally criminally liable for product defects could also become relevant in this context. In addition, according to the Court, if decisions are made by a body of the company and an individual causal relationship cannot be proven, all members of that body are criminally responsible. In this respect, the decision met with much criticism in legal literature, where authors especially took the view that the group of persons criminally liable for product defects was too large and that while the Federal Court of Justice considered (executive) employees to be liable in the case at issue, such liability should only be taken into consideration in absolutely exceptional circumstances. However, despite this fact, persons implementing and/or executing a product compliance system should always bear in mind that their own acts or omissions cannot only result in administrative fines, but also in them being criminally liable.

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Commercial.Litigation: Update on the German Federal Supreme Court's leading decision procedure – Relief of consumers and judiciary?

On 16 August 2023, the German Federal Government adopted the government draft law submitted by the German Federal Ministry of Justice on the introduction of a l ead decision procedure at the German Federal Supreme Court (*Bundesgerichtshof*, BGH). The Federal Government's law corresponds to the draft of the German Federal Ministry of Finance. The introduction of leading decisions opens up the possibility for the Federal Supreme Court to comment on fundamental legal questions independently of the termination of the proceedings by the parties.

As already stated in our article of 17 July 2023, mass individual actions, mostly brought by consumers, to enforce similar claims in court represent a great burden for the German civil courts. Current examples include the diesel lawsuits, invalid clauses in fitness center contracts or in insurance and banking contracts. Taking legal action is therefore intended on the one hand to relieve the courts through efficient and speedy decisions, to create legal certainty more quickly for those affected as well as legal practitioners, and on the other hand to protect consumers from high costs.

The law provides that the Federal Supreme Court may declare a case to be a leading case if an appeal is filed in mass proceedings. The Federal Supreme Court can decide on the fundamental legal questions even if the proceedings have been settled by an act of the parties. However, the leading decision has no effect on the individual appeal proceedings, so the parties are still free to end the proceedings, for example, by withdrawal or settlement.

The leading decision then serves as a guide for the courts of instance in reaching a judgement in similar factual situations with the same legal questions. The courts of instance may, with the consent of the parties, stay pending parallel proceedings from the time of the Federal Supreme Court's declaration of the lead decision proceedings until the lead decision.

Criticism and outlook

The Federal Government's approach is going in the right direction to help speeding up proceedings at the courts and

thereby relieving the burden on the judiciary and consumers. However, there is still criticism of the draft law, because the relief effect depends on further factors:

On the one hand, it is relevant how many appeals are allowed by the courts of appeal or how many appeals are allowed by the Federal Supreme Court on a complaint of non-admission. On the other hand, the extent of the relief depends on how many parties decide to appeal to the Federal Supreme Court in further proceedings. The Federal Government's draft law ties in with the object that the parties can prevent proceedings pending before the Federal Supreme Court by settling or withdrawing the appeal.

However, this problem is only partially solved by the introduction of a leading decision procedure. The parties are free to decide after the second instance not to appeal to the Federal Supreme Court by means of an appeal or a non-admission appeal. The losing party up to the second instance could include in its considerations that by not filing an appeal with the Federal Supreme Court, a final judgement is issued, but similar facts could nevertheless be decided differently in another individual action in the context of mass proceedings before another court. Since there is no Supreme Court decision by the Federal Supreme Court in this case, there is no clear orientation for the judiciary. The question therefore arises whether mass proceedings could not be countered more effectively by already allowing the courts of instance to declare proceedings to be lead decision proceedings.

Furthermore, the parties no longer have comprehensive power of disposal over proceedings that the Federal Supreme Court has declared to be lead decision proceedings. The parties can no longer prevent a leading decision on this legal question. This contradicts the principle of disposition enshrined in the German Code of Civil Procedure. The principle of disposition includes the right of the parties to dispose of the legal dispute as a whole. In particular, this also includes the right to end the legal dispute prematurely, i.e. without a judgement. The opposite of the principle of disposition is the official maxim that applies in German Criminal Procedural Law: According to this maxim, the state is the master of the proceedings. However, such management of the legal dispute has so far been alien to civil proceedings.

