ADVANT Beiten

# International Briefing

**October 2022**

Dear Friends and colleagues,

it is our pleasure to introduce you to our latest International Briefing and to point out important legislative developments that may be relevant for you or your client's business operations in Germany.

The common denominator of these important developments is that all of them derive from EU regulations. For general counsels this means that although the law in Europe still reflects the diversity of its member states, the major legal developments in corporate law, the rules on foreign direct investment, digital services or on corporate compliance highlighted in this Briefing are driven by the EU in an effort to harmonize the legal framework for doing business in Europe and to improve the competitiveness of the EU as a single market.

This is good news, and it reinforces our conviction we can serve our clients best with **ADVANT**, combining national expertise and a seamless European experience to clients seeking to expand into or within, continental Europe.

Last but not least we would like to draw your attention to the fact that shortly after the 1st anniversary of **ADVANT**, we were awarded as *International Firm of the Year 2022* by Legal Business.

To find out more about our recent journey, our team would be happy to catch up with you at IBA Miami.

Enjoy the read!

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# Table of contents

# Government Draft on the German Transformation Act: Will the Quick Cross-Border Company Conversion Come to an End?

In July 2019 we have informed you here in this blog on which the EU decided regarding cross-border conversions, mergers and divisions. In order to cast these changes into German law, the German government has planned respective amendments to the German Transformation Act (Umwandlungsgesetz).

These amendments will, in particular, reform the current procedure for the transfer of a German limited liability company, a GmbH, to another EU member state. At first glance, this cross-border company conversion will become more complex and difficult. It might therefore be a lucrative option for shareholders of German GmbHs to initiate a cross-border conversion this year, i.e. before the amendments will come into force.

## I. Overview of the Essential Amendments

On 6 July 2022, the Federal Cabinet adopted the draft of an Act to Implement the Conversion Directive (UmRUG-RegE). This government draft continues the implementation of the Directive on Cross-Border Conversions, Mergers and Divisions (Company Conversion Directive, UmwRL) as a part of the so-called Company Law Package of the EU. The objective of the Company Conversion Directive is to create uniform regulations for cross-border transformation activities for corporations (limited liability company (GmbH), public limited company (AG), partnership limited by shares (KGaA)) within the EU.

This standardisation of legal requirements is complemented by a comprehensive EU effort to digitally interconnect national commercial registers and enable companies to transfer to other EU countries with legal certainty.

## II. Company Conversion of a German Limited Liability Company

The cross-border company conversion means the transfer of a corporation founded under the laws of one EU member state to a legal form under the laws of another EU member state. Figuratively speaking, the corporation takes off its German legal dress and exchanges it for that of another EU member state.

One form of cross-border conversion that we frequently assist with is the transformation of a German GmbH into a Dutch B.V. (Besloten vennootschap met beperkte aansprakelijkheid) or into a Luxembourg S.à r.l. (Société à responsabilité limitée).

The adaptation of the regulations in the EU is accompanied by a number of innovations for this cross-border conversion, involving more steps and a more complex procedure. Due to the additional submission and waiting periods we expect that the cross-border conversion of a German GmbH to another European country will take longer in the future.

The now codified procedure consists of two steps. Once the prerequisites for the conversion in Germany have been met, the company must be registered in its new legal form in the register of the destination state in compliance with the relevant foundation regulations.

## 1. CONVERSION REPORT

Once the shareholders have decided on a cross-border company conversion, the management must first prepare a Conversion Report. This Conversion Report must illustrate the economic and legal effects of the cross-border company conversion for the GmbH, the shareholders and the employees. In particular, the management must describe the effects of the cross-border conversion on the future business activities of the company and its subsidiaries, if any. In case the GmbH has multiple shareholders, the report further must explain how the company conversion affects the shareholders' legal positions.

The Conversion Report must be made available to the shareholders electronically six weeks prior to the resolution on the conversion.

## 2. CONVERSION PLAN

In the future, the management will additionally have to draw up a Conversion Plan. The Conversion Plan constitutes the core of the cross-border conversion and contains its key points. These are, in addition to the company name and the registered office of the new legal form, an indicative timetable for the cross-border conversion.

The Conversion Plan must be notarially recorded one month prior to the resolution of consent by the shareholders and subsequently be submitted to the registration court with a request for publication. Only in a second step, upon expiry of the month, shareholders may approve the Conversion Plan in a shareholders' meeting.

## 3. EXAMINATION REPORT

If the GmbH has more than one shareholder, in the future also a Conversion Examination must be performed. Previously, such an examination was only required in the case of mergers. The examination must be carried out by one or more experts, checking the information in the Conversion Plan for completeness and correctness.

After the examination, the conversion examiners will prepare an Examination Report. Also, the Examination Report must be made available to the shareholders one month before the shareholders' meeting.

If the GmbH has multiple shareholders and these do not waive the Conversion Examination in a notarially recorded form, this requirement may delay the cross-border conversion consid-erably.

## 4. CONVERSION RESOLUTION

Once the Conversion Plan, the Conversion Report and, if necessary, the Examination Report have been made available to the shareholders meeting the respective deadlines the shareholders vote in a notarially recorded shareholders' meeting on the cross-border conversion. A qualified majority of 75% of the votes cast must be in favour of the cross-border company conversion.

