Milbank

Financial Restructuring Group

Client Alert

The new German business stabilization and restructuring regime ("German Scheme")

A groundbreaking, internationally competitive restructuring instrument

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1. Proposed legislation for a "German Scheme"

The German Federal Ministry of Justice and Consumer Protection has recently presented the long-awaited draft bill to introduce a new pre-insolvency business stabilization and restructuring regime into German law.[1] The availability of this ground-breaking new "**German Scheme**" will significantly change the German restructuring landscape and elevate it to an internationally competitive level. In particular, the German Scheme will close the gap between consensual out-of-court restructurings and in-court restructurings since the latter can to date only be implemented in Germany by means of comprehensive insolvency proceedings.

2. Background

On 20 June 2019, the European Parliament and the Council adopted the EU directive on restructuring and insolvency (the "EU Directive")[2]. The EU Directive requires EU member states to implement effective national preventive restructuring frameworks which enable debtors in financial difficulties to continue operating, in whole or in part, by changing the composition, conditions or structure of their assets and/or liabilities or any other part of their capital structure. The German government, while being required to implement the EU Directive, also recognized the necessity of a pre-insolvency restructuring instrument and now presented a comprehensive business stabilization and restructuring framework also encompassing complementary adjustments of German insolvency and corporate law.

In the past, German law only provided for either out-of-court restructurings with the consent of all affected creditors and shareholders or in-court restructurings by means of an insolvency plan. Consequently, if the contemplated restructuring solution was not unanimously supported by the relevant

[1] Unternehmensstabilisierungs- und restrukturierungsgesetz – StaRUG, which forms part of the proposed bill to further develop the restructuring and insolvency law in Germany (*Sanierungsrechtsfortentwicklungsgesetz – SanInsFoG*).

[2] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

creditors and/or shareholders, the required cram-down of dissenting creditors or shareholders was only possible within insolvency proceedings.[3]

An insolvency process, however, entails various significant drawbacks ranging from impediments for the debtor's trading and legal restrictions for its management affecting the creditors to loss of control of the shareholders of the debtor. In addition, and despite the significant improvement and acceptance of insolvency proceedings as a restructuring tool in the last years, an insolvency process may still unsettle employees, customers, suppliers, trade credit insurers etc. German insolvency proceedings are by definition comprehensive bankruptcy proceedings over the entire estate of an insolvent debtor and are therefore not well-suited to restructure only certain elements of the capital structure of a debtor, e.g., financial liabilities of an over-leveraged company whose operating business should continue without any disruption.

To avoid such drawbacks of German insolvency proceedings, German debtors which (only) required a financial restructuring (i.e., without the necessity of a restructuring of their operative business) often turned to English law governed schemes of arrangement. This provided German debtors with the option to implement the required financial restructuring without being dependent on the consent of all affected creditors and shareholders. Sometimes, the availability of a scheme of arrangement and the willingness of the majority of the affected creditors and shareholders to implement it, had a disciplinary effect on all other stakeholders which ultimately resulted in the restructuring being implemented consensually.

3. At a glance – Key features of the proposed German Scheme

The key features of the proposed German Scheme are:

- Debtor-in-possession process
- Availability of the German Scheme upon imminent illiquidity prior to an insolvency (actual illiquidity or over-indebtedness)
- No comprehensive bankruptcy process, but selective pre-insolvency process which can be confined to certain liabilities (in particular, financial liabilities)
- Restructuring of the debtor's liabilities and the security interests securing such liabilities, including guarantees and security granted by subsidiaries of the debtor, and the related contractual provisions (e.g., financial covenants) as well as arrangements among the creditors (in particular, intercreditor agreements)
- No restructuring of employment-related obligations, pension schemes or pension obligations
- Availability of measures relating to the share capital of the debtor, enabling debt-to-equity swaps, share transfers and the reduction and increase of share capital as well as accompanying measures
- Possibility to terminate certain contracts which have not yet been discharged
- Majority threshold of 75% of the votes in the respective class
- Votes are determined in each class by the amount of the respective liabilities, value of the security interests etc.; Headcount majority not required
- Availability of cross-class cram-down of dissenting creditors and shareholders
- Reduced claw-back and lender liability risks for turnaround financings
- Appointment of a restructuring officer under certain circumstances to supervise the debtor and the restructuring process
- Safeguarding measures such as stay on foreclosure and enforcement measures and invalidity of *ipso facto* clauses
- Shift of directors' and supervisory bodies' duties (already) upon occurrence of imminent illiquidity towards the protection of creditors' interests

[3] Other than a possible cram-down of bond liabilities pursuant to the German Bond Act (*Schuldverschreibungsgesetz*) which is applicable to German law governed bonds.

