GLOBAL
LEGAL
INSIGHTS

# Mergers & Acquisitions 2024

13th Edition

Contributing Editors:
**Lorenzo Corte &**
**Denis Klimentchenko**
**Skadden, Arps, Slate, Meagher & Flom (UK) LLP**

Global Legal Group

# TABLE OF CONTENTS

# Germany

**Dr. Thomas Schnülle-Weingart**
**Dr. Christoph Trautrims**
**Daniel Herper**

**FPS Rechtsanwaltsgesellschaft mbH & Co. KG**

## Overview

In this chapter, we provide a consolidated overview of the German legal mergers & acquisitions (M&A) market in 2023 and share an outlook for 2024. In particular, we will outline deal volumes as well as specifics on the largest M&A deals from 2023, including the first quarter of 2024 (*cf.* Significant deals and highlights). As a second step, we will highlight the key developments and corresponding legislative adjustments that influenced the German legal M&A activity within approximately the last 12 months (*cf.* Key developments and Industry sector focus). Finally, as a conclusion, an outlook on future developments and trends of the German legal M&A market for the year 2024 and the near future will be given (*cf.* The year ahead).

In 2023, geopolitical events and high inflation impacted the M&A market, resulting in a stagnation of transactions and reduction of the number of large-cap deals. Notwithstanding, companies withstood the headwinds and demonstrated resilience and strategically realigned themselves. However, the anticipated cooling down of the German M&A market, particularly with regard to mid- and small-cap transactions, did not occur. We are looking back on a year that was significantly affected by numerous macroeconomic factors, in particular the ongoing war in Ukraine, continuing disruptions in global supply chains, as well as the increase in energy costs and the gradual rise in key interest rates from 2.5% at the beginning of the year to 4.5% since mid-September 2023. Nonetheless, the German M&A market again reached a significant transaction level. As a result of the multiple crises, and despite standstill or material deal reduction, M&A counsel were confronted with the question of how to mitigate risks in times of new geopolitical uncertainties, particularly where the planned transaction would suddenly become less attractive or even impossible to complete (*cf.* Key developments).

In addition, digital and environmental transformation is progressing further, which is affecting the transactional practice, in particular with regard to ESG compliance issues.

Overall, we can conclude that a marginal downturn in the number of transactions is primarily attributed to a decrease in inbound cross-border and large-cap transactions. However, Germany is still attractive to international investors.

To break the numbers down in brief, based on the transactions published in the relevant deal databases: for 2023, we are looking back on a year of around 2,700 completed or announced deals with a German participation on either buy- or sell-side. As a result, the decrease in transaction activity was significantly lower than many industry experts had expected. Despite a challenging market environment, the M&A market was stable. Throughout the year, only around 200 fewer deals were documented than in 2022, with around 2,900 deals. Accordingly, the German M&A market lies approximately 52% above the historical average since 1996. It is noteworthy that a fundamental decrease in deals with German participation can be observed in cross-border deals (about -17%), while inbound deals increased slightly (about 8%). Traditionally, strong investors, for example from the USA (about -17%) as well as UK (about -27%) behaved with restraint and reduced their deal activity in Germany. In total, this resulted in a moderate decrease in deal activity compared to a record 2022 (about -4%), measured by the number of deals. The highest relative increase in deal activity was again recorded in the energy sector (about 11%) by the number of deals, which was influenced by the ongoing transformation of the German energy industry. In 2023, M&A activity in Germany shrank again by more than EUR 8 billion compared to the already weaker year 2022, to an aggregated transaction value of EUR 63 billion, having already decreased by 45% to EUR 71.5 billion in 2022.

## Significant deals and highlights

While the first half of 2023 even exceeded the record year 2021, the second half of the year was characterised by significantly lower M&A activity, especially from November onwards. This has been mainly caused by the increasingly challenging financing environment to which investors were confronted.

With around EUR 21 billion worth of deals, April 2023 was the month with the largest deals by volume. Within this period, probably the most prominent transaction on the German M&A market was also signed.

