GERMANY

Law and Practice

Contributed by:
Michael Josenhans, Lucas Lengersdorf and Karl Kuhn
Freshfields

Contents

Freshfields is a leading international globally integrated law firm offering clients dedicated advice across all legal fields and industry sectors in all important economic regions. With over 2,800 lawyers and 29 offices in 18 countries across Europe, Asia and the USA, it is among the largest law firms in the world. The firm specialises in complex, cross-legal and cross-border matters and combines in-depth industry knowledge with innovative solutions to help its clients grow, strengthen and defend their businesses. In the finance sector, the firm's advice covers corporate finance, acquisition finance, leveraged finance, real estate finance, financial restructuring, finance regulatory, equity and debt capital markets, securitisation and structured, project and asset finance.

Authors

Michael Josenhans advises on banking and finance matters with a focus on private credit and syndicated loan transactions, including corporate finance, acquisition finance, leveraged finance and infrastructure finance. He is a member of Freshfields' global transactions group and of its private capital sector group. He has advised lenders, sponsors and borrowers for more than 20 years throughout Europe and the USA on the full range of credit and debt financings. His experience grants him a deep understanding of complex issues and the rapidly changing market. Numerous corporate clients, sponsors, banks and debt funds rely on his advice for their most important financings or capital restructurings.

Lucas Lengersdorf is a finance associate in Freshfields' global transactions group. Currently based in the firm's New York office, he specialises in national and international finance law, with a particular focus on acquisition and corporate finance. Lucas advises private equity sponsors, private credit funds and corporate borrowers on a wide range of financing solutions, including term loan B, unitranche, HoldCo/PIK and bank/bond transactions.

Karl Kuhn is an associate in Freshfields' global transactions group and is based in the firm's Berlin office. He specialises in national and international finance law, with a particular focus on leveraged and corporate finance.

Freshfields

Bockenheimer Anlage 44
60322
Frankfurt am Main
Germany

Tel: +49 6927 308 340
Fax: +49 6923 2664
Email: michael.josenhans@freshfields.com
Web: www.freshfields.com

1. Private Credit Overview

1.1 Private Credit Market

The German private credit market has demonstrated mixed performance over the last 12 months amid broader economic and political challenges. In the first half of 2024, private credit deal activity in Germany showed resilience, aligning with overall European trends that saw a recovery in Q2 after a weaker Q1. This upward movement reflected improved deal volumes, especially in refinancings and bolt-on acquisitions. The second half of 2024 has seen a slowing down of activity and a shift towards rescue financings.

Impact of Political and Economic Conditions

Germany's private credit market performance has been shaped by a complex economic backdrop. Inflationary pressures, combined with slower-than-anticipated interest rate cuts, have contributed to uncertainty, but the M&A market for German mid-cap deals has slowly begun to adapt to the increased interest rate environment and rising energy prices. While public markets have recovered, competing directly with private credit, notable refinancings of private debt into syndicated loans have occurred, with margin savings of up to 200 basis points for borrowers. The persistence of geopolitical instability across Europe, coupled with the strong presence of the regionally structured German banking system, has added to the cautious sentiment within Germany's private credit landscape. Therefore, apart from restructuring situations, private debt deal activity in the German market has not developed as dynamically as in other European jurisdictions.

Key Sectors of Activity

Significant private credit activity in Germany over the past year has been concentrated in a few key industries. Prominent sectors include technology and software, services, insurance, healthcare and life sciences, and, to a lesser degree, manufacturing, all of which have continued to drive deal volumes. Notable transactions in Germany involved companies such as SumUp, Envalior, Permira/GGW and Ottobock, showcasing private capital providers' interest in resilient and innovative businesses across the technology and industrial sectors.

1.2 Interaction With Public Markets

Competitiveness of Public Debt Markets v Private Credit in Germany

In recent months, Germany's public debt markets, particularly syndicated loans and high-yield bonds, have shown increased competitiveness with private credit markets. The leveraged loan market has rebounded, with refinancing activity demonstrating a strong comeback. Notably, borrowers in Germany are increasingly exploring public debt options to benefit from lower margins and more favourable terms compared to private credit. Regardless, debt funds were still able to claim about half of the financed deals in the German mid-cap market in 2024.

Significant Refinancing Trends

There has been a noticeable trend of private credit being refinanced into public debt products. The resurgence of syndicated loans has allowed borrowers to achieve margin savings of up to 200 basis points. For reference, the all-in yield of 10.82% of the Private Performing Credit Index is currently 240 basis points higher than the European Leveraged Loan Index. This shift highlights the competitive pressure on private credit funds as public markets regain momentum amid stabilising interest rates.

In summary, Germany's public debt markets have posed strong competition to private credit, with significant refinancing activities driven by cost advantages and improved liquidity in syndicated loans and high-yield bonds.

1.3 Acquisition Finance

Private credit has played a significant role in acquisition financing in Germany, particularly for private equity-sponsored deals. However, it has not been an uncontested preference, as public markets and bank financing have remained strong competitors.

Market Share of Private Credit v Banks

In Germany, private credit funds have been able to defend their market share relative to banks. In 2024, debt funds financed around 55% of completed mid-cap transactions, compared to 45% financed by banks.

Financing Purpose and Acquisition Trends

Add-on acquisitions and leveraged buyouts (LBOs) have been a strong driver for private credit activity in Germany. Add-ons remained a substantial part of German deals throughout 2024. The share of new LBOs remained small but increased across Europe, including Germany, signalling that private credit remains attractive for sponsors pursuing new acquisitions.

Competitive Pressure from Banks and Public Markets

Despite private credit's flexibility, public debt markets and banks have been strong alternatives. For instance, refinancing activity has increasingly moved towards syndicated loans due to pricing advantages. This indicates that some private credit transactions have been replaced or refinanced by more traditional financing sources.

Overall Preference

While private credit remains a preferred form of acquisition financing for mid-market sponsor transactions and complex LBOs due to its flexibility and speed, public markets and bank debt have emerged as competitive alternatives, particularly for high-quality assets and larger borrowers.

1.4 Challenges

Several challenges have impacted the expansion of Germany's private credit market over the last year, a number of which are set out below.

Aforementioned Competition with Public Debt Markets

The resurgence of syndicated loans and high-yield bonds has increased competition for private credit lenders, with public debt markets offering significant margin savings in certain instances. Furthermore, Germany's SME sector (its famous *Mittelstand*) remains largely conservative, favouring the strong domestic banking sector for financing. Longstanding relationships and trust in traditional banks often outweigh the appeal of private credit or public debt, posing challenges for private credit providers in a market dominated by established banking partnerships.

High Cost of Capital and Interest Rates

Rising interest rates, particularly the elevated EURIBOR, have resulted in higher financing costs, causing borrowers and lenders to adopt a more conservative approach regarding leverage multiples.

