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Reform of German Law on Limited Liability Companies

On 1 November 2008, the "Act Aimed at Modernising the Limited Liability Company Act and Combating Abuses" ("MoMiG") came into force in Germany. This legislation is designed to streamline the administrative burdens in establishing and maintaining a German limited liability company and to make this form of company more "competitive" against other European company structures for German businesses.

As a result of the freedom of establishment guaranteed under European Union ("EU") laws and regulations, the European Court of Justice ruled that companies established anywhere within the EU should be recognised throughout the EU. This has meant that other types of companies in the EU, particularly the limited company of the United Kingdom, have become competitors in Germany to the limited liability company ("GmbH"). MoMiG is intended to make it easier for a GmbH to be established and maintained in Germany for conducting business within the EU.

The "Entrepreneurial Company"

One new option under the MoMiG for business requiring little capital is the "entrepreneurial company liability limited" with limited liability [*Unternehmensgesellschaft (haftungsbeschränkt)*, or UG], also affectionately known as a "mini-GmbH" for starting the business. Such a company requires a minimum nominal capital investment of only 1 Euro. Such a company may also become the general partner of a limited liability partnership business; a common form of business structure in Germany.

However, this company is not a separate type of company but rather a specific kind of the GmbH. In order to make the public aware of the reduced minimum capital the company must use the entire expression "entrepreneurial company (liability limited)" *"Unternehmergesellschaft (haftungsbeschränkt) (or "UG (haftungsbeschränkt)"* as part of its company name, must not call itself only GmbH and is not allowed to abbreviate the words "liability limited" *"(haftungsbeschränkt)"*.

The nominated share capital in this form of GmbH must be paid in full and cannot be raised through contributions in kind. Further, a UG must also set aside a quarter of its annual profits to allow its share capital to grow to the GmbH level, at which point the UG can change its designation to a GmbH.

Equity-Substituting Shareholder Loans

Under the previous legislation, a shareholder's loan became reclassified if it was granted during a liquidity crisis of the debtor company and, consequently, any repayment of principal or interest was forbidden. In this way, the loan was in practice regarded as equity but on the company's balance sheet and for taxation purposes, was classified as debt.

Under the new legislation, such a concept no longer exists. As a result, the prohibition on repaying loans obtained from shareholders made during a financial crisis is abolished. It is now permissible for companies to enter into agreements with shareholders that involve loans or other comparable arrangements, but this is counterbalanced by a change in the insolvency laws of Germany that make these arrangements subject to challenge if the company subsequently goes into liquidation.

Upstream Cash Loans

In the past, the traditional rules concerning maintenance of registered capital have imposed limitations on cash transfers between wholly-owned subsidiaries and their holding company, especially the practice of "cash-pooling" within intra-group company financing structures. In particular, any payment of cash to a holding company that would reduce the assets of the subsidiary to below the registered equity of the company was strictly prohibited.

Under the new legislation, such upstream cash transfers are possible provided that the subsidiary company receives an entitlement to valuable consideration that is not contingent in nature. However, the potential tax consequences, especially those dealing with deemed profit distributions, remain in place.

Conclusions

The new company laws in Germany are intended to make the German GmbH more "competitive" within Europe and also to make corporate financing somewhat easier. How these changes may affect or benefit a business or a start-up venture will depend on the circumstances of the business or venture on a specific or case-by-case basis.

If you have any questions in relation to the reform of German law on limited liability companies, please contact Michael Kobras (Migration Agent Registration Number (MARN) 0638733) on +61 2 9223 9399.

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Foreign Investments In Australia Now Easier

Foreign investments in Australia are now easier with recent changes to the monetary notification thresholds under the Australian foreign investment review framework.

Under the *Foreign Acquisitions and Takeovers Act 1975*, a foreign person (which includes a company) proposing to acquire or increase a "substantial interest" in an Australian company or in an Australian business may first need to notify the Foreign Investment Review Board ("FIRB") and obtain the Board's approval of the transaction. The term "substantial interest" is defined in the legislation as a 15% interest held individually or a 40% interest held together with other foreign persons.

Before changes to the legislation, which were introduced on 22 September 2009, notification was required where the Australian company or business was worth more than $100 million, with higher thresholds applying if the foreigner was a U.S. national under free trade arrangements between Australia and the US. Since the changes, the relevant notification threshold for both U.S. and other foreign persons investing in Australian companies and businesses, even in sensitive sectors, has been raised to $219 million.

As a result of the changes, any foreign investment in an Australian business that is less than $219 million in value is able to proceed without the need to apply for FIRB approval. The threshold will be indexed each year in accordance with GDP increases. Accordingly, there will no longer be need for the Australian government to continually adjust the threshold in response to domestic inflation.

Also since the changes, the requirement that the establishment by foreign persons of a new business in Australia valued above $10 million be notified to FIRB is abolished. This reflects the fact that no such applications to FIRB have been rejected for a number of years.

If you have any questions in relation to foreign investments in Australia, please contact Norbert Schweizer on +61 2 9223 9399.

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