The leading decision procedure thus represents, in addition to the model declaratory action, the capital investor model proceedings and the intended introduction of the action for redress, a further possibility of civil procedural design in the context of mass proceedings. These means of collective legal action in consumer disputes are united by the goal of making legal enforcement more efficient and cost-saving for the state and consumers. The model declaratory action, for example, was introduced in consumer disputes in order to determine the preconditions for the existence of claims in the case of mass damages by bundling claims and to clarify the central legal questions in advance in a procedure with effect for all injured parties.

The German Federal Council is expected to deal with the draft law at the end of September 2023.

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Commercial.Restructuring: Relevant forecast period for the over-indebtedness test – Change as of 1 September 2023

Initial situation

At the end of last year, the German legislator responded to the war in Ukraine and the resulting uncertainty in planning, due in particular to the higher cost of energy, by reducing the forecast period for the over-indebtedness test for which companies must document a sufficient level of liquidity for the future from twelve to four months (for further details, please refer to our blog post from 1 February 2023 in the German language). The German Act on the Temporary Adjustment of Restructuring and Insolvency Law Provisions to Mitigate the Impact of Crises (*SanInsKG*, hereinafter: "Crisis Impact Mitigation Act"), which temporarily amends the German Insolvency Code (*InsO*), amongst other laws, continues in force until 31 December 2023. There are currently no indications that the Crisis Impact Mitigation Act will be extended.

Planning periods beyond the year 2023

The Crisis Impact Mitigation Act may, however, lose its practical effectiveness even before the expiry of its limited period of validity. If a company establishes less than four months before 31 December 2023 – that is, on or after 1 September 2023 – that it does not have sufficient liquidity for the twelve-month forecast period stipulated in § 19(2), first sentence, of the German Insolvency Code, which will apply again from 1 January 2024, this might have to be taken into account from as early as 1 September 2023 when examining whether the company is obliged to file for insolvency. This was already pointed out in the explanatory memorandum (BT printed matter 20/2730 and BT printed matter 20/4087). And also a press release issued by the German Federal Ministry of Justice (*BMJ*) with regard to the Crisis Impact Mitigation Act is to the effect that the currently reduced forecast period will be twelve months again starting from 1 September 2023. The Institute of Auditors in Germany (*IDW*) seems to have adopted this view in its new draft standard referred to as IDW ES 11 (margin no. 106); in any case, the Institute has not distanced itself from the statements contained in the explanatory memorandum and in the press release issued by the Federal Ministry of Justice. Unsurprisingly, the insolvency administrators' representatives are of the opinion that "former insolvency law" should apply again from 1 September 2023.

Unclear legal situation

The purpose of the Crisis Impact Mitigation Act would be an argument against the aforesaid interpretation. The plan was to relieve companies by introducing the reduced forecast period as an interim solution. A de facto reduction of the duration of application of the reduced forecast period would thwart the

purpose of the Crisis Impact Mitigation Act. In addition, the wording of the Crisis Impact Mitigation Act ("*until and including 31 December 2023*") is also hardly compatible with said interpretation. It appears, however, that the German legislator intended to limit the reduced forecast period until 31 August 2023; otherwise, it would be difficult to explain the respective pertinent – albeit cryptic – statements in the legislative documents and in the press release issued by the Federal Ministry of Justice.

It is essential for a company's management board members or managing directors to have a precise legal framework with clear information about the exact obligations and deadlines for filing for insolvency. At present, however, the forecast period applicable from 1 September 2023 cannot be determined with the certainty necessary in connection with obligations to file for insolvency. Waiting until this legal issue has been clarified in court is not an acceptable option, given the considerable civil and criminal liability risks associated with the late or premature timely filing of an application to open insolvency proceedings.