Selectivity and Lengthy Deal Timelines

Private credit lenders have become increasingly selective when originating new transactions, focussing on selected attractive sectors, solid underlying assets and strong outlooks and credit stories. This selectivity, coupled with valuation mismatches and macroeconomic uncertainty, has limited or at least extended deal completion times.

Challenges in Fundraising

Fundraising has proven to be uneven, with larger, established funds capturing the lion's share of capital, while smaller or newer funds face headwinds. For every USD2.40 of targeted capital, only USD1 was successfully closed. The more liquid secondary market has – in contrast – experienced a surge in activity.

Regulatory Uncertainty and Market Risk Transmission

Increasing regulatory scrutiny of private credit, particularly regarding its interconnectedness with the banking sector and institution investors, could pose additional challenges. This scrutiny stems from concerns about risk transmission and early signals of stress, such as negative outlooks for private credit-backed instruments.

Performance Fragility and Default Risks

Signs of underlying fragility in the performance of portfolio assets have emerged, particularly in sectors that traditionally attract higher leverage. This fragility is further reflected in the increasing use of payment-in-kind (PIK) structures and credit facilities based on net asset value to address short-term pressures.

1.5 Junior and Hybrid Capital

Private credit providers in Germany actively offer junior and hybrid capital products such as mezzanine financing, subordinated debt, and PIK structures. These products play a key role in the private credit ecosystem, particularly for acquisition financing, growth capital, and recapitalisation strategies where flexible financing solutions are required.

Trends in Junior and Hybrid Capital Products

Strategic role of mezzanine and subordinated debt

Subordinated debt and mezzanine loans have been increasingly utilised as private credit providers aim to bridge gaps where senior financing alone is insufficient. These products are particularly prominent in:

- LBOs – junior capital allows sponsors to optimise the capital structure with an equity-light approach, enhancing returns;

- growth capital – companies requiring financing for expansion often turn to subordinated and mezzanine debt for its flexibility; and
- recapitulations and refinancings – hybrid capital products are frequently employed to provide liquidity for shareholders or restructure existing debt.

Rise of PIK structures

Holding company (HoldCo) PIK loans and similar hybrid instruments have gained traction as sponsors seek ways to manage cash flow constraints amid elevated interest rates. PIK structures allow borrowers to defer interest payments, preserving liquidity during periods of economic uncertainty or business transitions. These structures are particularly favoured for non-sponsored transactions or companies undergoing transformation projects.

Flexibility in capital deployment as competitive advantage

Private credit providers are increasingly competing with traditional banks by offering bespoke junior capital solutions. The ability to structure financing creatively – through combinations of senior, subordinated, and hybrid instruments – has become a differentiating factor in Germany's competitive mid-market landscape.

Challenges in the hybrid capital market

Despite their strategic value, the higher cost of capital caused by rising interest rates, has impacted the attractiveness of junior and mezzanine products. Borrowers are increasingly cautious about taking on subordinated debt, as it comes with higher costs. This trend has led to a more selective deployment of hybrid instruments, favouring quality assets and sponsors with strong track records.

1.6 Sponsored/Non-Sponsored Debt

Private credit providers in Germany primarily focus on private equity (PE) sponsors and their portfolio companies. This is evident in PE's dominant share of sponsor-driven transactions, such as LBOs and add-on acquisitions. In the last twelve months, mostly PE-driven add-ons represented 30% of all financings in the German market.

However, private credit has also extended its reach beyond PE sponsors to include public companies and founder-owned businesses. These segments are increasingly tapping into private credit markets for bespoke and flexible financing solutions:

Founder-Owned and Management-Owned Companies

Private credit providers are actively supporting management-owned and founder-owned businesses, especially those seeking growth capital or refinancing without diluting ownership. Such transactions often involve innovative structures, such as unitranche, mezzanine debt, and PIK tranches, which offer tailored solutions to these businesses.

Public Companies

While less common compared to sponsor-backed deals, public companies are increasingly considering private credit as an alternative to traditional syndicated loans or bond markets. In Europe (not including the UK), 18% of deals in the last twelve months were accounted for by sponsor-less private deals. Private credit generally offers greater structural flexibility, faster execution, and the ability to customise terms; these advantages are particularly attractive during periods of market volatility.

Private credit providers in Germany remain heavily focused on sponsors and their portfolio companies, with a clear trend toward diversification. Increasingly, private credit is becoming a critical funding source for public companies and founder-owned businesses seeking tailored, non-dilutive capital solutions. The addition of equity-related features further expands the offering of debt funds, presenting potentially viable structuring solutions for founder-owned businesses and start-ups (see also **3.7 Junior and Hybrid Capital**).

1.7 Recurring Revenue Deals and Late-Stage Lending

The recurring revenue market in Germany shows growing maturity, evidenced by increasing private debt activity, which supports in particular growth capital and, in some cases, acquisitions. Private credit providers are active in Germany, as part of a broader European trend. However, recurring-revenue-based financings are not as prominent or established yet as in the UK or US market.

1.8 Deal Sizes, Fund Sizes and Fundraising

Typical Size Limits for Private Credit Transactions in Germany

Private credit deals in Germany typically span a value range that reaches up to EUR2.5 billion, but with the majority of deals being between EUR50 million and EUR250 million. This wide range highlights the flexibility of private debt providers in not solely addressing the needs of mid-market borrowers. Funds have increasingly targeted lower mid-market opportunities as competition intensifies for high-quality assets at the top end of the mid-market. Further, a number of private debt providers have signalled their ability to take on large ticket sizes together (up to EUR1 billion) and/or to act as sole lender in certain financings. The latter may offer additional advantages for borrowers in terms of deal execution, overall speed and negotiation of loan documents as well as simplified/more efficient communication channels prior to and after closing.

Typical Fund Sizes and Fundraising Challenges

In the European private credit market, fund sizes are expanding, particularly for larger, well-established players. Notable recent examples include ICG raising USD17 billion for its flagship direct lending fund, marking one of the largest such fundraises in Europe. The average size of top private credit funds exceeds EUR1 billion, with a significant portion of global fundraising now flowing to funds exceeding this size threshold. In 2023, 20 European funds alone accounted for EUR95 billion in commitments, averaging approximately EUR4.7 billion per fund.

However, smaller and newer funds face significant fundraising challenges. Investors are increasingly wary of committing fresh capital due to the challenging exit environment and record levels of uninvested dry powder. For every USD2.40 of new fundraising targeted, only USD1 was successfully closed, underscoring difficulties for managers without a proven track record or sufficient scale.