Then the management of the company must register the resolved conversion with the commercial register and apply for the issuance of a so-called Conversion Certificate.

## 5. EXAMINATION BY THE REGISTRATION COURT

Another important change regarding the cross-border company conversion is the now required verification of lawfulness by the registration court. In the future, the registration court will examine all the procedural steps and formalities described above. Only after completion of the examination will the registration court issue the Conversion Certificate. It certifies that all relevant requirements have been met in Germany. The Conversion Certificate is required for the registration of the company in the destination state. The German registration court transmits the Conversion Certificate electronically to the competent register in the destination state.

in the conversion. Although the Act provides for an examination period of three months, it remains to be seen whether the registration courts will reach the limits of their capacity in view of the newly introduced procedures for cross-border conversions, mergers and divisions.

## 6. BLOCKADE BY CREDITORS

The reform of the German Transformation Act also legally regulates that, in the future, creditors of the GmbH can interrupt the registration of the cross-border conversion by filing an action for a security provision. Thus, creditors who can credibly demonstrate that they are entitled to a claim against the GmbH which arose prior to the publication of the conversion, and which has become due after the publication, can prevent the cross-border conversion, if the conversion endangers the settlement of the outstanding claim. Creditors must assert their claim for security in court within three months of the publication of the conversion by the registration court.

## 7. RELOCATION TO THE MEMBER STATE

The new registration of the company can then be filed with the competent register of the destination state. In addition to observing the formation provisions of the respective destination state, the company will have to submit the Conversion Certificate issued by the German registration court to the register of the destination state. In this respect, the register of the destination state is bound by the findings of the Conversion Certificate. This will simplify and accelerate the entry of the company in the register of the destination state in the future. The cross-border conversion becomes effective upon entry in the register of the destination state.

Once the company is registered in the destination state, the register of the destination state will notify the German commercial register of the entry so that the German register can delete the company from the German commercial register with reference to the conversion.

## 8. TRANSITIONAL ARRANGEMENTS

The government draft of the Act to Implement the Conversion Directive (UmRUG-RegE) provides for a transitional period for cross-border conversions that were resolved by the company before 31 January 2023 and filed with the registration court before 31 December 2023. During this transitional period, the cross-border conversion is still possible in accordance with the former legal provisions.

### 9. CONCLUSION

Thus, in the future there will be legal certainty for the shareholders and the registration courts for cross-border conversions. This is welcome, as the procedure for cross-border conversions currently depends to a large extent on how the respective registration courts apply the rules in practice.

The downside of the ensuing legal certainty in the European Economic Area is the expected prolongation of the procedure. This can be combined with higher costs for the company due to growing expenses.

## III. Outlook

The Conversion Directive is to be transposed into national law by 31 January 2023.

## IV. Last Chance for a quick Cross-border Company Conversion?

The welcome harmonisation of European conversion law reforms the current legal situation in Germany. However, due to the increased complexity and the newly introduced procedural steps, cross-border conversions will take longer once the amendments come into force, especially in the first period after the amendment.

To avoid application of the amendments to the Act regarding a cross-border conversions, it may be advisable to initiate the cross-border conversion this year so that the conversion can be completed in accordance with the current legal situation.

We will be pleased to advise you on whether it is reasonable for your GmbH to convert to another European country before the end of the year.

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# Chinese Investments in Germany - Is FDI Control an Obstacle?

In this interview, our expert Dr Patrick Hübner talks about the increasing control of Chinese direct investments in Europe and Germany. He explains which FDI control measures exist and what influence the pandemic had on Chinese investments.

Welcome to "Article 5", the ADVANT Beiten Podcast.*

My name is Jörg Hahn and I'm a former editor and journalist for a major German newspaper. Today I'm talking to Dr Patrick Hübner about the developments in the control of Chinese investments in Europe and Germany.

Patrick Hübner is a lawyer and partner at ADVANT Beiten and is a member of the firm's Corporate/M&A, Foreign Trade Law and China practices. He has represented numerous clients in investment control proceedings before the German Federal Ministry of Economic Affairs and Climate Action in Berlin (which we'll refer to as just the "Ministry").

We're looking at the increasing control of Chinese investments in Europe and Germany and explore what this means for German companies looking for foreign investors from the Far East to avert impending insolvencies, bridge liquidity bottlenecks or find a successor for the company.

**JÖRG HAHN:** Patrick, anyone following the German media over the past few years will have seen the growing scepticism towards investments from China. The 2016 takeover of robotics manufacturer Kuka by the Chinese Midea Group was a key moment in the control of foreign investments, and it is said to have led to a change in thinking in German industry and politics. What do you think about this development?

**PATRICK HUEBNER:** In my opinion, Germany and Europe are still very attractive locations for foreign investment. This is due to the good framework conditions, the predominantly stable political situation, good infrastructure and a large supply of highly qualified labour.