The German Scheme does not provide for a single holistic procedure, but rather a flexible framework providing a toolkit from which the debtor can choose to implement the desired restructuring. The new German Scheme combines well-established features of German insolvency plan proceedings with new tools providing for more flexibility and protection of the debtor in the pre-insolvency stage. The key element of the German Scheme is the restructuring plan. The restructuring plan implements and effects the desired restructuring with binding effect for the affected creditors and shareholders.

The debtor and its management will be the driving force in the new process. The German Scheme provides for a debtor-in-possession process with the debtor's management remaining in charge of the debtor's affairs. Only the debtor is entitled to propose the restructuring plan and to submit it for adoption by its affected creditors and/or shareholders. Creditors and shareholders are not entitled to initiate the restructuring process. A pre-packed solution is, however, possible. In certain circumstances, a restructuring officer is to be appointed and commissioned to supervise the debtor and the restructuring process (see below, section 4.7 (*Appointment of a restructuring officer*)).

From a corporate law perspective, the draft bill proposes a material change of directors' and supervisory bodies' duties towards preserving the interest of the creditors already once imminent illiquidity has occurred and prioritizing them over the shareholders' interests (see below, section 4.6 (*Debtor-in-possession process with a shift in corporate bodies' duties towards protection of creditors' interests*)). Pursuant to the German Federal Ministry of Justice and Consumer Protection, this fundamental – and in its details and implications still unclear – shift represents a compensation for the extended options rendered available to directors by the German Scheme, in particular the possibility to cram down creditors.

The restructuring pursuant to the German Scheme can involve all types of secured and unsecured liabilities other than employment or pension-related obligations. In contrast to the existing insolvency plan procedure (which will also be amended accordingly), a restructuring plan is also capable of restructuring upstream guarantees and security granted by subsidiaries of the debtor (see below, section 4.2 (*Comprehensive restructuring of the capital structure and of executory contracts*)). This is of particular relevance for the restructuring of LBO financing structures which regularly involve upstream guarantees and security granted by material group companies across various jurisdictions.

The restructuring plan is adopted by vote of creditor classes with creditors in a similar position forming a creditor class (see below, section 4.3 (*Creditor classes, voting and cram-down*)). The same applies to shareholders if the restructuring extends to the equity. The voting threshold in each class is a qualified majority of 75 per cent. of claims or, as regards shareholders, equity participation (see below, section 4.3 (*Creditor classes, voting and cram-down*)). Since out-of-court restructurings have in the past been frustrated by hold-outs of dissenting creditors or shareholders, the draft bill provides not only for such majority decision in each class, but also for a cross-class cram-down (see below, section 4.3 (*Creditor classes, voting and cram-down*)) to overcome such hold-outs and facilitate pre-insolvency restructurings.

4. In detail - The new German Scheme

4.1. Availability for debtors with a COMI in Germany upon imminent illiquidity

The new German Scheme will be available to all debtors (other than financial institutions) which have their centre of main interest – COMI – in Germany. Linking the jurisdiction to the COMI follows the principle for determining the jurisdiction for insolvency proceedings.

Debtors with a COMI in Germany have access to the new restructuring process if they are threatened to become illiquid (imminent illiquidity) without yet being insolvent. A debtor is imminently illiquid if it is more likely than not (>50%) that the debtor will be unable to honor all of its payment obligations which are due from time to time within the applicable forecast period. The draft bill clarifies that the applicable forecast period will generally be 24 months (see below, section 4.9 (*Accompanying changes to the insolvency regime*)).

Should a debtor become insolvent in the course of the restructuring process, the restructuring efforts will not necessarily be frustrated due to the occurrence of actual insolvency (illiquidity or over-indebtedness). The restructuring process can be continued, and an insolvency process does not have to be initiated, if, and for as long as, the restructuring efforts are promising. This is the case if (i) there

are sufficient prospects that the proposed restructuring plan will be accepted by the affected stakeholders and (ii) the tests of illiquidity and over-indebtedness would not be met had the debtor's liabilities – which are supposed to be rearranged by the restructuring plan – already the amount, maturity and other terms envisaged by the proposed restructuring plan.