1.9 Impending Regulation and Reform

EU-regulated alternative investment funds are permitted to originate loans to German borrowers without further restrictions under German law (but restrictions under the law of the home jurisdiction may apply). For German credit funds, the following applies:

- only closed-ended – ie, no redemption rights for investors,

- eligible for professional and semi-professional investors only,
- concentration limit per borrower of 20% of commitments, net of cost,
- leverage limit of 30% of commitments, net of cost,
- no consumer loans.

In contrast to other EU investment funds, German credit funds have also been subject to rather restrictive risk management requirements for the origination of loans and direct investments in unsecuritised loans since they were permitted to originate loans to German borrowers in 2016.

Non-EU funds, meanwhile, are not allowed to originate loans to German borrowers until the Alternative Investment Fund Managers Directive (AIFMD) passport extends to non-EU jurisdictions, which is unlikely in the near future.

The revised AIFMD ("AIFMD II") will impose additional risk management obligations on loan-originating funds (LOFs) across the EU, aligning the requirements for German and other EU funds. Further, the government is proposing to prohibit alternative investment funds from granting consumer loans within the meaning of the EU Consumer Credit Directive.

Moreover, the European Commission has kicked-off a public consultation that aims to identify the vulnerabilities and risks of – and to map the existing macroprudential framework for – non-bank financial intermediaries, including private credit funds.

2. Regulatory Environment

2.1 Licensing and Regulatory Approval

In Germany, the granting of loans is subject to a banking licence requirement. Foreign lenders are considered to engage in such granting of loans if they offer their services to customers who are considered German residents.

An exemption applies if the customer seeks out the foreign lender explicitly and such lender does not market its services to German customers ("reverse solicitation"). This exemption is generally applicable to both foreign EU lenders and non-EU lenders. However, for EU-regulated lenders, an exemption from the requirement to hold a banking licence applies. Further, no licence is required for the acquisition and holding of loan claims, but there is a very fine line between mere "holding" and other actions in respect of those claims (eg, extensions) that trigger a licence requirement. Non-banks may co-operate with credit institutions in order to be involved in the loan business (the "fronting-bank model" or "white label model").

Banking licences for domestic lenders are granted by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) and, if combined with a deposit-taking licence, the European Central Bank (ECB). EU lenders also require a licence, except where they hold a banking licence in their home jurisdiction and are supervised by competent authorities in their home EU jurisdiction. These institutions may passport their banking licence to Germany if they fulfil the relevant requirements.

The receiving of security or guarantees is generally not a licensable business in Germany.

2.2 Regulators of Private Credit Funds

The primary regulator is the BaFin and, where the lender is a large credit institution, the ECB.

2.3 Restrictions on Foreign Investments

German private credit funds are only eligible for investment by professional and semi-professional investors. Other than that, there are no restrictions on investments in private credit funds that are specific to investment law.

As regards general restrictions on investment into Germany, there are no foreign currency controls but there are reporting obligations in the case of inbound or outbound payments regardless of currency. However, financial institutions are required to freeze assets of persons subject to EU sanctions. This affects all assets/funds, regardless of currency. Funds subject to a freeze are required to be reported to the competent authorities.

2.4 Compliance and Reporting Requirements

Please refer to **2.1 Licensing and Regulatory Approval** and **2.3 Restrictions on Foreign Investments**.

2.5 Club Lending and Antitrust

Club lending by private credit providers can give rise to potential antitrust concerns if there are no appropriate guard rails in place to steer private credit providers away from oversharing of information, price-fixing, allocation of customers, or other forms of collusion. Risk mitigants include borrower consent, proper documentation of the pro-competitive rationale for club lending in a given case, and implementation of clear compliance protocols at all stages.

3. Structuring and Documentation

3.1 Common Structures

Transactions are usually structured as a first lien structure, whereby the unitranche is the dominant structure. In most cases, the unitranche is accompanied by a super senior revolving credit facility for working capital needs, and in some cases, by a super senior term facility (first-out structures). These facilities are usually provided by traditional banks. In certain situations, alternative or subordinated structures (eg, second lien/PIK/mezzanine) may be pursued by the relevant borrower.

3.2 Key Documentation

Private credit transactions in Germany typically involve several key documents, including the facility agreement, the intercreditor agreement and the security agreements. These documents are often based on Loan Market Association (LMA) precedents, adapted to reflect the specifics of the transaction. In sponsor-backed transactions, documentation is oftentimes also substantially based on recent/agreed precedents. The facility agreement is usually drafted by borrower's counsel and sets out the loan terms, covenants and repayment schedules, while the intercreditor agreement governs the rights and priorities of different creditor classes and the sharing of transactions security and enforcement proceeds. Agreements among lenders are not commonly negotiated separately; instead, lender co-ordination and priorities are addressed within the intercreditor agreement, to which the obligors are also usually a party.

In distressed markets, the drafting dynamics may shift, with the lender's counsel often holding the pen on the main finance documents. This reflects the increased leverage of creditors in such scenarios, where tighter covenants,

enhanced security, and robust enforcement mechanisms are prioritised. Additionally, recent restructuring experience as well as macroeconomic factors like interest rate volatility have influenced documentation trends, alongside ESG considerations, which are becoming more prominent in loan agreements.

3.3 Restrictions on Foreign Direct Lenders

The banking licence requirement applies both to domestic lenders and to foreign lenders equally. Please refer to **2.1. Licensing and Regulatory Approval**.

Further restrictions could arise for foreign lenders if the loans are secured by land charges or mortgages in Germany. In this case, the lenders could be subject to tax liability in Germany in the event of income accruing from those loans.

3.4 Use of Proceeds and Acquisition Financings

By law, no restrictions on the use of proceeds arise, other than for non-compliance with applicable sanctions or other public laws and the financial assistance/capital maintenance requirements described in **5.3 Downstream, Upstream and Cross-Stream Guarantees** and **5.4 Restrictions on the Target**.

3.5 Debt Buyback

A debt buyback is often contractually permitted but accompanied by a disenfranchisement of the borrower or sponsor in such a case – meaning that, among other things, they cannot participate (and are not counted) in any decision-making by the lenders. Sponsors need to consider the risk of equitable subordination based on statutory German law as well as potential tax consequences.

3.6 Recent Legal and Commercial Developments

Pre-Insolvency Restructurings

German legislation has established a comprehensive legal framework for voluntary out-of-court restructurings. As a result, certain provisions of financing agreements have become subject to increased negotiations, though such renegotiations need to be closely observed in line with the law. For example, certain lenders have intended to include Stabilisation and Restructuring Act (StaRUG) proceedings as an event of default, even though such provision would be void and potentially cross-contaminate the rest of the credit agreement. Please refer to **7.4 Rescue or Reorganisation Procedures Other Than Insolvency** for further discussion of StaRUG.