The takeover of Kuka by the Midea Group in 2016 was a key moment which led to a noticeable increase in the control of foreign direct investments in Germany, especially those from the People's Republic of China. Germany now looks very closely at who is investing and what is being invested in.

Still, there are only a few known cases since 2016 in which foreign investments were prohibited or prevented in some other way. This might be because FDI review procedures are not public, but it corresponds with our experience in recent years:

Most of the M&A transactions subject to German FDI review are cleared by the Ministry. This is a very good sign for Germany as an investment destination.

**JÖRG HAHN:** Have there been any cases in the past where Chinese investments were prohibited in Germany?

**PATRICK HÜBNER:** Yes. Six cases are worth mentioning.

The acquisition of Kuka by Midea was ultimately completed in 2016 after the US defence business was carved out. In the same year, there was a tug-of-war over AIXTRON, an equipment manufacturer in the semiconductor industry. A Chinese investment fund sought to take over the German manufacturer. The deal eventually fell through due to US security concerns.

Two further cases occurred in 2018. The first formal prohibition decision was imposed by the Ministry on the planned acquisition of the German special machinery manufacturer LEIFELD METEAL SPINNING by a Chinese state-owned company from the nuclear industry;

In the second case, the German Federal Government intervened indirectly and acquired shares in German grid operator 50 HERTZ, a former Vattenfall subsidiary, through the German development bank (KfW) to prevent the State Grid Corporation of China from acquiring the shares.

In 2020, the second formal prohibition decision followed. IMST is a German communications technology company active in the fields of satellite and radar communications as well as 5G technology which became the target of a takeover by the Casic-Group, a major Chinese state-owned defence contractor.

Since the beginning of this year, we have been reading about another two failed takeovers. The deadline for the public takeover bid of SILTRONICS by Taiwanese chip supplier GlobalWafers ultimately expired before the Ministry had made a decision. The takeover of German medical ventilators manufacturer HEYER MEDICAL AG by the Chinese Aeonmed-Group was

vetoed by the Ministry, assumingly due to concerns for the security of the German public health care. This marked the third formal prohibition decision.**

**JÖRG HAHN:** Who are the top investors from third countries?

**PATRICK HÜBNER:** The top investors in Europe are currently the USA, followed by the UK and the PRC, which is also reflected in the number of FDI control proceedings.

**JÖRG HAHN:** Looking at the European Commission's first Foreign Direct Investment Review Report, released in November 2021, we can see a dramatic decline in Chinese M&A transactions in 2020, falling by nearly 2/3 year-on-year. What could be the reason for the sharp decline? Is it just general uncertainty related to the pandemic?

**PATRICK HÜBNER:** Our firm's China practice has also seen a general decline in M&A transactions with Chinese participation. The pandemic is certainly one reason for this, but I would say it is far from the only reason.

Before the pandemic, there was already a degree of uncertainty due to the ongoing trade disputes. The pandemic increased this uncertainty.

During the pandemic, travel restrictions were also introduced. Many investors want to "see and touch" what they intended to buy, but could not do so due to the restrictions on air travel and the quarantine requirements when re-entering the PRC. We know many investment projects have been postponed indefinitely.

And, finally, the regulatory issues already mentioned played - and still play - a particularly important role: on the Chinese side, there is the regulation of outbound investments and foreign currency outflows, and on the European and German side, there is the control of Chinese direct investments.

**JÖRG HAHN:** At the start of the pandemic, the EU Trade Council warned of a "European clearance sale" and the former German Federal Minister of Economic Affairs announced the revision of Germany's foreign trade law. What happened?

**PATRICK HÜBNER:** What happened? Over the last two years, the control of foreign direct investments in Germany and the EU picked up in

speed, with Chinese investors increasingly becoming the focus of national FDI reviews, as the examples I mentioned indicate.

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These protectionist efforts of the European Union against China are nothing new. However, the pandemic became acted as a "fire accelerant" in the light of the feared wave of insolvencies in Europe.

At the European level, the EU Screening Regulation was adopted in spring of 2019, well before the pandemic, incidentally at the initiative of Germany, France and Italy. Since it entered into force in autumn 2020, the EU Screening Regulation has created a uniform framework for controlling foreign direct investment in the EU.

The EU Screening Regulation can be seen as a unified European response to the increasing activities of Chinese investors worldwide and China's ambitious plans to secure global technological supremacy by 2049.

In light of the EU Screening Regulation, 24 of 27 EU member states have already either introduced an investment control regime, revised the existing regulatory framework, or launched corresponding initiatives.

In Germany, for example, there have been several amendments to the foreign trade laws that have significantly tightened up the existing FDI control regime. We've definitely noticed the effects in M&A transactions with foreign investors.

**JÖRG HAHN:** What is FDI control and what specifically does the German FDI control cover?

**PATRICK HÜBNER:** Generally speaking, FDI control allows the respective EU member state to examine whether a foreign investment affects national or European interests related to public security.

German FDI control covers not only the acquisition of a company, but also the acquisition of shares in a German company when certain voting right thresholds are reached, as well as the acquisition of a definable part of a business or its essential operational assets.