The highest single transaction volume with German participation in 2023 was the acquisition of Viessmann Climate Solutions SE by Carrier Global Corporation, with a cumulative transaction volume of EUR 12 billion. The family-owned company sold its climate division, and thus a key part of the enterprise, to the US company. The selling Viessmann Group received 80% of the purchase price in cash and 20% as shares in Carrier Global Corporation. A whole series of guarantees was agreed for the preservation of locations and jobs, but numerous critics voiced their concerns about the sell-off of German SMEs after the deal was announced. Hence, one of the most prominent German producers of heat pumps has been sold to a US enterprise.

Accordingly, the volume of the largest single transaction is EUR 2.5 billion below the previous year's leading transaction (the nationalisation of Uniper SE by way of a cash capital increase (about EUR 14.5 billion) by the Federal Republic of Germany).

SAP SE is ranked second in this year's deal ranking, with the sale of its US market research subsidiary, Qualtrics International Inc., to Silver Lake Group LLC and the Canada Pension Plan Investment Board for about EUR 11.2 billion.

Alongside this deal, the British oil company Harbour Energy plc is taking over the BASF SE subsidiary, Wintershall Dea. BASF SE and the minority shareholders, LetterOne Holdings S.A., have reached an agreement to this effect. The transaction value amounts to around EUR 10.2 billion. The deal is expected to be closed in the fourth quarter of 2024 – subject to antitrust and regulatory approvals. The transaction includes production and development assets and exploration rights in Norway, Argentina, Germany, Mexico, Algeria, Libya, Egypt and Denmark, as well as Wintershall Dea's carbon capture and storage licenses. The business related to Russia remains excluded.

In addition, the largest deal in the company's history was on the agenda for Deutsche Börse AG. The financial services provider acquired SimCorp A/S for around EUR 3.9 billion. Deutsche Börse AG intends to expand its data and data analysis business with the Danish software provider. SimCorp A/S is to complement the data analysis business of the subsidiary ISS STOXX Index GmbH. The Frankfurt-based company completed the public takeover bid at the beginning of October and subsequently initiated a squeeze-out of the remaining shareholders.

For the sake of completeness, it has to be mentioned that the Spanish investment company Asterion Industrial Partners EIC SA is taking over the energy producer Steag GmbH. For its entry into the German market, EUR 2.6 billion will be paid to Kommunale Beteiligungsgesellschaft (KSBG). The deal includes a total of six municipal utilities in the Ruhr region, which Steag had taken over from Evonik Industries AG.

## Key developments

### Environment, social, governance (ESG)

ESG has arrived in business law within the last years. While the German and European legislators restrained from strict ESG legislation in the past, the amount of ESG-related acts have increased and existing acts have been expanded meanwhile. Generally, this requires parties of any M&A transaction to pay particular attention to ESG topics through the entire transaction process.

Most prominent, the Corporate Sustainability Reporting Directive (CSRD) entered into force on 5th January 2023. Starting from the reporting year 2024, large capital market-oriented companies are obligated to add a declaration of the company's sustainability to their annual statements as part of the management report. The Commission of the European Union (EU) thereby intends to provide the public with an insight into the sustainability of companies. The enhancement of available information through the CSRD shall enable ESG-based investors to assess the target's compatibility with its ESG-related investment strategy. The declaration of a company's sustainability must respect the principle of "double materiality". This requires companies to report their impact on the environment as well as the impact of the environment – especially caused by climate change – on the company. Thus, companies are now obligated to give a precious overview about their sustainability footprint. The Commission of the EU published the European Sustainability Reporting Standards (ESRS) on 22nd December 2023 to provide guidance to the economy. The ESRS are meant to give valuable advice to prepare a sustainability declaration. A major aspect of the CSRD, substantiated by the ESRS, refers to the obligation of collecting data on the sustainability footprint of a company. Companies must disclose their greenhouse gas emissions with respect to their influence on the emissions. Thereby, the ESRS request to report on direct emissions of a company as well as on indirect emissions occurred within the upstream and downstream value chain. Companies currently build up a sufficient system to collect, document and report the required data. The relevance of the CSRD for the due-diligence process is evident. Equally, a potential purchaser will probably not be able to retrace the entire process of collecting the relevant data. However, either by a due diligence on the existence of a sufficient reporting system or by guarantees of a sufficient reporting system, M&A transactions have to consider new risks arising from the CSRD.