Sanctions

Sanctions imposed in connection with the Ukraine war are still drawing close attention to the sanctions clauses in financing agreements. While in most cases the previous market standard of flexible sanctions provisions is sufficient to cater for this increased awareness and does not require (extensive) changes, the continuous development of sanctions laws and funds' internal policies requires a stronger focus on these provisions. Henceforth, loan documents are expected to include more detailed representations or covenants in this regard.

3.7 Junior and Hybrid Capital

Junior/subordinated financing – despite being an option in Germany – has seen limited activity in 2024, in line with the overall trend in the European market. Junior debt is usually provided through subordinated, mezzanine or profit-participating loans (*Genussscheine*), convertible instruments and HoldCo PIK instruments. These structures, combining debt and equity features, are tailored for growth funding, acquisitions or restructuring

scenarios. Mezzanine financing blends subordinated or unsecured debt with equity-related features such as warrants. Subordinated loans rank below senior debt in repayment priority, offering higher yields, while profit-participating loans tie returns to the borrower's performance. Convertible instruments allow debt to convert into equity under specific conditions, aligning lender returns with the company's growth potential. HoldCo payment-in-kind (PIK) financings are also seen in certain transactions, enabling borrowers to defer interest payments and conserve cash flow.

Notable documentary features include a so-called anti-layering-covenant which precludes the borrower from incurring new subordinated debt, layered between the senior and subordinated tranches, hence ensuring that the subordinated debt will only be junior to the current senior tranches. Another prominent provision is the prohibition on making short-circuit payments. This provision has two purposes, ensuring on the one hand, that no shareholder contribution will be structurally senior to the HoldCo financing and, on the other, that distributions made upstream are funnelled through the HoldCo entity.

Other features in subordinated financing agreements are subject to negotiation, such as a potential covenant-look-through to the operating company (OpCo) group as well as events of defaults and their scope with a view to the OpCo group or material subsidiaries thereof. Further, the granting of certain information and/or participation rights (eg, by way of designated board-members or observers) is frequently discussed. Such information and/or participation rights would, however, need to be assessed critically, especially with a view to corporate governance, confidentiality and equitable subordination aspects. Additionally, junior lenders may want to have the option to cure payment/financial covenant defaults on OpCo level (so called step-in rights).

See **5.1 Assets and Forms of Security** for discussion of the customary scope of collateral.

3.8 Payment in Kind/Amortisation

In Germany, PIK arrangements in private debt are not particularly common in traditional markets but have become more frequent in high-yield, distressed or leveraged finance transactions, especially in private equity-backed deals. PIK loans allow borrowers to defer interest payments, which are instead capitalised into the principal. This structure can be attractive for borrowers looking to preserve cash flow during growth or restructuring phases. But, pursuant to Section 248 paragraph 1 of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB), the parties to a loan governed by German law may not agree upfront to compound interest (ie, interest may not be charged on interest) but can do so once the interest has accrued (ie, PIK toggle arrangements are possible, but may require certain procedural steps to ensure compliance with mandatory law).

3.9 Call Protection

Call protections conflict with the circumstance that, by law, the borrower can terminate loans with variable interest rates at any time with a notice period of three months in accordance with Section 489 paragraph 2 of the BGB. Loan agreements with a fixed interest rate can be cancelled at the end of the fixed interest period and after ten years at the latest, according to Section 489 paragraph 1 of the BGB. Any prepayments which are made prior to the last day of the current interest period, will generally trigger break costs under German law.

Nevertheless, call protection is a customary feature in private credit transactions, particularly in unitranche and mezzanine financings. The typical structures include a side letter under English or Luxembourg law, which imposes prepayment penalties during the initial years of the loan. These penalties often follow a step-down structure, such as 3% in the first year, 2% in the second, and 1% in the third year, with no penalty for prepayments thereafter.

In more complex financings, make-whole provisions may be included, requiring borrowers to compensate lenders for the full value of interest payments they would have received during a specified period.

Call protection terms can vary depending on market conditions and negotiations. Strong borrowers may secure more flexible terms, while lenders may enforce stricter protections in riskier deals. Given the competitive market environment, call protection is increasingly a focal point in structuring agreements to balance lender security and borrower flexibility.

4. Tax Considerations

4.1 Withholding Tax

Whether payments of principal, interest or other payments made to lenders are subject to German withholding tax depends on the financing structure. A "typical" loan agreement usually triggers no withholding tax. However, certain exceptions exist – for instance, interest paid by a German tax resident debtor under profit participating loans, convertible bonds or certain other hybrid financing arrangements is subject to withholding tax. Also, interest payments trigger a limited tax liability if the underlying loan is secured by German real estate. Accordingly, structures to mitigate or manage withholding tax concerns are not generally required, but only in exceptional cases.

4.2 Other Taxes, Duties, Charges or Tax Considerations

Besides withholding tax and limited tax liability aspects (as noted in **4.1 Withholding Tax**), lenders are usually not subject to German tax by making loans to (or taking security and guarantees from) entities incorporated in Germany. In particular, Germany does not levy stamp duty nor a net wealth tax. With respect to VAT, an exemption usually applies.

4.3 Tax Concerns for Foreign Lenders

Tax concerns for foreign tax resident lenders only appear where at least a limited German tax liability is triggered or if they have a nexus to a non-cooperative jurisdiction within the meaning of the German Tax Haven Defence Act. Depending on the specific case (and the tax residency of the private credit lender), protection may be provided under a double taxation agreement.

4.4 Tax Incentives

There are generally no tax incentives available for foreign private credit lenders lending into Germany.

4.5 Non-Bank Status

Regarding interest income, there is generally no significant difference between bank and non-bank lenders. Therefore, no additional tax considerations are usually necessary for non-bank lenders.

5. Guarantees and Security

5.1 Assets and Forms of Security

A comprehensive collateral package will typically comprise collateral over all of the obligors' assets to the extent that the cost benefit ratio and the agreed security principles justify it. Although this scope may differ in certain transactions, the customary package offered in private capital financings consists only of share pledges to ensure the single point of enforcement (SPE), account pledges and assignments of certain receivables. Parallel debt structures are customarily used.

Most security agreements have standard terms, leaving little room for negotiation. With few exceptions, security agreements can be executed by simple exchange of signatures (electronic, if agreed between the parties).

Shares/Interests/Stocks

Pledges over shares in German limited liability companies (contrary to pledges over partnership interests and stocks) need to be notarised, incurring high costs. Attending the notarial meeting will usually require a power of attorney (certified/legalised to the extent required).

The perfection of a pledge requires that the relevant pledged entity be notified accordingly. In the case of certified stocks, the stock certificates need to be handed over or a substitute of such handover needs to occur. Sometimes, stock certificates need to be endorsed.

Bank Accounts

The perfection of account pledges requires that the account bank be notified of the pledge.