**JÖRG HAHN:** What specific changes have there been in the field of FDI control in Germany?

**PATRICK HÜBNER:** In the past three years, the two main sets of regulations in Germany, the German Foreign Trade and Payments Act ("Außenwirtschaftsgesetz") and the German Foreign Trade and Payments Ordinance ("Außenwirtschaftsverordnung"), have been revised several times. Some related regulations, such as most recently the German Ordinance on the Designation of Critical Infrastructure ("Verordnung zur Bestimmung Kritischer Infrastrukturen"), have also been adapted.

The amendments implement three main changes:

- First, they expand the scope of the German FDI control. The relevant voting rights thresholds were lowered so that German FDI control applies in some cases where only 10 percent of the voting rights are acquired. The cases in which the Ministry must be notified were significantly expanded in terms of both quantity and quality;

- Second, they significantly tighten the review standard of the German FDI control, i. e. where previously an actual threat to the public security or the essential security interests was required to prohibit a foreign investment, from now it will be sufficient if there is a probable impairment of the public security or the essential security interests; and

- Third, the amendments extend the review period, resulting in noticeable delays in M&A transactions with foreign investors.

**JÖRG HAHN:** What are the specific features of the current FDI control regime in Germany?

**PATRICK HÜBNER:** German FDI control distinguishes between sector-specific FDI review and cross-sectoral FDI review.

Sector-specific FDI review mainly covers cases in which a foreigner, i.e. an acquirer based outside Germany including in another EU Member State, intends to acquire an interest of 10 percent or more of the voting rights in a German company involved in the defence and armaments industry.

All other acquisitions are subject to cross-sectoral FDI review, where the acquirer is a non-EU / non-EFTA investor and the acquisition meets or exceeds certain industry-specific thresholds of 25, 20 or 10 percent.

It is important to note that, where the German target company operates within a (critical) industry sector, which is particularly relevant to security,

the planned acquisition must be notified to the Ministry and may not be consummated (closed) before clearance.

**JÖRG HAHN:** To which industrial sectors does this "mandatory notification obligation" apply?

**PATRICK HÜBNER:** The obligation to notify an acquisition to the Ministry applies in all industry sectors that are – from the perspective of the German Government – particularly relevant to public security.

For sector-specific FDI review, these industries are the defence and armaments industry, certain products with IT security functions and certain defence-critical facilities.

For cross-sectoral FDI review, the mandatory notification obligation applies to classic industry sectors such as critical infrastructure, cloud computing, the media industry, and the healthcare sector, which was added to the list of sectors at the beginning of the pandemic. The mandatory notification requirement also applies to numerous, particularly promising future technology sectors, such as artificial intelligence, additive manufacturing (i.e. 3D printing), automated driving or flying, robotics, semiconductors, and network technologies (keyword: 5G), but also includes areas such as cybersecurity, aviation and aerospace, nuclear technology, critical raw materials and others.

**JÖRG HAHN:** In light of the recent tightening of German foreign trade laws, what do German companies need to keep in mind when looking for an investor from China?

**PATRICK HÜBNER:** German companies seeking investors from China or planning to sell the company or parts thereof to them should address the question of whether the planned investment or acquisition may be subject to German FDI control at an early stage.

Incidentally, this applies to all non-EU investors, including those from the US, UK and Northern Ireland. In the defence and armaments sector, it even applies to investors from other EU Member States.

In our experience, realistic timing is key. To this end, it is important to know that German FDI control is divided into two stages, the preliminary and main proceedings, and can take up to 10 months or longer for complex transactions. To obtain transaction security as quickly as possible, we recommend notifying the acquisition to the Ministry before the contract is concluded or applying for a certificate of non-objection.

**JÖRG HAHN:** Let's assume a German company which does not belong to a particularly security-relevant (critical) industry sector is looking for an investor from the US or China to acquire shares in the company. What applies?

**PATRICK HÜBNER:** Two cases must be distinguished here:

If the planned investment is below the generally applicable threshold of 25 percent for investments in non-critical industry sectors, in other words, if the US or Chinese investor does not acquire control of 25 percent or more of the voting rights in the German company, the investment is exempt from FDI approval. In this case, the acquisition does not fall under the scope of German FDI control.

If, on the other hand, the 25% threshold is reached or exceeded, the acquisition is subject to German FDI control. However, since the German target company in our case does not operate in a critical industry sector, the acquisition does not have to be reported to the Ministry and can be closed.

Since the Ministry can still review threshold-relevant investments ex officio up to five years after the conclusion (signing) of the contract, many investors decide to apply to the Ministry for a certificate of non-objection (Unbedenklichkeitsbescheinigung) as a precautionary measure, even where notification is not mandatory, to obtain transaction security at an early stage.

**JÖRG HAHN:** What can the Ministry do if it concludes that an acquisition constitutes a risk to public security?

**PATRICK HÜBNER:** The Ministry can prohibit the acquisition - as in the case of Leifeld Metal Spinning, IMST or Heyer Medical - or issue orders restricting the acquisition. In our experience, however - for reasons of proportionality – the Ministry usually tries to remedy security-related concerns primarily by creating a balance of interests in the context of negotiating public-law contracts. This is often the milder remedy compared to unilateral orders.