4.2. Comprehensive restructuring of the capital structure and of executory contracts

The restructuring plan allows for a comprehensive restructuring and recapitalization of the debtor. It can compromise and rearrange all of the debtor's secured and unsecured liabilities, including security interests, and executory contracts.

The draft bill also takes into account typical financing structures involving various layers of debt and upstream guarantees and security. On the one hand, the restructuring plan can also extend to intercreditor agreements and rearrange the ranking and enforcement rights of the various creditor classes. On the other hand, it can restructure guarantees or security granted by subsidiaries of the debtor and thereby restructure not only the debtor but also its subsidiaries which granted such upstream guarantees or security. Insofar, the restructuring plan is more extensive than the existing insolvency plan regime which is confined to claims against, and security granted by, the debtor and does not extend to intercreditor agreements or claims and rights against subsidiaries. It is noteworthy that the draft bill contemplates only a restructuring of upstream guarantees and security, i.e., downstream and sidestream guarantees and security are not included – this may impede the restructuring of group financings.

The restructuring plan can also restructure shareholder rights, allowing for all types of equity measures such as debt-to-equity swaps, share transfers, capital reductions and capital increases with an exclusion of the subscription rights of existing shareholders. Shareholders can be diluted or squeezed-out entirely. As in insolvency plan proceedings, any change of control rights of third parties triggered by a debt-to-equity swap or other changes in the shareholding structure resulting from the restructuring plan are deemed invalid. Similarly, a debt-to-equity swap requires the consent of the affected creditors and cannot be forced onto them. If a creditor refuses to exchange its debt for equity, it will receive a cash settlement instead.

In addition, the proposed new law allows for a termination of executory contracts. Executory contracts are mutual contracts which have not yet been fully performed by both sides. A termination of such executory contracts is only possible if the termination is required for the implementation of the restructuring and the counterparty refused to agree to an adjustment or termination of the contract in question. In the event of such termination, the counterparty is no longer entitled to performance of the contract. If the contract is a contract for continuous performance, such as lease agreements, the termination notice has the effect of a termination with three months' notice, unless a shorter notice period applies. The counterparty has a claim for damages due to the non-performance of the contract. Such claim for damages can, however, be compromised and rearranged by the restructuring plan in which case a separate class needs to be formed for the creditors of such claims for damages.

Claims resulting from intentional tort liability and monetary fines cannot be compromised or rearranged by way of a restructuring plan. The same applies to employment and pension obligations. Consequently, a restructuring plan is not capable of facilitating any lay-offs, adjustments of pension schemes or reduction of pension obligations. Such claims are expressly carved-out from the EU Directive. Since many German companies, in particular in the industrial sector, have significant pension liabilities which are not always fully funded or otherwise covered, the exclusion of such liabilities constitutes a drawback of the new restructuring regime. Insofar, it remains the case that pension liabilities can only be restructured as part of a comprehensive in-court insolvency process.

4.3. Creditor classes, voting and cram-down

The adoption of the restructuring plan follows to a significant extent the tried and tested procedure for the adoption of an insolvency plan in an in-court insolvency process. The restructuring plan needs to be voted on by the affected creditors and, if shareholder rights are to be impaired by the restructuring plan, the affected shareholders. The relevant stakeholders are separated into classes. Stakeholders which hold different legal positions have to form different classes. A further separation based on economic interests is possible.

Typically, separate classes will have to be formed at least for secured creditors, unsecured pari passu creditors, subordinated creditors, small claims creditors and shareholders. In addition, counterparties of executory contracts which are to be terminated and whose damage claims are included in the restructuring plan (see above, section 4.2 (*Comprehensive restructuring of the capital structure and of executory contracts*)) will form a sperate class. The same applies to beneficiaries of upstream guarantees and security (see above, section 4.2 (*Comprehensive restructuring of the capital structure and of executory contracts*)).

Subject to a possible cross-class cram-down, the restructuring plan needs to be accepted by each class. The acceptance by a class requires a majority of 75 per cent. of the voting rights. For unsecured creditors, the voting rights are determined in accordance with the nominal amount of such creditors' claims. For secured creditors and beneficiaries of upstream guarantees and security, the voting rights are determined by the value of such security interests or guarantees. The voting rights of shareholders are determined by their respective participation in the equity. The draft bill suggests that all voting rights of the relevant class are counted for determining the majority and not only the voting rights of stakeholders which participate in the voting.