Movable Assets

Security transfer agreements require the inclusion of certain details on the location or the identity of the assets and potential rights of third parties (eg, landlords, suppliers or factoring providers). Obtaining the required information on those details from the security provider is a key timing item.

The transferred assets need to be clearly determinable (*bestimmbar*) by an independent third party. Therefore, close attention needs to be paid to a sufficiently detailed description of the location of the transferred assets or, if necessary, other features which set the transferred assets apart from others (eg, by way of labelling the transferred assets).

Intellectual Property

Intellectual property (IP) rights can be assigned or pledged for security, depending on the exact type of IP and its registration. Security rights over IP need not (but should) be registered with the competent registry to protect the lenders' interests.

Note that electronic signatures are not sufficient in the event that the IP includes trade marks registered with the European Union Intellectual Property Office (EUIPO), and in such cases actual wet-ink signatures need to be exchanged.

Receivables

Security assignment agreements need special attention in the case of other/previous assignments of receivables by the assignor – eg, to a factoring provider. Obtaining the required information from the assignor is a key timing item.

A notification of the debtor of the assigned receivable is not required to perfect the security. However, prior to receipt of a notification,

the debtor can effectively settle the receivable by way of payment to the assignor. Notifications are therefore common in respect of intra-group receivables and receivables towards professional parties (eg, insurances or report providers) but, for confidentiality reasons, typically not in respect of customers.

Real Estate

Security over immovable assets is provided by way of land charges or mortgages. The land charge or mortgage itself is a standard document containing only a formal description of the security right to be established. Therefore, a related security purpose agreement needs to be concluded which includes all other provisions, such as the security purpose and enforcement triggers. The land charge or mortgage itself needs to be notarised and registered in the land register, incurring additional costs. Land charges and mortgages can be certified or uncertified. In the case of an uncertified land charge or mortgage, the security only becomes valid upon its entry into the land registry.

5.2 Floating Charges and/or Similar Security Interests

A floating charge typically describes an instrument which creates security over non-constant assets changing in quantity and quality. However, German law requires that a security interest relate to determinable assets such that these assets are identifiable by a third person. A floating charge would not be compatible with these requirements.

Nonetheless, in a manner similar to a floating charge, German security usually covers all existing and future assets of a certain type (which is possible for all of the security types mentioned in **5.1 Assets and Forms of Security**, except for land charges/mortgages).

5.3 Downstream, Upstream and Cross-Stream Guarantees

It is generally possible for any entity to provide downstream, upstream and cross-stream guarantees or security. However, if the guarantee/security provider is a German limited liability company or a limited partnership with a limited liability company as its general partner, upstream and cross-stream guarantees/security may result in personal and criminal liability for the management directors, to the extent that the granting or enforcement of such a guarantee/security would lead to a breach of capital maintenance rules (*Kapitalerhaltungsregeln*).

The capital maintenance rules prohibit the direct and indirect repayment (where this term includes payments pursuant to guarantees or security in favour of obligations of a direct or indirect shareholder) of the registered share capital of a German limited liability company to its shareholders. Accordingly, by way of so-called limitation language in the respective guarantee/security document, enforcement of an upstream and/or cross-stream guarantee/security will be limited (subject to certain exceptions) if and to the extent that payments under the guarantee or enforcement of the security would directly or indirectly cause the net assets (*Reinvermögen*) of the guarantee/security provider (or, in the case of a partnership, the net assets of the respective general partner) to fall below the amount of its respective registered share capital and, hence, to create personal or criminal liabilities for the management directors.

If there is a stock corporation (*Aktiengesellschaft* or *Societas Europaea*) involved, the general prohibition of repayment of contributions (*Verbot der Einlagenrückgewähr*) under the German Stock Corporation Act (*Aktiengesetz* – AktG) also warrants designated language, aimed at

limiting enforcements of upstream and cross-stream security in such cases.

5.4 Restrictions on the Target

The granting of guarantees, securities or financial assistance is not generally prohibited under German law but is subject to certain restrictions, depending on the legal form of the target, to the extent that it qualifies as a payment to the shareholders of the target.

Restrictions for Limited Liability Companies and Limited Partnerships and Stock Corporations

If the target is one of the mentioned corporate forms, the granting of security or guarantees is subject to the restrictions set out in **5.3 Downstream, Upstream and Cross-Stream Guarantees**.

Solutions

There is no white-wash procedure in Germany, though the following procedures are – subject to certain requirements being met – usually implemented to avoid the legal consequences potentially arising from a breach of capital maintenance rules:

- inclusion of so-called limitation language in the financing documentation (see **5.3 Downstream, Upstream and Cross-Stream Guarantees**);
- a so-called debt push-down – ie, an assumption of the debt by the target company;
- a merger (*Verschmelzung*) of the target with the acquisition vehicle; or
- the conclusion of a domination and/or profit and loss transfer agreement (*Beherrschungs- und/oder Ergebnisabführungsvertrag*) between the target and its shareholder(s).

5.5 Other Restrictions

The articles of association of entities to be pledged sometimes include provisions requiring the approval of all shareholders for pledges and/or a sale of any shares (*Vinkulierungsklausel*). In such cases, shareholder consent for the pledge and for a potential future enforcement of such a pledge should be obtained. Ideally, the deletion of such provision is requested and implemented prior to, or at least shortly after, the execution of the pledge agreement. Other restrictions, such as pre-emption or redemption rights are less common but could be included in the articles of association.

German insolvency law provides for certain hardening periods which would especially need to be considered in release-and-retake scenarios and distressed financings. For further details see **7.5 Risk Areas for Lenders**.

5.6 Release of Typical Forms of Security

All types of security mentioned in **5.1 Assets and Forms of Security** can be released by way of a release agreement, which can be executed by simple signature (ie, no notarisation is required in respect of the notarised security rights).

The release of a land charge/mortgage needs to be entered into the land registry in order to become effective. All other security rights cease to exist at the time agreed in the release agreement. The release of the pledges and assignments is usually (but need not be) notified to the relevant debtors (if they have also been notified of the pledge or assignment).

5.7 Rules Governing the Priority of Competing Security Interests and/or Claims

Certain security interests (in particular, security transfers of movable assets and assignments of

receivables) can only be established once and can therefore only exist in one rank. However, it is possible to ensure that the proceeds of such security be applied in a different order to groups of creditors, by providing the security to a security agent and contractually agreeing on the order of application – for example, in an intercreditor agreement. Such arrangement will, however, not have an in-rem effect on the ranking of said security interest but will survive the insolvency of the borrower.

Security interests over shares/interests/stocks, bank accounts and land can be provided in different ranks. Such security interests will rank in the order of the timing of their valid establishment (priority rule). Nonetheless, in non-distressed financings, usually only one rank of security is established, and the order of application is agreed in an intercreditor agreement, as described above. In deviation thereof, in scenarios in which different secured claims face different insolvency claw-back rights, it is common to provide individual, different-ranking security rights to different creditor groups.