If a prohibition or order is issued, it does not have to be simply accepted. Prohibitions and orders are administrative acts that can be appealed. However, it must be noted that the Ministry has broad discretion when deciding whether an acquisition is likely to impair security-related interests, which can be reviewed by German courts only on limited grounds.**

**JÖRG HAHN:** How many German FDI reviews have there been and which industries have been affected?

**PATRICK HÜBNER:** According to the Ministry, there were more than 300 FDI control proceedings in Germany in 2021. This is remarkable, as it represents almost double the number of FDI reviews compared to the previous year, despite the general decline in M&A activity. This shows that the expansion of the type of cases subject to the mandatory notification obligation has significantly increased the Ministry's caseload of FDI reviews.

In total, more than half of the FDI reviews are attributable to US investments and, since BREXIT, to UK investments, too. Only a small proportion of the acquisitions reviewed involved Chinese investors. Information and communications technology, infrastructure, healthcare, and semiconductors industries have been particularly relevant for FDI control.

**JÖRG HAHN:** Thank you very much, Patrick. Do you have a forecast for the future of Chinese investment in Germany?

**PATRICK HÜBNER:** I don’t have a “crystal ball”, but I can try.

In the next one or two years, I expect we will see an increase in greenfield investments in Germany and Europe. Chinese companies will be entering the market and setting up new operations, making long-term investments, expanding existing market activities - such as in the field of electromobility - creating huge value for the German economy and offering many opportunities for German companies, for example in the context of cooperation and joint ventures.

With the end of the pandemic, Chinese direct investments should return. Despite the increased number of transactions in critical industry sectors subject to mandatory notification, there is still significant investment potential in Germany and Europe, such as in Italy and France, but also Poland, for example.

Finally, most of the investments subject to the German FDI control, whether from the US or China, are ultimately approved by the Ministry. Europe and Germany remain very attractive targets for foreign investments.

*The interview was conducted in March 2022. You can listen to it in German at https://www.advant-beiten.com/de/aktuelles/podcasts.

**The answer was updated to include the latest developments in German FDI control, including the ministerial veto of the acquisition of Heyer Medical AG by the Chinese Aeonmed-Group from April 2022.

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# Federal Cabinet approves Whistleblower Act

On 27 July 2022, the Federal Cabinet adopted the draft bill for a Whistleblower Act, which was presented in April. The Act will enter into force three months after it is adopted by the German Bundestag, most likely in January 2023.

### Background

The Whistleblower Act implements the EU Whistleblower Directive, which seeks to establish standard protections for informants throughout the EU. Implementation is long overdue, as the deadline for transformation into national law ended on 17 December 2021. In 2019, Germany provided some protection for whistleblowers with the adoption of the "Act on the Protection of Business Secrets". However, this new draft bill goes far beyond the 2019 Act.

### Content of the draft bill

The Whistleblower Directive and the German Whistleblower Act are designed to establish comprehensive protection for whistleblowers. This is based on the following components:

- Companies and organisations with more than 50 employees must establish and operate a SECURE INTERNAL WHISTLEBLOWER SYSTEM. Small companies with fewer than 250 workers have been granted a "grace period" until December 2023.

- Whistleblowers must have the option of providing information orally, in writing or in person, as they wish.

- When information is provided, the internal reporting channel must provide the whistleblower with confirmation of receipt WITHIN SEVEN DAYS.

- Within THREE MONTHS, the competent person or body must inform the whistleblower of the measures taken, e.g., the opening of an internal compliance investigation or the referral of the matter to the relevant authority, such as a law enforcement agency.

- Second, Germany must establish the equivalent possibility to provide information to the Federal Office of Justice (Bundesamt für Justiz) as an EXTERNAL NOTIFICATION BODY. The Laender can also establish bodies that whistleblowers may notify in such situations.

- Whistleblowers can decide freely whether to notify the internal company body or the external body.

- To protect the whistleblower against "retaliation", the law contains a wide-reaching REVERSAL OR THE BURDEN OF PROOF: if a whistleblower is "disadvantaged" with respect to their professional activities, it will be assumed that the disadvantage they face is in retaliation. In addition, the whistleblower may CLAIM DAMAGES for the (assumed) retaliation.

## Significance for practice

Companies and organisations should prepare for and organise professional installation and implementation of an internal notification system in good time because failure to do so can result in significant fines. If a whistleblower system is already part of the internal compliance management system, companies should assess whether the system is in line with the requirements of the Whistleblower Protection Act and make any necessary adjustments in time.

Particular care should be taken with respect to the reversal of the burden of proof when implementing personnel measures "near" the whistleblower, such as in their team or at their level. This is particularly important when the whistleblower reveals their identity (they are not required to remain anonymous), when there is an exemption releasing the notification body from the duty to maintain confidentiality (§ 9 of the draft bill), or when the notification body infringes the duty of confidentiality. In such cases, the identity of the whistleblower will be exceptionally known. Accordingly, a failure to consider the whistleblower for a pending promotion, but even the breach or simple failure to extend a fixed-term employment contract could be considered "retribution". As a result, the employer will have to show that they have not disadvantaged the whistleblower due to the notification made by the employee. If this exculpatory evidence is insufficient, the employer may face a claim for damages from the whistleblower, as well as fines. Employers should therefore be prepared for the reversal in the burden of proof to be used as an additional "weapon" in an action against unfair dismissal, which could make it more difficult to defend against such a claim.