The draft bill provides for a cross-class cram-down to overrule hold-outs combined with a modified "**absolute priority rule**". For this purpose, the restructuring plan is deemed to be accepted by a class despite a negative vote of that class if:

- the members of that class are likely not to be placed at a disadvantage by the restructuring plan compared to their situation in the absence of such restructuring plan;
- the majority of classes have accepted the plan, provided that if there are only two classes, the acceptance by the other class is sufficient and provided further that accepting classes must not exclusively be constituted by classes of shareholders and/or subordinated creditors; and
- the members of that class participate appropriately in the economic value the restructuring plan provides for the affected stakeholders.

As regards the latter requirement,

- a class of creditors is deemed to participate appropriately in the in the economic value if:
  - no other creditor receives economic value in excess of the full (nominal) amount of its claim;
  - neither any subordinated creditor nor the debtor or any of its shareholders receives any economic value (other than any economic value compensating a corresponding contribution into the debtor's estate) – so-called **absolute priority rule**; and
  - no creditor ranking equal with the creditors of that class is awarded any preferential treatment by the restructuring plan,

whereas

- a class of shareholders is deemed to participate appropriately in the economic value if:
  - no creditor receives any economic benefits exceeding the full (nominal) amount of its claim; and
  - no shareholder ranking equal with the shareholder of that class is awarded any preferential treatment by the restructuring plan.

As an exception to the absolute priority rule set out above, an appropriate participation of creditors in the economic value is also possible if:

- economic value is provided to the debtor or any of its shareholders, if the involvement of the debtor or its shareholders is required for the continuation of the debtor's business to achieve the added value of the restructuring plan, provided that the debtor

and/or its shareholders have committed to such continuation; or

- the claims of such creditors are only affected in a non-material manner, in particular if neither the nominal amount is compromised nor the maturity of such claims is extended by more than twelve months.

Beneficiaries of upstream guarantees and security must always receive appropriate compensation for any compromise of their rights against subsidiaries of the debtor. Otherwise, no cram-down of the class of beneficiaries of upstream guarantees and security may occur.

4.4. Mitigation of claw-back and lender liability risks for turnaround financings

New financings. i.e., new money financings as well as extensions or deferrals of existing financings, may form part of the restructuring plan. The same applies to guarantees, but not to asset security for such new financings. The exclusion of asset security has been criticized and it remains to be seen if the final bill will also cover asset security. Such new financings are generally excluded from claw-back, providing a safe haven for lenders in a subsequent insolvency.

The lender liability regime imposed by German case law on turnaround financings is not suspended in its entirety. Under German law, lenders providing financing to a company in a state of crisis may be exposed to tort liability vis-à-vis the company's other creditors if such loans merely delayed the company's insolvency filing (or in the words of the German Federal Supreme Court (*Bundesgerichtshof*): "merely prolonged the futile struggle for survival") and the delay caused a shortfall in the recovery of other creditors. No lender liability, however, will arise if the lender has granted or extended the financing in order to facilitate a successful turnaround. Even if the restructuring ultimately fails, the lender will escape liability if it legitimately and reasonably – ideally on the basis of a sound restructuring concept – expected the restructuring to succeed. For this purpose (amongst other purposes), the debtor usually commissions a restructuring opinion (pursuant to the requirements of the German Federal Supreme Court (*Bundesgerichtshof*) and the IDW S6-standard) which analyzes if a success of the restructuring efforts is predominantly likely.

The draft bill clarifies that such lender liability cannot arise from the creditor's knowledge that a restructuring matter is pending with the restructuring court or that the debtor has applied for certain instruments under the new German Scheme. Consequently, lender liability risks are not excluded in their entirety, and the lender should ensure that it is able to demonstrate that it was of the reasonable opinion that the restructuring will succeed. Insofar, we expect that lenders will continue to require restructuring opinions pursuant to the requirements of the German Federal Supreme Court (*Bundesgerichtshof*) and the IDW S6-standard.

While the EU Directive provided for the option of a priming of new money financings in a subsequent insolvency of the debtor, the German Scheme has not made use of that option. New money financings will not enjoy any preference in a subsequent insolvency of the debtor.