Further, lenders may require security confirmations and junior ranking pledges when doing an upsize or amend/extend transaction. With regards to add-on acquisitions financed by incremental debt, borrower's counsel should ensure that securing such incremental debt is pre-baked into the security documents to the extent legally possible.

5.8 Priming Liens and/or Claims

There are two types of security that, in practice, usually rank prior to the contractual security rights of lenders.

Pledge by the Account Bank

Account banks usually have a right of pledge over the accounts opened with them based on their general terms and conditions for any claims arising against the pledgor. Account pledge agreements therefore usually request the pledgor to undertake reasonable efforts such that the account bank waives or subordinates such pledge. A strict requirement for such waiver or subordination is usually not included, given the limited scope of the secured obligations under such a pledge pursuant to the general terms and conditions.

Landlord's Right to Movable Assets on Leased Premises

A landlord of leased premises has a statutory right of pledge over the lessee's assets brought onto the premises for any claims arising in connection with the lease. Given the limited scope of the secured obligations under such a pledge, it is unusual to include a requirement that such a pledge be waived. However, recent transactions have sometimes seen a requirement for the lessee to regularly provide proof of rent payments, in order for lenders to be able to assess the risk associated with the prior ranking pledge of the landlord.

5.9 Cash Pooling and Hedging/Cash Management Obligations

Cash pooling is widely used in Germany for corporate liquidity management, with funds centralised into a single account typically managed by a parent company. While efficient, this practice poses challenges for private credit lenders, especially in insolvency scenarios. The cash pooling bank is typically not secured by the security package provided under the financing agreements and, therefore, is not considered a "beneficiary" under the intercreditor agreement. Instead, the cash pooling bank is secured sole-

ly by the general terms and conditions pledge (*AGB-Pfandrecht*) and is, as such, a "competing secured party" relative to the private credit lenders.

Secured hedging is common in private credit transactions. Unlike the cash pooling bank, hedge parties typically participate in the intercreditor agreement but usually as "silent secured parties," meaning they are formally co-secured, but generally do not have voting rights.

5.10 Bank Licensing

The taking or holding of collateral is in principle not a licensable activity in Germany.

If the security or collateral agent transfers monies, this may qualify as a payment service which requires authorisation as a payment services provider. A security agent can hold collateral for the benefit of the lenders and, hence, no collateral needs to be retaken if the lender assigns its loan.

6. Enforcement

6.1 Enforcement of Collateral by Non-Bank Secured Lenders

By law or pursuant to the relevant security agreement, the enforcement of German collateral is only possible if and once the secured claims have become due and payable. In many cases, security agreements contain (additional) conditions, requiring an event of default to have occurred and be continuing and/or the loan to have been accelerated. However, certain pre-enforcement securing steps are sometimes permitted without a due and payable claim as long as an event of default is continuing.

Enforcement by law generally requires the enforcing creditor to obtain an enforcement title in court. This requirement is often either waived (eg, in share pledges) or avoided by immediate submission to foreclosure (eg, in land charge deeds).

The further enforcement procedure depends on the type of security, as follows.

- A security assignment over claims is enforced by the secured party collecting any claims from the debtors.
- A surety or guarantee is enforced by seeking a court title for payment against the guarantor.
- A share pledge is generally enforced by way of a formalised public sale (ie, an auction). This is subject to a prior notice period typically limited to five business days. After the secured debt has become enforceable, the pledgor and pledgee may also agree on a private sale – a forced private sale or appropriation is not permitted. If the shares subject to the pledge are publicly traded, the shares may be sold in a sale by private agreement (*freihändiger Verkauf*) on the basis of their exchange price.
- An account pledge is enforced by instructing the account bank to pay any amounts standing to the credit of the account to the pledgee.
- Land charges/mortgages are primarily enforced by way of public auction. This process can be expected to take at least 12 months. Where the charged real property generates income, it is also possible to place the property into forced administration and to use the generated income to pay down the secured debt – this is often quicker. In any event, the enforcement of a land charge

requires that six months' prior notice be given to the debtor.

Typically, creditors try to find consensual solutions to avoid enforcement actions. The most commonly threatened form of enforcement is a share enforcement of the SPE (despite the formalistic share enforcement procedure).

6.2 Foreign Law and Jurisdiction

In general, parties may contractually agree on the governing law of their agreements. Under the Rome I Regulation (Regulation (EC) No 593/2008), in general, the parties have the right to choose any governing law, even without a specific connection to the case.

Similarly, the parties may contractually agree to submit to a foreign jurisdiction. Depending on which foreign jurisdiction is chosen, this submission will be legally binding in accordance with different applicable regulations, conventions or laws.

A waiver of immunity will generally be upheld by German courts. However, assets that serve a specific public purpose generally benefit from sovereign immunity under German law, according to Section 882a of the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO).

6.3 Foreign Court Judgments

Under the Brussels I Regulation recast (Regulation (EU) No 1215/2012), judgments in civil and commercial matters delivered within an EU member state are (with very limited reasons for rejection) automatically acknowledged in all EU member states, regardless of whether or not the judgment is final and binding.

If the EU regulation is not applicable but the fundamental criteria for recognition (or rejection) are governed by an international treaty, German courts will apply those criteria.

In all other cases, the foreign judgment must be both final and binding. According to Section 328 of the Code of Civil Procedure (ZPO), a foreign judgment will be acknowledged in Germany if no grounds for rejection are applicable. The party seeking recognition bears the responsibility of proving that the elements required for recognition are present.

6.4 A Foreign Private Credit Lender's Ability to Enforce Its Rights

A foreign lender can generally enforce its rights in the same way as a domestic lender.

6.5 Timing and Cost of Enforcement

An enforcement process of German collateral usually takes between two and twelve months. The timing and cost of enforcement are determined by the respective enforcement process and the type of security, as outlined in **6.1 Enforcement of Collateral by Non-Bank Secured Lenders**. Generally, enforcement processes involving courts, public auctioneers or authorities are more costly and time-consuming. Therefore, the enforcement of account pledges and security assignments over claims is typically the most time and cost-effective option.

6.6 Practical Considerations/Limitations on Enforcement

As mentioned in **5.3 Downstream, Upstream and Cross-Stream Guarantees** there are some limitations on enforcement pursuant to German capital maintenance rules. As a consequence, so-called limitation language in the financing documentation must be included in these cases (see also **5.4 Restrictions on the Target**).

In addition, when accelerating secured obligations, lenders need to enter into stand-still agreements with borrower's management to avoid triggering any personal liability for management due to non-compliance with mandatory insolvency filing requirements.