### Conclusion

The Whistleblower Act will require all companies with more than 50 employees to review and adapt any existing internal whistleblower system or to establish such a system for the first time. Companies should consider whether to outsource and use a third party as their notification body and as the operator of the notification system. In any case, companies are required to follow up on notifications, take measures and remedy violations. Finally, employers must ensure that any whistleblower is protected against retribution. At the same time, they should bear in mind the potential for misuse of the new reversal of the burden of proof.

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# The 11th Amendment to the Act against Restraints of Competition: Paradigm Shift in Antitrust Law

With the outbreak of the Russia-Ukraine war and the considerable price increases for fuels in Germany, an intense public discussion began on how the Federal Government can legally record 'silent' coordination of behaviour between companies (especially in transparent, oligopolistically structured markets). Against this background, the Federal Ministry of Economics and Climate (BMWK) presented a first draft on 26 September 2022 to tighten competition law and strengthen the Federal Cartel Office ("Competition Enforcement Act"). The explanatory memorandum to the draft states:

"Where the market structure stands in the way of competition, for example because there are only a few suppliers in the market and parallel price developments are regularly observed to the detriment of consumers, the intervention instruments of antitrust law are to be strengthened."

Accordingly, the Federal Cartel Office (FCO) is to be given powers equivalent to those of a regulator to intervene in market and corporate structures even even with regard to companies which have neither committed a cartel infringement nor are planning a merger and have not behaved in an abusive manner - a paradigm shift in antitrust law, where the cost-by-cause principle previously applied.

According to the draft bill the FCO is to be strengthened in 3 areas:

- in conducting sector inquiries and imposition of measures thereafter,
- in the enforcement of the Digital Market Act and
- in the disgorgement of advantages.

The first hearings on the draft are going to take place as early as October so that a speedy legislative process and adoption before the end of this year can be expected. The fact that the next, 12th amendment to the Act against Restraint of Competition (ARC) has already been announced by the BMWK for next year also speaks in favour of a quick adoption. Thus, almost 1.5 years after the 10th ARC amendment came into force, two further amendments are already in the pipeline of the Ministry.

Details of the proposed 11th ARC amendment:

## I. Follow-up and streamlining measures to the sector inquiry

With the instrument of sector inquiries the FCO investigates and analyses the structures and conditions of competition in specific sectors of the economy. These market studies are not based on the suspicion of a cartel infringement and are not directed against individual companies. Rather, it is a procedure for gaining knowledge with the possibility of subsequently carrying out cartel proceedings against specific companies on the basis of possible antitrust infringements. The FCO is, for example, currently conducting such investigation in the fuel markets.

The draft bill provides for a strengthening of these inquiries. In the future the FCO will be able to order measures and remedies following a sector inquiry (which may now only take a maximum of 18 months) without having established a specific infringement of the law by a market participant. The only prerequisite for ordering remedies is that the FCO has identified a significant, lasting or repeated disturbance of competition on at least one market or across markets. The remedies that follow can be behavioural and structural, with non-abuse unbundling (widely called for on both sides of the Atlantic) provided for as an ultima ratio. The draft provides, inter alia, for measures relating to:

1. granting access to data, interfaces, networks or other facilities,
2. supplying other companies, including the granting of rights to use intellectual property,
3. official or comparable approvals or permits,
4. the supply relationships between undertakings on the markets concerned and at different market levels,
5. common norms and standards,
6. the organisational separation of company or business divisions.

It shall also be possible for the FCO to impose requirements on certain types of contracts or contractual arrangements including contractual provisions on the disclosure of information. This catalogue is not exhaustive, so that all measures necessary for restoring effective competition are in principle to be available to the FCO. With the exception of unbundling , the measures are not ranked in a specific order so that considerable legal uncertainty for companies which comply with (cartel) law can be expected. This applies all the more as the draft does not specify against whom the measures are to be directed. The only criterion so far is the necessity of the specific measure for the elimination or

reduction of the distortion of competition - an indeterminate legal concept that requires considerable further clarification of both, courts and authorities.

## II. Extension of the FCO's powers to enforce the Digital Market Act and Private Enforcement

Originally, a similar and equally far-reaching regulatory instrument was envisaged for the European Commission at a European level ("New Competition Tool"). This proposal ultimately gave way to the Digital Markets Act ("DMA").

The DMA, which will come into force on 1 November 2022, is a European regulation designed to ensure that digital markets where gatekeepers (i.e. companies that control market access for others due to their market power and network effects) are and remain contestable, i.e. that other market players can exert competitive pressure on these gatekeepers, and to ensure fairness and a level playing field for players in digital markets in the EU.

