

How M&A can help to repair crumbling supply chains - What to watch out for?

Agenda

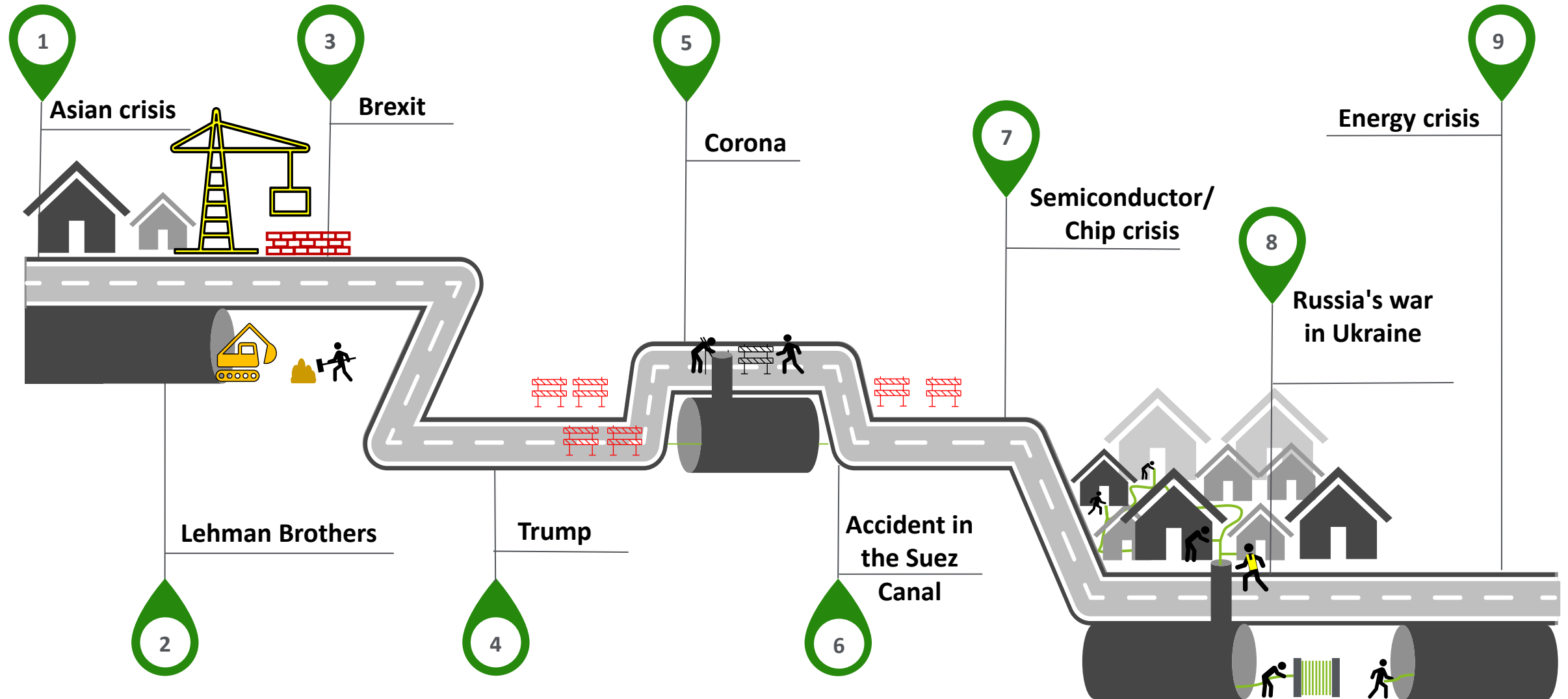
- I. Reasons for the crisis in supply chains
- II. Investment Control
- III. LkSG and EU LkRL-E
- IV. Consequences for the drafting of contracts and strategic considerations in M&A transactions
- V. Questions & Answers (Q&A)



Reasons for the crisis in supply chains

The Creeping Downfall of the Global Supply Chain

Events



Investment Control

Investment Control

Where does it come from and what is it supposed to do?