4.5. Safeguarding measures such as moratorium and invalidity of ipso facto clauses

The German Scheme includes various safeguarding options the debtor can utilize to protect the restructuring process.

Most importantly, the debtor can apply for a moratorium on foreclosures and security enforcements. This also applies to upstream guarantees and security granted by the debtor's subsidiaries. The restructuring court can grant such moratorium for an initial period of up to three months. An extension by one month is possible if the debtor has submitted a restructuring plan and no facts are known which would prevent the adoption of that restructuring plan in that month. The extension can be granted for up to eight months if the sanctioning of the restructuring plan by the restructuring court is pending.

As long as a moratorium is in effect, counterparties cannot deny performance of their contractual obligations due to payments which have been outstanding at the time the moratorium was ordered by the restructuring court. This does not apply to contractual obligations the performance of which is not required for the continuation of the debtor's business. During the moratorium, creditors are also barred from filing a creditor petition for the commencement of insolvency proceedings over the debtor's assets.

The fact that a restructuring matter is pending with the restructuring court or that the debtor has applied for certain instruments under the new German Scheme as such is not capable of triggering any termination or acceleration right or rights of retention of the debtor's creditors or counterparties. Any contractual provisions to the contrary are deemed invalid. Any termination or acceleration right or rights of retention based on other grounds remain unaffected.

4.6. Debtor-in-possession process with a shift in corporate bodies' duties towards protection of creditors' interests

Restructuring proceedings under the new German Scheme are debtor-in-possession proceedings. The debtor, respectively its management, remain fully in charge to manage the debtor's affairs.

To safeguard the interests of the creditors, the draft bill proposes an early shift of the duties of the directors and of the corporate bodies supervising them. Currently, the management generally owes its duties to the company and its shareholders until the occurrence of actual insolvency (i.e., illiquidity or over-indebtedness) which requires the management to file for insolvency. With a view to creating a counterweight to the extensive options the German Scheme provides for a debtor to curtail the rights of its creditors, the proposed new law shifts the focus of directors' duties to the protection of the creditors' interests upon the occurrence of imminent illiquidity, i.e., once the debtor has access to the new restructuring instrument (see above, section 4.1 (*Availability for debtors with a COMI in Germany upon imminent illiquidity*)). From such point in time, the primary duty of the directors is the preservation of the interests of the creditors which are, by operation of law, prioritized over the interests of the shareholders. The supervisory bodies have to monitor compliance with these adjusted duties.

The details and actual practical consequences of this shift of the focus of directors' duties are still unclear. In any event, they will have to be analyzed on a case-by-case basis and may vary depending on the stage of the debtor's crisis. In particular, the draft bill remains abstract as regards the rather vague principle of creditors' interests and its distinction to the company's and the shareholders' interests. It remains to be seen if the final bill includes more detailed guidelines for directors and whether it will maintain the proposed concept pursuant to which shareholders' interests are subordinated to the creditors' interests up to 24 months prior to an insolvency due to the occurrence of mere imminent illiquidity, the determination of which relies on a liquidity forecast with inherent uncertainties (see above, section 4.1 (*Availability for debtors with a COMI in Germany upon imminent illiquidity*)).

4.7. Appointment of a restructuring officer

Without restricting the right and responsibility of the debtor's management to remain in charge of the debtor's affairs, the restructuring court can appoint a so-called restructuring officer. The restructuring officer can be any person which is independent from the debtor and its creditors and is qualified and suitable for the specific case. If the debtor proposes a specific person as officeholder and evidences that the restructuring is not obviously futile, the restructuring court can only abstain from appointing the proposed person if such person is obviously inept. If the court is not bound by a debtor proposal, it must follow the joint proposal of creditors representing 25 per cent. of the voting rights (see above, section 4.3 (*Creditor classes, voting and cram-down*)) in each class, unless such person is obviously inept.

The appointment of a restructuring officer by the restructuring court is mandatory if

- the plan compromises rights of consumers or SMEs;
- measures are ordered which affect substantially all creditors;
- the debtor applies for a termination of executory contracts;
- upstream guarantees or security are to be restructured;
- a cross-class cram-down other than a cram-down of financial creditors is required; or
- the restructuring plan provides for the appointment of a restructuring officer to supervise the implementation of the restructuring plan.

Consequently, for restructurings confined to financial liabilities, the appointment of a restructuring officer is not mandatory.