The draft bill on the 11th amendment to the ARC provides that in the future the FCO may investigate possible infringements of the DMA and for this purpose also make use of the investigative powers available to it in the event of suspected infringements of antitrust law. This will enable the FCO on the one hand to support the European Commission in enforcing the DMA and on the other hand to generate synergies for the enforcement of national supervision of gatekeepers, which is regulated in section 19a ARC.

Since the DMA is to be enforced not only by public authorities but also by private parties (by means of actions for injunctive relief and damages) (private enforcement), according to the draft bill, the simplifications that have so far applied to antitrust damages actions will in the future also apply to claims for the enforcement of rights and obligations under the DMA - undoubtedly an advantage for Germany as a place of jurisdiction and a new danger for companies that are addressees of the DMA.

## III. Reduction of the requirements for the levy of benefits

Courts and authorities have so far hardly ever ordered disgorgement due to the high standard of proof required. To change this, the draft bill provides that in the future the requirement of fault will be deleted altogether. In addition, the period during which disgorgement may be orderedf will be extended to 10 years after the infringement has ended.

Particularly interesting is the introduction of (rebuttable) statutory presumptions, whereby it is presumed that

1. the cartel infringement resulted in an advantage for the undertaking concerned
2. this advantage amounts to at least 1% of the worldwide group turnover of the goods and services concerned.

### IV. Initial Evaluation

As a first step in implementing its competition policy agendapublished in February, the BMWK wishes to strengthen the FCO's powers of intervention and lower the requirements for various instruments and claims. The skimming off of advantages in particular is likely to be used increasingly by the FCO in the coming years and to have a deterrent effect on companies. Since some anti-competitive phenomena of the 21st century - especially in digital markets, which are particularly susceptible to concentrations of power due to strong network and scale effects - cannot (or can no longer) be controlled with the existing antitrust toolbox, the BMWK deliberately breaks with the existing antitrust doctrine and gives the FCO quasi-regulatory powers.

It remains to be hoped, however, that in the course of the legislative process the decisive issues of the preconditions and the legal consequences will be clarified in such a way that legal uncertainty will be reduced. To this end, more specific requirements can be introduced for both definitions of individual characteristics or preconditions (e.g. for the term "significant, persistent or repeated distortion of competition") and the legal consequences (e.g. who can be affected by a measure after a sector inquiry has been carried out).

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# The Digital Services Act - "A new Sheriff in Town"

Thierry Breton, EU Commissioner for Internal Market, announced the Digital Services Act ("DSA"), which is intended to harmonise regulations on the internet at EU level, with the pictorial comparison of "a new sheriff in town".

It has been 20 years since the EU first laid down a basic legal framework for the regulation of the internet – namely the eCommerce Directive of 2000. Since then, it has been the Member States who took the lead on making the internet a safer or at least better place – however, on national level (e.g. in Germany with the Network Enforcement Act). This led to regulations regarding the internet being very inconsistent across the EU. From a business perspective, at times there was the impression of a fragmentation of the "European Internet".

Therefore, the EU Parliament and eventually the EU Council on October 4, 2022 approved the DSA. Other than hoped by some and feared by others, the DSA is not a "constitutional law for platforms". Rather it contains basic rules for the so-called intermediary services providers.

The underlying idea of the DSA is: "What is illegal offline, should be illegal online". At first glance, this sounds like an obvious truism, and in fact the regulations of the DSA are more of a tightening up or standardisation of regulations that already exist in many member states. However, many new obligations have been added with the real novelty being the possibility of initiating sanctions against companies along with a system of fines modelled on the GDPR).

## To whom the DSA applies

The DSA is aimed at "intermediary services providers" who offer their services in the EU. This includes, for example, internet providers, cloud services and content sharing platforms, but also social networks, app stores and online marketplaces.

The extent of regulation depends on the respective type of intermediary service. A distinction is made between the pure transmission of data ("mere conduit"), transmission with short-term intermediate storage ("caching") and "hosting", with the special case of online platforms. The strictest regulations apply to "very large online platforms" and "very large online search engines".

## Areas of regulation of the DSA – Harmonising Limited Liability Exemptions and establishing Due Diligence Obligations

At first, the DSA establishes a standardised legal framework for the conditional exemption from liability of intermediary service providers for the data or content they transmit. The exemption is mainly based on the knowledge of the intermediary services providers of the illegality of the content.

## Due Diligence Obligations applying to All Intermediary Services

The DSA furthermore lists obligations of the intermediary services providers, some of which are very detailed.

- Providers of intermediary services must act against illegal content when ordered to do so by the relevant national judicial or administrative authority. However, there neither a general duty of the intermediary services providers to monitor all information, nor are they obliged to actively search for facts indicating illegal activities without prior indications.

- Intermediary services providers are required to establish a single point of contact for direct communication with the authorities and the Commission, as well as a point of contact enabling the users of the service to communicate directly and rapidly with the services providers.

- Additional information will need to be provided in the terms and conditions of the services providers. This will ensure the fundamental rights of users, such as freedom of expression, freedom and pluralism of the media, and other fundamental rights are adequately reflected in the terms and conditions. The information shall cover restrictions on content as well as the policies, procedures and tools used for content moderation, as well as the internal procedures for handling complaints.