2018

MASCHINENBAUER LEIFELD

Berlin bremst Peking aus – chinesische Investoren scheitern erneut an Übernahme deutscher Firmen

Leifeld - machine builder with nuclear business

2021

INVESTITIONSKONTROLLE

Strengere Prüfung von Übernahmen in der Robotik

No concrete purchase but precaution, according to KUKA

2018

50 Hertz

Bund schützt Stromnetz vor chinesischem Investor

50Hertz- Electricity grid operator

2022

CHIPFERTIGUNG

Regierung untersagt Elmos-Verkauf an chinesische Investoren

Elmos - chip manufacturer

2020

INVESTITIONSKONTROLLE

Radar-Spezialist: Bundesregierung stoppt Übernahme durch chinesischem Investor

Berlin verhindert den Kauf der IMST GmbH durch einen Rüstungskonzern aus Fernost. Die Firma aus Kamp-Lintfort beliefert demnach auch Bundeswehr und Polizei.

IMST - Satellite Communication, Radar and Radio Technology

2020

AUSSENWIRTSCHAFTSRECHT

Schutz des Corona-Bollwerks: Bundesregierung verschärft die Investitionskontrolle

No concrete purchase but precaution

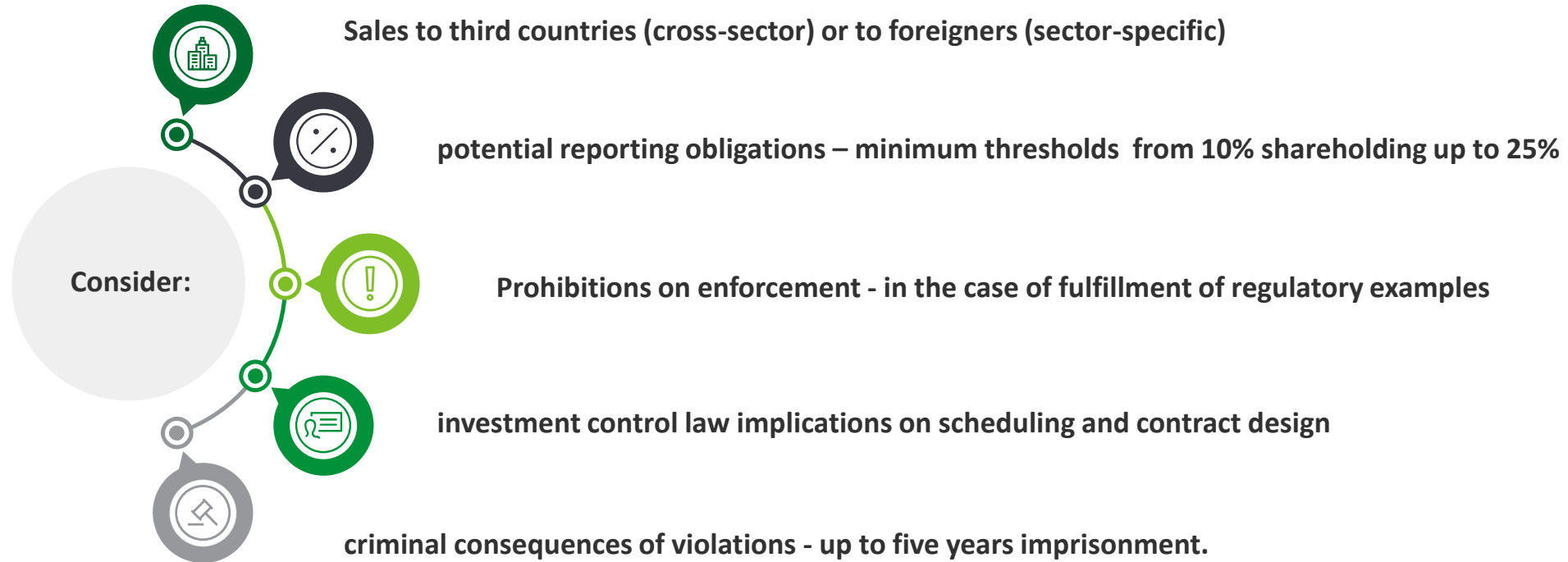
Risk to public safety and order

In particular by:

- "Selling out" expertise:
 - Artificial intelligence
 - Motor vehicles or unmanned aerial vehicles, which have autonomous driving or navigation functions
 - Industrial robot
 - Semiconductor and optoelectronics etc.
 - IT and cyber security for specific purposes
- "Protecting the public" and maintaining critical infrastructure
 - Operators of critical infrastructure (energy, water, food, health, finance, transport, etc.)
 - Companies in the media industry
 - Personal protective equipment
 - Essential medicines
 - Medical devices for life-threatening & highly contagious infections

Investment Control

What is important to pay attention to?