Consequences for management

Against this background, we would recommend returning to rolling integrated business planning with a planning horizon of twelve months as part of the company's legally required monitoring systems from the beginning of September 2023, at the latest. Management should proceed on the assumption – if only for reasons of prudence – that for forecasts as to the company's continued existence as a going concern, the twelve-month forecast period will apply again from 1 September 2023. As soon as it is no longer "highly likely" that the company will continue to exist as a going concern, which means that the company will become unable within a period of twelve months to meet its payment obligations when due, the application to open insolvency proceedings must be filed without undue delay. To avoid being liable for filing a possibly premature application to open insolvency proceedings, in particular the shareholders should be involved in the decision beforehand.

Debtor-in-possession proceedings and restructuring plans

As for the planning periods for debtor-in-possession proceedings and restructuring plans, which have also been reduced by the Crisis Impact Mitigation Act with a view to facilitating access to debtor-in-possession proceedings and to stabilisation and restructuring measures, the former six-month periods are likely to apply again from 1 September 2023, instead of the current four-month periods.

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Commercial.Singapore: “Compass”: Changes to the procedure for the granting of work permits in Singapore

As a one-stop service provider in Asia, Luther offers its clients not only legal and tax advice but also further services through its colleagues from Luther Corporate Services, including acting as company secretary, a role required in any company in Singapore, or as a locally resident director or data protection officer. If desired, we can also provide bookkeeping and accounting services or perform certain HR functions.

As client mandates are always handled in an interdisciplinary manner, our clients can, of course, also count on our lawyers to provide legal advice in the areas mentioned above. This is particularly important whenever changes in law need to be implemented, or upon significant changes being made to well-established official procedures in Singapore.

A highly topical issue in this context is the changed procedure for the granting of work permits in Singapore, which is scheduled to take effect on 1 September 2023.

The “**Complementarity Assessment Framework**” applicable from 1 September 2023 is also referred to briefly as “Compass”. It will be interesting to see whether the new system will live up to its name and point a new way forward for work permit applications or whether our clients’ current scepticism will prove justified.

In a nutshell, Compass will replace the work permit application procedure currently in force, which focuses above all on the applicant’s salary. In future, in addition to the required base salary, more importance will be placed on the applicant’s qualifications and on whether there is a demand for those qualifications in Singapore which cannot be fulfilled by the local labour force. Apart from the strong financial services sector in Singapore, qualifications in agrotechnology, green economy, healthcare and shipping are currently in particular demand. As Singapore’s already high level of digitalisation continues to rise quickly and the country wishes to maintain its position as an excellence centre in Southeast Asia, the most sought-after employees are people working in InfoComm technology.

In addition to the personal assessment of the applicants their potential employers in Singapore – and hence our clients – will also be examined in future. In this context, particular consideration will be given to whether and to what extent the employer supports the local labour market, to the employer’s diversification, and to whether the employer contributes to achieving Singapore’s strategic economic goals.

Luther is by far the largest continental European law firm in Southeast Asia, with offices in Singapore, Indonesia, Malaysia, Thailand, Vietnam and Myanmar. All these offices offer our clients interdisciplinary advice and are also part of a tightly integrated network.

Full-service advice in all relevant areas of law

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We collaborate across locations to advise companies and their stakeholders throughout the business lifecycle on matters as diverse as the establishment of representative offices, branches or independent companies, corporate law issues, the formation of distribution networks, setting up at a production site, and all types of mergers. We also occasionally provide advice on private matters, such as tax, inheritance or family law issues. When providing advisory services, our colleagues from diverse European backgrounds – German, French, Spanish, Belgian, Austrian, Turkish and Swiss – always work closely with our local lawyer colleagues and partners. Our main areas of practice are:

- Compliance;
- Employment Law;
- Investment;
- IP Law;
- Commercial and Distribution Law;
- Litigation;
- M&A;
- Tax;
- Data Protection; and
- Immigration.