Besides the CSRD, the EU advanced on the implementation of a European directive on the due diligence of companies' value chain with regard to sustainability. While, in Germany, the Supply Chain Due Diligence Act (SCDD; *Lieferkettensorgfaltspflichtengesetz*) already entered into force in 2023, the European Corporate Sustainability Due Diligence Directive (CSDDD) was discussed throughout 2023. Finally, at the beginning of 2024, the CSDDD was passed by the European Parliament and European Council. Thus, it will take effect in May 2026, at the latest. The scope of application has been reduced compared to the previous draft of the CSDDD. Prospectively, companies with more than 1,000 employees (instead of 500) and a revenue of more than EUR 450 million (instead of EUR 150 million) will be obligated to due diligence their supply chain. In terms of content, the CSDDD requires companies to ensure that human rights and standards of protecting climate are respected by suppliers within the upstream value chain. Experience with a supply chain act – as it still exists in Germany – shows that it is difficult to establish a sufficient due diligence process for the supply chain. As far as it is possible, companies demand declarations from suppliers guaranteeing to comply with human rights and standards of sustainability. Since such guarantees require the involvement of all companies alongside the supply chain, the scope of application of the SCDD, and prospectively of the CSDDD, is indirectly enhanced on small companies as well. The significance of the SCDD and CSDDD for M&A transactions appears even more from their sanctions for the breach of due diligence obligations. While the SCDD charges EUR 100,000–800,000 – in special constellations, even up to 2% of the annual revenue worldwide – the CSDDD even comes up to allow civil claims of damages.

To sum up, the year 2023 was characterised by the introduction and preparation of new sustainability laws in terms of ESG. Pending M&A transactions – even mid- or small-cap transactions – will raise more awareness to ESG-related legislative activity.

### Distressed M&A

In the midst of a constantly changing and increasingly challenging market environment, distressed M&A (mergers and acquisitions in financially distressed companies) has emerged as a significant area within the M&A sector. This particular form of transaction has grown considerably in importance in recent years, largely due to the increasing challenges of refinancing companies.

Global economic conditions have changed significantly in recent years, which has led to increased pressure on the liquidity of many companies. A significant factor in this context is interest rate policy, which has led to an increase in financing costs. Companies, particularly in the automotive, healthcare, real estate and retail sectors, are facing an increasing strain on their financial resources. These sectors are characterised by structural changes and market uncertainties, leading to increased vulnerability to financial problems.

Against this backdrop, distressed M&A transactions have experienced remarkable momentum. Investors are increasingly recognising the opportunities that arise from the acquisition and restructuring of financially distressed companies. By acquiring companies in financial distress, investors can gain access to valuable assets that might not be available under normal market conditions. This applies in particular to strategically important assets such as intellectual property, production facilities or customer bases.

Companies in financial distress often trade at lower valuations, offering investors the opportunity to acquire assets at an attractive price. This can allow investors to create significant value by buying cheaply and getting the companies back on track through restructuring measures. Although distressed M&A is often associated with short-term challenges, these transactions offer long-term growth potential. By restructuring and repositioning financially distressed companies, investors can create long-term value and benefit from the company's revitalisation.

Overall, distressed M&A transactions offer investors the opportunity to create significant value in a dynamic market environment. Through the targeted acquisition and restructuring of financially distressed companies, investors can unlock long-term growth potential and diversify their portfolio. With a clear strategy and a dedicated team, investors can achieve significant success in this area and contribute to the stabilisation and recovery of the economy.

For lawyers working in distressed M&A, the practice requires an interdisciplinary approach. Knowledge of insolvency law is essential, as distressed M&A transactions are often closely linked to insolvency proceedings. The ability to manage complex legal, financial and operational challenges is crucial to the success of these transactions. This applies both to transactions in the run-up to court restructuring proceedings and transactions in connection with insolvency proceedings.

Common strategies in distressed M&A include the transferring restructuring through an asset deal or the implementation of an insolvency plan. Both approaches offer opportunities to restore the financial health of the company while preserving value. The choice of the appropriate strategy depends on a variety of factors, including the specific conditions of the company and the objectives of the parties involved.

In an asset deal, usually only selected assets and no liabilities of the insolvent company are transferred. This allows the buyer to acquire certain assets without taking on the burdens of previous liabilities. The buyer has the flexibility to acquire only those assets that are of interest to its business. Asset deals can usually be completed more quickly than insolvency plans as they require less complex approval and consent processes. This allows the buyer to quickly take possession and control of the acquired assets.