Committee on Foreign Investments (CFIUS)

Overview

audit competency for „Covered Transactions“ when:

Transactions of any kind in which a **foreign person** may obtain, directly or indirectly, legal or de facto **control of a U.S. enterprise** and which threaten or impair U.S. **national security**.

- **Exception:** "Safe Harbor" shares **below 10%** and no indication of control.

CFIUS may be prohibited if:

- the transaction threatens to compromise U.S. national security,
- the lead agency recommends an investigation and CFIUS agrees,
- the transaction would result in control by a foreign government, or
- the transaction would result in control of a critical infrastructure asset, which could compromise U.S. national security, and that this threat has not yet been mitigated.



CFIUS risk assessment includes, but is not limited to, the following criteria to ensure national security:

- Possible impact of the transaction on **domestic production** and on the **ability of** domestic industry
- **Include availability of** human resources, products, technologies, and other services.
- Potential security implications for **U.S. technologies and critical infrastructure** (for example: chemicals, communications, energy, nuclear reactors, etc.)
- **Reasonable concerns** regarding military goods, equipment, or technology to countries related to terror, proliferation, or chemical, biological nuclear weapons

LkSG and EU LkRL-E

Supply Chain Due Diligence Act

What is the background?



Supply Chain Due Diligence Act (LkSG)

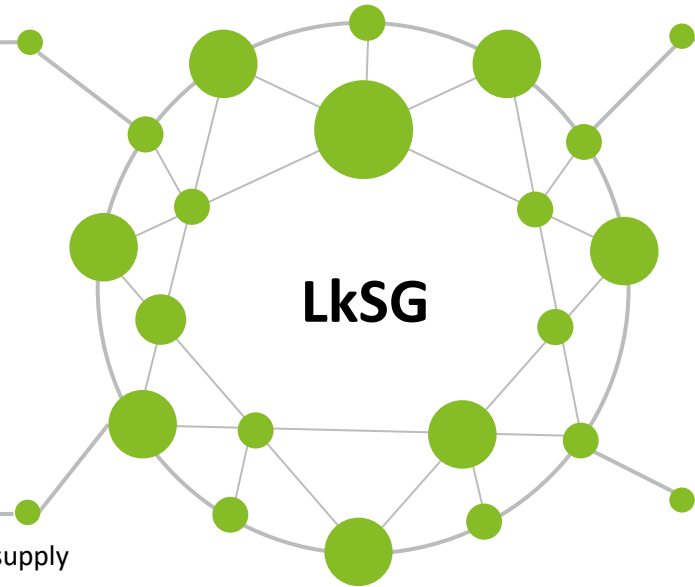
Scope and relationship to the EU Directive

Reason and goals

- New jobs and wealth are created by opening up new markets and production sites
 > Risk: due to intransparency and the frequent lack of enforcement of human rights in the supply chains of companies in the global economy.
- **Goals:** Improve protection of human rights along global supply chains and ban substances hazardous to humans and the environment

Importance for companies

- Obligation to commit compliance with human rights and certain environmental due diligence requirements
- They must, among other things, establish complaint mechanisms and report on their activities



LkSG Germany

EU Directive

- | | |
|--|---|
| • Own company and supply chain towards suppliers | • Both directions of the supply chain |
| • Employee threshold 2023 - 3000 2024 - 1000 | • Employee and sales threshold 500 + 150 million 250 + 40 million |
| • No direct right of action for the affected parties | • Right of action |

Protected legal rights

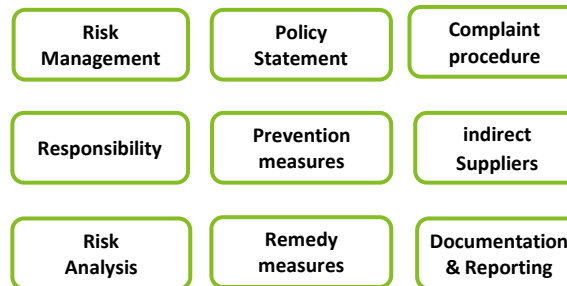
The LkSG refers more to work-related legal positions, whereas the EU Directive has a broader understanding:

Human Rights

- | | |
|------------------------|---------------------------|
| • Forms of child labor | EU: Freedom of expression |
| • Forced Labor | EU: Freedom of Religion |
| • Slavery | |
| • Equality at work | |
| • Fair wages | |

Environmental rights

- Mercury-related legal hazards (LkSG).
- Global warming (EU)



Consequences for the drafting of contracts and strategic considerations in M&A transactions



Consequences



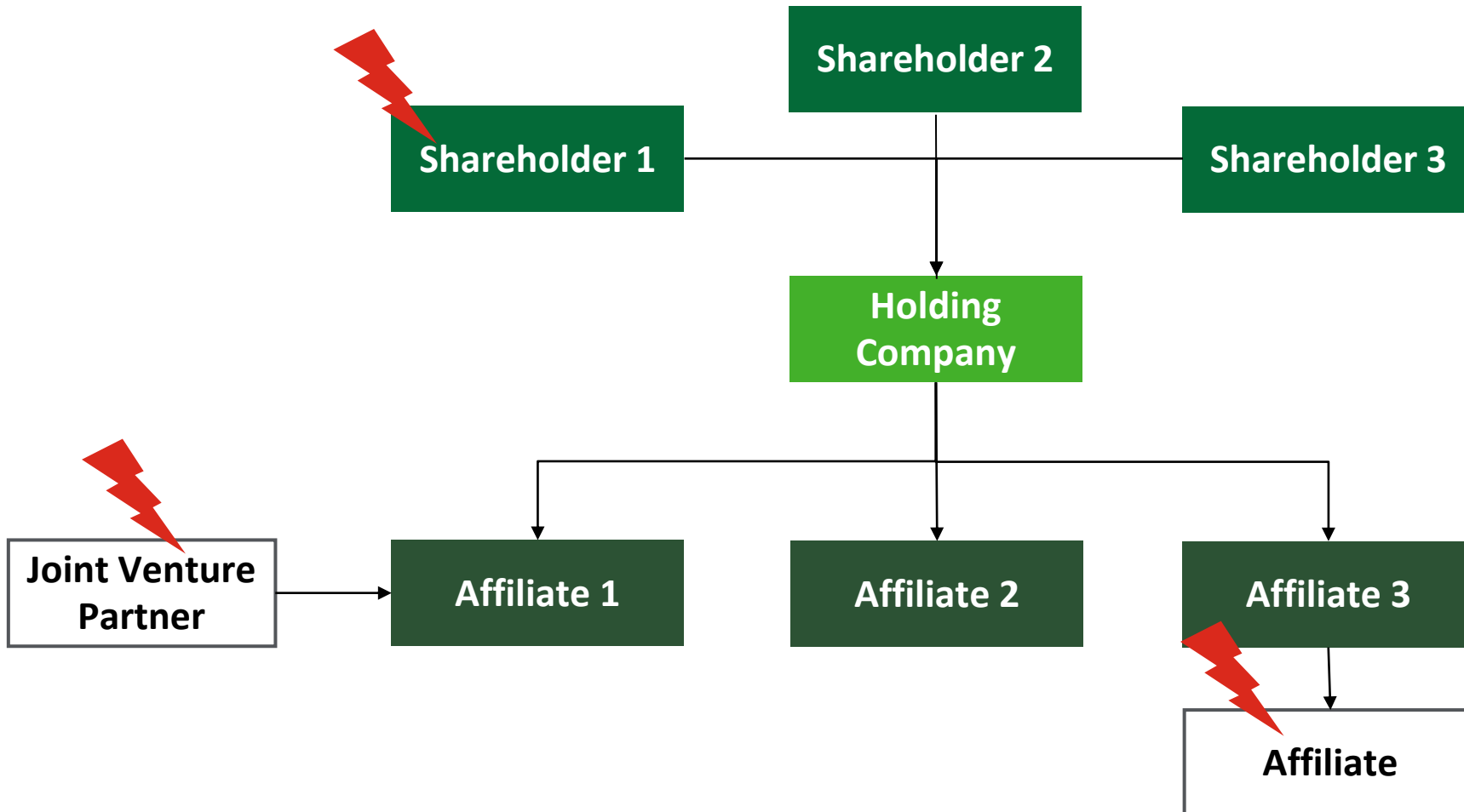
Review of the existing corporate structure