We are always committed to achieving the best possible economic results for our clients. Where these results cannot be achieved in direct negotiations with contractual partners or public authorities, we advise and assist our clients in any mediation, arbitration or court proceedings that may become necessary.

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Commercial.Restructuring: Next step towards Europe-wide harmonisation of insolvency law

European Commission presents draft EU Directive – German Bundesrat has reservations about the introduction of simplified winding-up proceedings for insolvent microenterprises.

On 7 December 2022, the European Commission published a "Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law" (COM(2022) 702 final). The proposal seeks to advance the implementation of the Capital Markets Union, which is considered a key project to further financial and economic integration in the European Union. So far, the European Economic and Social Committee, the European Data Protection Supervisor, and two EU member states (Portugal and the Czech Republic) have issued opinions on the proposed Directive. The first reading in the European Parliament is yet to be held.

Minimum requirements for avoidance actions

The proposed Directive (Articles 4 et seq.) contains detailed minimum requirements for **avoidance actions**. The relevant time period for avoidance actions in respect of legal acts against no or a manifestly inadequate consideration is proposed to be one year, and the limitation period for claims resulting from legal acts that can be declared void is proposed to be three years from the date of the opening of proceedings. The four-year period stipulated in Section 134(1) of the German Insolvency Code and the three-year limitation period according to Sections 146 of the German Insolvency Code, 195 and 199 of the German Civil Code (calculated from the end of the year in which proceedings are opened) exceed the minimum requirements stipulated in the proposed Directive. It is therefore unlikely that any adjustments will be made to the avoidance provisions set out in Sections 129 et seq. of the German Insolvency Code.

EU-wide access to registers

The proposed Directive (Articles 13 et seq.) provides for cross-border **rights to access registers** to trace the assets belonging to the insolvency estate ("asset tracing"). Insolvency courts are to be given the power to search the national bank account register and, upon request of the insolvency practitioner, access bank account registers in other EU member states where necessary for the purposes of tracing the assets belonging to the insolvency estate. The insolvency practitioner is to be given access to the national beneficial ownership register and to asset registers in other EU member states (for example, land registers or vehicle, ship and aircraft registers). Certain adjustments can be expected in this respect, as the German Insolvency Code does not provide for any such access rights to date.

Introduction of pre-pack proceedings

One of the key issues of the proposed Directive (Articles 19 et seq.) is the introduction of **pre-pack proceedings**, which are intended to facilitate the sale of the debtor's business or part thereof as a going concern and largely reflect current M&A practice. The purpose of pre-pack proceedings is to allow contracts to be negotiated and the takeover to be prepared prior to the opening of insolvency proceedings

("preparation phase") so that the transfer of the business can be carried out in a shortened process immediately after the opening of insolvency proceedings ("liquidation phase"). Adjustments to the German Insolvency Code can be expected.

Directors' duty and civil liability

According to the proposed Directive (Articles 36 et seq.), a legal entity's directors are to be obliged to **submit a request for the opening of insolvency proceedings** with the court no later than three months after the directors became aware or can reasonably be expected to have been aware that the legal entity is insolvent. The proposal further provides for liability of the directors if they fail to comply wit the obligation to submit a request for the opening of insolvency proceedings. The provisions of Sections 15a(1), second sentence, 15b(4) of the German Insolvency Code correspond to the minimum requirements so that no adjustments to the German Insolvency Code are expected in this respect.

Winding-up of insolvent microenterprises

Another key issue of the proposed Directive (Articles 38 et seq.) is the introduction of simplified **winding-up proceedings** for insolvent microenterprises, i.e. enterprises which employ fewer than ten employees and whose annual turnover or balance sheet total does not exceed two million euros (2003/361/EG, Articel 2). The insolvency court is to conduct the proceedings electronically using standard forms. Such proceedings are to be opened even if the debtor has no assets or its assets are not sufficient to cover the costs. According to the proposed Directive, an insolvency practitioner may only be appointed if the debtor, a creditor or a group of creditors requests such an appointment and if the costs of the intervention of the insolvency practitioner are covered by the insolvency estate or by an advance on the costs. The creditors' claims indicated by the debtor in the request for the opening of simplified winding-up proceedings are to be considered as lodged and deemed to be undisputed, as a rule. The assets are to be realised by the insolvency court through electronic auctions.