6.7 Claims Against Secured Lenders Post-Enforcement

The enforcement of collateral by a secured lender does not typically result in the lender assuming the obligations of the borrower, such as employee or environmental remediation obligations. However, certain circumstances could indirectly expose the lender to liabilities or claims. If the collateral includes an operational business and the lender sells or takes over the business, employee contracts may transfer to the buyer, including all related liabilities (eg, unpaid wages or severance). Even tax authorities and social security agencies hold preferential claims in insolvency proceedings but these obligations generally do not transfer to the secured lender unless the lender takes over the borrower's operations.

Further, a secured lender acquiring real property as part of the enforcement process could face clean-up obligations if contamination were to exist under the Federal Soil Protection Act (*Bundesbodenschutzgesetz*).

7. Bankruptcy and Insolvency

7.1 Impact of Insolvency Processes

The German Insolvency Code (*Insolvenzordnung*- InsO) contains the statutory framework for the initiation, process and termination of insolvency proceedings.

The court order opening insolvency proceedings customarily imposes an automatic stay on any enforcement actions by unsecured creditors against the company. Unsecured creditors can only enforce their rights within the legal framework of insolvency proceedings – ie, substantially filing their claims to the insolvency table with the insolvency officeholder to receive the insolvency dividend (pro rata payment). In practice, the court often imposes such a stay even prior to the formal commencement of insolvency proceedings in so-called preliminary insolvency proceedings.

The InsO does not impose an automatic stay on the enforcement by third parties/certain (secured) creditors. Generally speaking, the following rules apply.

- Third parties who can demonstrate that they have ownership (title) in an asset or similar rights in rem or other absolute rights which, therefore, are not part of the insolvency estate (segregation right, *Aussonderungsrecht*) have a claim for restitution of the relevant asset – eg, suppliers with (simple) reservation of title rights (*einfacher Eigentumsvorbehalt*).
- Creditors with security interests in assets forming part of the insolvency estate have a right to separate satisfaction (*Absonderungsrecht*) – ie, they may seek preferential satisfaction of their claims from the proceeds of the liquidation of the relevant asset. The InsO provides for specific rules regarding the responsibility for and processing of the enforcement of such security interests.

7.2 Waterfall of Payments

The proceeds realised by the insolvency officeholder (note the exceptions under **7.1 Impact of Insolvency Processes**) will generally be distrib-

uted to the creditors pursuant to the following waterfall:

- costs of insolvency proceedings and so-called administrative claims (*Masseverbindlichkeiten*) – ie, specifically including claims arising from transactions executed by the insolvency officeholder after the commencement of insolvency proceedings;
- unsecured claims (*Insolvenzforderungen*) pari passu; and
- subordinated claims (*nachrangige Insolvenzforderungen*) – eg, interest accruing after the commencement of insolvency proceedings or claims of shareholders holding more than 10% of the registered share capital.

7.3 Length of Insolvency Process and Recoveries

The sale of a company on a going-concern basis out of insolvency (asset deal) is typically consummated within three to six months. The completion of the proceedings for corporate insolvencies – including any litigation, admission of claims, distribution of the insolvency estate, etc – can take several years depending on the size of the company and/or the complexity of the matter. If the insolvent company implements an insolvency plan, the timeframe also varies from a few months to several years.

The amount of insolvency dividends distributed in German insolvency proceedings varies significantly. Further, the rights of segregation and rights to separate satisfaction are usually not included in insolvency statistics in Germany. These depend on the value of the collateral in each individual case. For insolvency proceedings commenced in 2011 and concluded by end of 2018, the average dividend of unsecured creditors amounted to 6.1%, noting that this statistic includes the full spectrum of insolvency proceedings.

7.4 Rescue or Reorganisation Procedures Other Than Insolvency

StaRUG

Since 1 January 2021, the Stabilisation and Restructuring Act (StaRUG) has provided for a comprehensive legal framework for voluntary out-of-court restructurings.

In principle, a debtor with its centre of main interest (COMI) in Germany has access to StaRUG proceedings if it faces imminent illiquidity (*drohende Zahlungsunfähigkeit*) but not yet illiquidity (cash-flow insolvency, *Zahlungsunfähigkeit*) or over-indebtedness (balance sheet insolvency, *Überschuldung*) (each as defined in the InsO).

StaRUG enables the debtor to implement a financial restructuring by majority vote on the restructuring plan (generally 75% consent of the nominal amount of the relevant debt or equity in each class). The debtor has the exclusive right to submit a restructuring plan (see **7.9 Dissenting Lenders and Non-Consensual Restructurings** for a discussion of the process). Operational restructuring measures, however, continue to require a consensual agreement of all affected parties (for example, long-term contracts such as lease agreements cannot be varied under StaRUG).

If a new financing is required to implement the restructuring, StaRUG cannot afford super senior status. However, such financing will, in principle, be excluded from claw-back and lender liability in subsequent insolvency proceedings. However, as these privileges only apply for a limited timeframe until the debtor is sustainably restructured, in practice, lenders continue to rely

on a restructuring opinion (*Sanierungsgutachten*) to reduce risks (see **7.5 Risk Areas for Lenders**). If required, the debtor may choose to apply for a moratorium applying a stay on enforcement measures by creditors.

SchVG

The German Bond Act 2009 (SchVG) provides for an out-of-court restructuring procedure in relation to bonds governed by German law. Provided and to the extent that the terms and conditions of the bond provide for the possibility to amend these by way of a bondholders' resolution, the SchVG allows for a wide range of restructuring measures. These include:

- a waiver of principal and/or interest;
- deferrals;
- a debt-for-equity swap; and
- modifications of the terms and conditions of German bonds.

For major decisions (such as waivers or debt-for-equity swaps), the resolution of bondholders generally requires a quorum of 50% by value of the bonds in the first bondholders' meeting, and, if the quorum is not met, 25% by value in a second bondholders' meeting. No quorum is required for other decisions in a second bondholders' meeting.

The majorities that must be obtained to approve the resolution for major decisions are 75% of bondholders by value present and voting in the bondholders' meeting and more than 50% for any other decisions (such as the appointment of a joint representative). The bondholders' resolution is subject to appeal within one month. A successful appeal will nullify the resolution.

7.5 Risk Areas for Lenders

Insolvency Claw-Back

Certain transactions that have directly or indirectly disadvantaged the debtor's creditors carried out prior to the formal opening of insolvency proceedings are subject to insolvency claw-back actions by the insolvency officeholder. Generally speaking, the closer the relevant transaction was carried out prior to the filing for insolvency proceedings, the higher the claw-back risk. Insolvency claw back periods extend to four years, in some circumstances up to ten years looking back from the filing for insolvency proceedings.