The restructuring officer is supervised by the restructuring court and mainly responsible for reporting on certain factual and procedural prerequisites of the new German Scheme to the restructuring court. In

certain cases, the restructuring court can extend the responsibilities of the restructuring officer, especially with a view to protecting the interests of the creditors.

4.8. Recognition in other jurisdictions

The recognition approach in the draft bill is twofold:

- If the restructuring proceeding is conducted as a public proceeding, the draft bill assumes recognition under the European Insolvency Regulation[4]. Recognition under the European Insolvency Regulation by the EU member states (other than Denmark) only requires that the debtor has its COMI in Germany.

- If the restructuring proceeding is non-public, recognition will not be awarded under the European Insolvency Regulation. Insofar, the rules on jurisdiction and the recognition and enforcement of judgments under the Brussels 1a Regulation[5] apply, which has been a tried and tested approach for the recognition of schemes of arrangements sanctioned by English courts.

The debtor can elect if the proceedings are conducted as public proceedings. If the proceedings are public, the restructuring court will publicly announce the venue and date of any hearings, the appointment and dismissal of the restructuring officer and any of its decisions made in the proceedings.

4.9. Accompanying changes to the insolvency regime

The draft bill also stipulates certain consequential changes to the German Insolvency Code (*Insolvenzordnung*). The changes aim at facilitating the implementation of restructurings under the new German Scheme prior to the occurrence of a mandatory insolvency reason, i.e. illiquidity or over-indebtedness, and shall thereby separate the pre-insolvency restructuring proceedings from insolvency proceedings.

The new pre-insolvency restructuring regime can be accessed by the debtor upon the occurrence imminent illiquidity. The current German Insolvency Code and its interpretation consider the test for imminent illiquidity and for a positive continuation forecast, which is one element of the over-indebtedness test, to be substantially identical, as both tests aim at determining whether or not it is predominantly likely (>50%) that the debtor will be able to honour its payment obligations when they fall due from time to time within the applicable forecast period. The forecast period is not defined in the German Insolvency Code, but typically encompasses the debtor's current and next business year.

The draft bill proposes to set the forecast period for the test of **imminent illiquidity** to **24 months** in general. As regards the test of **over-indebtedness**, the forecast period shall in the future be reduced to **twelve months**.

In light of the economic consequences and uncertainties the COVID-19 pandemic caused for the majority of businesses, the draft bill proposes certain interim relief measures which are supposed to remain available until 31 December 2021. Considering the increased forecasting uncertainties during the ongoing COVID-19 pandemic, the forecast period in relation to the **over-indebtedness** test will be reduced even further to **four months** until 31 December 2021, but only for companies which

- were not illiquid as of 31 December 2019;
- achieved a positive result from ordinary business activities in the financial year ending prior to 1 January 2020; and
- suffered a decline in turnover from ordinary business activities by 40 per cent. in 2020 compared to 2019.

In addition, if these three requirements are met, the debtor will have easier access to protective-shield proceedings (*Schutzschirmverfahren*) under the German Insolvency Code and to the new German

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[4] Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

[5] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

Scheme. Insofar, the occurrence of illiquidity which would normally preclude the availability of protective-shield proceedings and the occurrence of illiquidity or over-indebtedness which would normally preclude the availability of the new German Scheme will not prevent the access to the relevant proceeding until 31 December 2021.

5. Outlook and timing

The draft bill for a new business stabilization and restructuring framework proposes a practical, efficient and internationally competitive new restructuring regime and has to date been well received by the majority of restructuring professionals. The German Scheme will close the gap between consensual out-of-court and in-court restructurings by providing a pre-insolvency instrument for a quasi-consensual restructuring enabling the cram-down of hold-out creditors and shareholders.

The far-reaching proposals in the draft bill entail paradigm shifts under German law. Given the extensive options for compromising and rearranging creditors' and shareholders' rights, which are accompanied by a substantial modification of directors' duties and the existing insolvency regime, controversial discussions are to be expected.

The proposed new business stabilization and restructuring framework will be discussed in parliament and the relevant parliamentary committees in the next weeks and, following finalization of the legislative process which may entail certain adjustments and refinements in detail, is planned to become effective on and from 1 January 2021. The German government acknowledges the urgency given the rising debt levels and increasingly unsustainable capital structures across various sectors in the wake of the COVID-19 pandemic.

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