Safeguarding supply chains through strategic investments

Review of the existing corporate structure

Pitfalls



- AWG / CFIUS restrictions at shareholder level: reduction below thresholds
- Co-shareholders: Regular KYC checks and, if necessary, renegotiation of the investment amount
- When adding new shareholders / investors / co-shareholders: Call/put option if AWG/ CFIUS issue arises
- LkSG Review of existing shareholdings

Securing supply chains through strategic investments

Consequences for the SPA / APA agreements (I)

- **Bidder perspective:**

The exclusion of AWG/AWV/CFIUS issues provides deal security vis-à-vis co-bidders and should therefore be emphasized and, if necessary, guaranteed in the bidding phase. Next to price and reps & warranties, this is the most important aspect when evaluating different offers.

- **Seller's View:**

Already in phase 1, a legal opinion on AWG/AWV/CFIUS triggers should be requested from the interested parties as part of the indicative offer and this should be guaranteed later in the SPA/APA. Pursuant to Section 58 AWV, a certificate of clearance of the acquisition (so-called clearance certificate) can be issued by the Federal Ministry for Economic Affairs and Energy upon request.

- **Both parties:**

Agree on solid sun-set dates for AWG/AWV/CFIUS violations, coupled with break-up fee agreements. Moreover, include call/put options in shareholder agreements/JVA for AWG/AWV/CFIUS issues that arise later.

- **Managing directors:**

Personal (internal) liability of managing directors under Sec. 43 II GmbHG if business operations are jeopardized due to known supply chain difficulties. Background: The due diligence requirements of Sec. 43 GmbHG include a thorough examination of the financial and economic circumstances of the target company prior to a share or company purchase. However, a consistent reduction of discretion to zero without consideration of the specific individual case must be rejected. (Business judgment rule) (MüKoGmbHG/Fleischer, 3rd ed. 2019, GmbHG § 43 no. 100) OLG Oldenburg, judgment of 22. 6. 2006 - 1 U 34/03

Safeguarding supply chains through strategic investments

Consequences for the SPA / APA agreements (II)

- **Board of Management of a stock corporation:**

The discretionary scope of the management board is basically reduced to zero in the case of a company acquisition due to the incalculable risks that the acquisition of an unaudited company entails. The management board must take measures to prevent risks (Kiethe NZG 1999, 976,(983).

- **Closing Conditions:**

While in the past reps & warranties were the subject of far-reaching contract negotiations, negotiations on these topics are increasingly losing importance due to the ever more widespread S&I insurance in company acquisitions. The topics of post-contractual non-competition clauses, good leaver / bad leaver and key employee issues as well as closing conditions are now coming more and more important.

- **CFIUS:**

Timely involvement of U.S. consultants specializing in CFIUS in order to identify and, if necessary, address issues in advance. For example, DTAG was only able to complete the acquisition of Voicestream after concluding a network security agreement with the U.S. government.

- **LkSG** as part of the LDD / inclusion in the Information Request List.

Questions & Answers (Q&A)

Thank you for your attention!

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Deloitte Legal fundraiser

December 2022





Thomas Northhoff
Chairman of the Deloitte Foundation
Partner Deloitte Germany

Giving young people a perspective for the future - that is the goal of many educational initiatives in this country. Often, it is the small local projects that make a big difference in the lives of young people. This is where the Deloitte Foundation's **Hidden Movers Award comes in**. The aim of the education competition is to turn innovative ideas, local initiatives and regional projects in the education sector into role models with charisma that bring about lasting change in the lives of young people nationwide.

The Hidden Movers Award promotes a broad range of topics - from digital education to language promotion and the teaching of values. Importantly, the focus is on empowering young people through education.

The **Hidden Movers** were honored at a ceremony in Munich in mid-November 2022. The prizes were awarded in the categories of **innovation, growth** and **language support**.

Price category: Growth

BASIC PRINCIPLES

GrundgeSÄTZE of the association [10drei](#) is a two-hour workshop in which students work on selected fundamental rights, develop everyday examples of them, and finally summarize the key statements in their own words. For this format, volunteers as well as teachers and trainee teachers are digitally qualified by 10drei to prepare and implement the offers with students.

The Deloitte Foundation awards the prize in the Growth category with 25,000 euros, an individual pro bono consulting by Deloitte experts and coaching by the Social Entrepreneurship Academy.



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