Lender Liability

If a lender refuses to grant a (new) loan to the distressed company, accelerates its (existing) loans or refuses to (partially) waive its claims, thereby causing the company's insolvency, the lender generally cannot be held liable, as it has no legal obligation to participate in the restructuring or remediation measures of the company. Nonetheless, lenders need to carefully consider the legal implications of their actions for the borrower's directors, given the relatively strict personal/criminal insolvency liability regime for directors.

Conversely, however, a liability can under certain circumstances be triggered by granting, as an existing lender, new loans – or by extending existing loans – if such financing was insufficient to achieve a turnaround of the debtor and ultimately only delayed an inevitable insolvency filing, thereby harming existing or new creditors of the debtor. When granting new loans or extending maturities of existing loans to borrowers in distress, lenders as a defence against any possible future liability therefore typically request the issuance of a restructuring opinion prepared by independent experts that confirms that, based on the expected economic development of the

debtor and the financial and operational measures projected, the debtor can be restructured.

7.6 Transactions Voidable Upon Insolvency

For claw-back of certain transactions prior to the commencement of insolvency proceedings, please see **7.5 Risk Areas for Lenders**.

In addition, the following general aspects are relevant for creditors in insolvency proceedings: All rights in relation to the insolvent estate and the debtor's business affairs become vested with the insolvency administrator who becomes the sole representative of the insolvent estate and who is exclusively entitled to dispose of assets of the estate; dispositions made without the officeholder's consent are null and void. Further, pending litigations are stayed. Creditors may only enforce their rights and claim payment in accordance with the rules set out in the InsO. Moreover, any kind of foreclosure action by a creditor against the estate is stayed and such actions made within the last month before the opening of insolvency proceedings become null and void. In debtor-in-possession proceedings, management may only enter into material transactions with the consent of the court-appointed custodian.

7.7 Set-Off Rights

The right to set-off claims in insolvency proceedings is subject to certain conditions. A creditor's set-off-right remains in force, if set-off was possible (contractually or by law) prior to the commencement of insolvency proceedings and effectively prior to the filing of insolvency proceedings. If the creditor's claim becomes due and payable after the commencement of insolvency proceedings, set-off is only possible if (and when) the creditor's claim is due and payable prior to the estate's claim becoming due and payable. Set-off by creditors is precluded, inter alia, if the creditor owes something to the estate or becomes a creditor only after the commencement of insolvency proceedings, or if the "possibility to set-off" is subject to claw back.

7.8 Out-of-Court v In-Court Enforcement

A typical out-of-court restructuring involves the negotiation of a consensual restructuring solution with all stakeholders. Such restructuring may include a range of measures – eg, extensions of maturities, reductions in principal or interest or a debt-for-equity swap. An out-of-court restructuring is often the preferred route as in-court proceedings are generally more time consuming, more costly and imply a loss of control by equity holders and, in insolvency proceedings, also by management. However, it requires the consent of all affected stakeholders, and, as the case may be, approvals required under corporate law, or the articles of association of the debtor. If agreement cannot be reached, StaRUG proceedings offer the possibility to restructure a debtor outside of a formal insolvency process permitting majority decisions of debt and/or equity-holders and a cross-class-cram-down. Entry into StaRUG proceedings by a German limited liability company requires relevant shareholder consent and, in a German stock corporation, approval of the supervisory board (*Aufsichtsrat*) unless, in each case, insolvency is the only alternative to a StaRUG process, in which case there are compelling arguments that no approval is required.

7.9 Dissenting Lenders and Non-Consensual Restructurings

There are robust mechanisms to bind dissenting lenders to a StaRUG restructuring or insolvency plan. Both frameworks provide for majority consent. Stakeholders vote in classes. If certain classes do not consent to the plan, cross-class

cram-down mechanisms are available. Dissenting lenders are protected by, inter alia, the principles of horizontal fairness (no preferential treatment of equal ranking creditors), absolute priority rule (with a new money exception), and a no-worse-off test, as well as judicial oversight and the need for judicial plan confirmation, which ensure fairness and transparency in the restructuring process.

7.10 Expedited Restructurings

Specific expedited restructuring procedures like pre-arranged restructurings are not available under German law. However, in practice, the debtor negotiates the terms of the restructuring with its main stakeholders and would normally only enter into a StaRUG process once at least an agreement in principle has been reached (and a lock-up has been entered into) with the majority of creditors/equity-holders required to implement the restructuring plan. A StaRUG process can then be implemented within a few weeks (often between seven and ten weeks). If the debtor has to file for insolvency proceedings, it may consider protective shield proceedings (generally, a three-months process) to prepare an insolvency plan. Insolvency plan proceedings may be completed, if well prepared, within approximately six months after the formal commencement of insolvency proceedings.

8. Case Studies and Practical Insights

8.1 Notable Case Studies

In March 2024, Näder Holding, repurchased a 20% stake in Ottobock from EQT to take back full ownership of the company. This acquisition was funded by a EUR1.1 billion private credit loan from a consortium of lenders consisting of funds managed by Carlyle Global Credit, KKR, Hayfin and Macquarie. Freshfields acted as legal advisor to Näder Holding.

This transaction demonstrates why private credit finance may be a valuable alternative source of funding even for German corporates. Notable take-aways and advantages from financing such a transaction with private debt include the following.

- *Execution speed* – The transaction was extremely complex and posed multiple challenges to both lenders and borrower. However, the participating lender group managed to move quickly, and the process was able to be completed within a very tight deadline, showcasing the known strength of private credit lenders when it comes to execution speed.
- *Handling complexity* – Private credit has the ability to understand and steer the complexity of transactions like the above. Paired with their sector-specific expertise and market experience, private credit lenders are able to move quickly and familiarise themselves at short notice with complex deal structures and challenges.
- *Flexibilities for borrowers* – Private credit enables borrowers to explore a wide variety of financing structures in order to achieve their overall goal. Especially in this transaction, private credit lenders were able to provide financing solutions and features which classic bank lenders would struggle to agree to for multiple reasons.

8.2 Lessons Learned

The Ottobock transaction as well as some other recent deals in the German market have shown that private credit is no longer reserved for sponsors or sponsor-backed companies. Private credit financing has become a real alternative source of funding for German corporates and

even family-owned enterprises. The German financing landscape benefits from two important aspects:

- an ongoing surge of private credit lenders looking to expand their portfolios and scope, with German corporates offering an interesting field of activity; and
- corporate borrowers increasingly looking for alternative financing solutions, with private credit funding providing many valuable advantages.

8.3 Application of Insights

Overall, we would expect an increase in private credit activity in the corporate field in the future. Borrowers should always keep private credit funding in mind when thinking about potential financing solutions, especially when complex transactions, flexible terms and a high execution speed is required. With private credit lenders gaining more and more experience in the field of German corporates, it is likely that there will soon be even more activity in that space.