Creditors' committees

The proposed Directive (Articles 58 et seq.) defines minimum requirements for the working methods, function, rights, duties, powers, expenses and remuneration and liability of creditors' committees. According to the current legal situation, the members of the creditors' committee can already be held liable in cases of simple negligence, whereas the proposed Directive only provides for liability in cases of gross negligence or intent. Stricter liability provisions are permissible, however, as the proposed Directive only contains minimum requirements. Those minimum requirements are covered by the provisions of Sections 56a(2), 67 et seq., 160 of the German Insolvency Code. Consequently, no adjustments to the German Insolvency Code are expected in this respect.

Key information factsheets on national regulations in the EU member states

Finally, the proposed Directive (Article 68) provides for the provision by each EU member state of a **key information factsheet** written in clear, non-technical and comprehensible language and containing essential information about such member state's national insolvency law (opening of insolvency proceedings, lodging and verification of claims, ranking of claims, distribution process, duration of the proceedings), which will be published on the European e-Justice portal.

The German Bundesrat's criticism about the proposed Directive

In its opinion dated 30 March 2023 (BR-Drucksache 25/23), the German **Bundesrat** welcomed the harmonisation objectives sought to be achieve by the proposal, as well as the regulatory approach of defining minimum requirements, expressing, however, reservations in particular about the introduction of simplified winding-up proceedings and opposing such proceedings using primarily the following arguments:

- Proceedings conducted without an insolvency practitioner would conflict with the regulatory function and the creditors' interests, adversely affecting both the orderly conduct of the proceedings and the chances of settlement of the creditors' claims. Insolvency proceedings conducted in accordance with the rule of law with special checks by the courts, insolvency practitioners and creditors' committees would become less significant compared to simplified winding-up proceedings.
- The Bundesrat expressed doubts about whether this would lead to an increase in the settlement rate for creditors' claims. The restriction of the right to assert claims resulting from legal acts that can be declared void and the absence of an insolvency practitioner who identifies assets belonging to the insolvency estate might prevent assets from being added to the insolvency estate. Also, there would be less motivation for directors to submit as soon as possible a request for the opening of simplified winding-up proceedings.

- Such proceedings would transfer the insolvency practitioner's functions to the insolvency court and would lead to a considerable additional burden on the judiciary. The judiciary would have to increase its staff and set up the required infrastructure. The additional budgetary burden for the judiciary would be disproportionate to the costs saved in terms of the insolvency practitioners' remuneration. The insolvency courts would be unduly burdened if they were responsible for realising the assets and distributing the proceeds, as the court staff is neither trained nor equipped for the performance of such tasks.
- Such winding-up proceedings should, in the opinion of the Bundesrat, only be conducted if the costs of the proceedings are covered. In view of the additional burden on the treasury that might otherwise arise, the basic concept should be adhered to, according to which the request for the opening of insolvency (or rather simplified winding-up) proceedings is denied for lack of assets and the company deleted from the register.

How things will evolve

The EU Directive will probably not be adopted in its current draft version. There are likely to be amendments to it. The actual content of the adopted EU Directive remains to be seen. The German legislator will then have to transpose the adopted EU Directive into national insolvency law. It will be interesting to see how it uses its leeway in doing so.

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■ GENERAL INFORMATION

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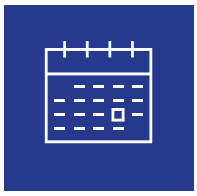
Events, publications and blog



You will find an overview of our events here.

You will find a list of our current publications here.

You will find our blog here.

Legal information

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