- Where the intermediary service is primarily directed at or used by minors, the terms and conditions must explain the conditions for and restrictions on the use of the service in a way minors can understand. For providers of intermediary services of any kind, it is advisable to review their general terms and conditions at an early stage according to these standards.

- There are now also transparency obligations (e.g. annual reports) for all services providers. The scope of this obligation varies depending on the type of intermediation service.

## Specific Obligations for Hosting Services (including Online Platforms)

Providers of hosting services must implement notice and action mechanisms. These must include a report function for illegal content which is easily accessible for users. If restrictions are imposed on user content or behaviour, the services provider must give a clear and specific statement of reasons for the restrictions to any affected recipient of the service. If a hosting provider becomes aware of any information that gives rise to the suspicion of a criminal offence involving a threat to the life or safety of a person, the provider must inform the relevant authorities.

## Special Category: Online Platforms

Online platforms, such as social networks or online marketplaces, are defined as providers of hosting services that not only store information provided by the recipients of the service but also disseminate such information to the public at the recipient's request. Such online platforms will have further obligations.

- Online platforms must establish an internal complaint procedure and out-of-court dispute resolution.
- They shall process notices about illegal content given by "trusted flaggers" without undue delay.
- The DSA entails detailed provisions on how to deal with users that frequently provide manifestly illegal content.
- New transparency obligations apply for advertising on online platforms. Generally, users need to be provided with information about the advertiser and the person who paid for the advertising.
- Online platform providers using "recommender systems" must inform users about the main parameters they use for these recommender systems and what options users have to modify or influence these parameters. This should be detailed in the platform's terms and conditions.
- Online platforms must not present advertising based on profiling that uses "sensitive" personal data, as defined in Art. 9 of the GDPR. This may even apply where the user has consented to the processing of their personal data. Personalised advertising based on profiling to

minors must not be presented by online platforms where they are reasonably certain the user is a minor. Online platform providers should review functions such as "recommended for you" or similar. Such algorithm-based suggestions often process user profiles for the purposes of personalised advertising within the meaning of the DSA.

- The DSA expressly prohibits the use of "dark pattern", i.e. application interfaces that interfere with users' free decision-making, for example, by displaying different sizes of consent and rejection options.

- Where a platform allows consumers to conclude distance contracts with traders, the platform must ensure traders are traceable and must therefore collect specific information about the trader's identity.

For very large online platforms having in average at least 45 million EU users per month, even more comprehensive transparency obligations apply. They must give their users the possibility to refuse recommendations based on profiling. They must establish risk management systems and meet specific compliance requirements. And they must be publicly accountable for meeting these requirements and will be subject to annual independent audits. In a crisis (such as war), very large online platforms may be subject to further obligations. These requirements also apply to very large search engines.

## Enforcement and Sanctions

Non-compliance with the DSA can be punished with heavy fines of up to six percent of the group's annual turnover. The competent national authority of the member state in whose territorial jurisdiction the intermediary services provider falls is responsible for enforcing the regulations of the DSA and imposing the respective fines. In the case of very large online platforms/very large search engines, the responsibility here lies with the Commission.

Companies will not only be subject to obligations if they are providers of any kind of intermediary services; they will now have the possibility to take better action against illegal content or illegal products (for example, counterfeit products, etc.).
The new regulations will probably apply from February 2024 and even earlier for very large online platforms. It remains to be seen whether and how the "new sheriff" will ensure better control and security online.

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## Meet us at IBA 2022 in Miami

We are delighted to be attending IBA 2022 in Miami this year with our partners from **ADVANT Altana** and **ADVANT Nctm**

Flyer

# ADVANT Celebrates First-Year Anniversary

**European law association marks one-year milestone in offices across Europe**

**ADVANT**, the leading European law firm association, celebrated its first year of existence on September 15th, 2022. The anniversary is being marked through celebrations and events across its member firm offices throughout Europe.

To learn more about the alliance and what we have achieved within our first year, feel free to check out our press release.

# ADVANT wins Legal Business Awards 2022 for International Firm of the Year


Shortly after our first anniversary, we were named **International Firm of the Year** at the Legal Business Awards, one of the global legal industry's most prestigious honours.

On September 27th, 2022, representatives from all three of our member firms attended the awards ceremony in London to receive the award, which recognizes stellar performance from leading independent non-UK or US law firms – operating onshore or offshore – in mainland Europe, Latin America and the Caribbean, Asia, Australasia, the Middle East and Africa.

Huge congratulations and thanks are due to all those who have made this possible.

To keep up with any news regarding **ADVANT** or **ADVANT Beiten**, follow us on LinkedIn (ADVANT Beiten & ADVANT) and Instagram (ADVANT Beiten & ADVANT).

**Further information of our practice group Corporate/M&A at ADVANT Beiten**

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**Imprint**
This publication is issued by Beiten Burkhardt Rechtsanwaltsgesellschaft mbH
Ganghoferstrasse 33, 80339 Munich, Germany
Registered under HR B 155350 at the Regional Court Munich / VAT Reg. No.: DE811218811
For more information see:
www.advant-beiten.com/en/imprint

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