An insolvency plan enables a holistic restructuring of the insolvent company by taking into account all assets and liabilities. This offers the opportunity to restructure the company as a whole and continue operations. An insolvency plan requires the consent of the insolvent company's creditors. The insolvency plan allows the interests of all parties involved to be taken into account by reaching compromises and agreements that enable a successful restructuring. An insolvency plan offers legal certainty as it is approved by the insolvency court. This creates trust among the parties involved and provides a clear legal framework for the implementation of the transaction.

The successful implementation of distressed M&A requires close cooperation between lawyers, financial experts, insolvency administrators and other stakeholders. By developing tailor-made solutions, these teams can optimally take into account the interests of all parties involved and create long-term added value.

Overall, the rise of distressed M&A not only reflects the current economic challenges, but also offers opportunities for investors and companies to improve their financial situation and ensure long-term success through innovative strategies and collaboration.

**Artificial Intelligence (AI) and Machine Learning (ML) in M&A**

The role of AI and ML in M&A is developing rapidly and opens up numerous new perspectives for the structuring, execution and follow-up of M&A transactions. For instance, these technologies enable a more accurate due diligence by processing large amounts of data more efficiently and extracting relevant information, which has traditionally been a manual and time-consuming task. By using AI, parties, their lawyers and M&A advisors can gain deeper insights into financial, operational and especially legal risks, leading to more informed investment decisions.

In addition, AI can improve the way in which target companies are identified and evaluated. ML algorithms are able to analyse industry trends, recognise growth potential and identify companies with high synergy potential. In a nutshell, the introduction of AI into the M&A business can not only improve the efficiency and quality of transaction processes, but also offer a strategic advantage. It should also be mentioned that the EU set a legal framework for AI. The Member States of the EU unanimously approved a regulation laying down harmonised rules on AI in the Committee of Permanent Representatives on 2nd February 2024. The EU Artificial Intelligence Act (AI Act, *Verordnung zur Festlegung harmonisierter Vorschriften für Künstliche Intelligenz* (*KI-Verordnung*)) is regarded as the fundamental cornerstone for the regulation of AI in the EU. The AI Act is intended to promote innovation, strengthen trust in AI and ensure that the use of technology is aligned with the fundamental rights and security of EU citizens, according to the German Federal Ministry of Justice. The AI Act follows a risk-based approach: the higher the risk, the stricter the obligations. While AI systems with an unacceptable risk are banned outright and strict technical and organisational requirements apply to high-risk AI systems, low-risk applications are only subject to certain transparency and information obligations. Banned AI includes biometric categorisation based on sensitive characteristics and the untargeted reading of facial images from the Internet or from surveillance cameras for facial recognition databases.

For 2024, investments are therefore also expected to focus on AI and be connected to more and more tools using AI. Despite initial concerns, companies are increasingly focusing their attention and resources on AI-based companies. The legal framework in the form of the AI Act is of course conducive to this.

## Industry sector focus

With regard to the focus on certain industrial sectors, it can be stated that the energy sector was boosted by the transformation of the energy industry. The energy sector once again recorded the highest growth in transaction activity (around 14%). Followed by the sector "other", which includes heating, ventilation and air conditioning (HVAC) transactions in particular, which were significantly driven by the German government's Renewable Heating Act (GEG, *Gebäudeenergiegesetz*) (around 11%).

While technology, media and telecommunications (TMT) deals, as in previous years, represented by far the largest proportion (around 26%) of all transactions, a substantial decline was again documented compared to 2022 (around -10%).

The healthcare (around -10%) and construction (around -12%) sectors also lost significant M&A activity.

Among the top 30 deals, most of the targets originated from the TMT (seven) and automotive sector (five), followed by energy and healthcare (four each).

PwC elaborated in a statistic on the part of foreign private equity investments in German targets that, in December 2023, the technology sector accounted for just under 28% of all deals (279 deals). There was a significant increase in foreign transactions in the manufacturing sector with around 16% (264 deals) (2022: 228 deals). In contrast, M&A activity in the healthcare sector decreased by 16.5% (81 deals) (2022: 97 deals). Private equity (PE) investors are continuing to increase their share of deals and remain very active on the German M&A market. Their market share is around 43%. This is also due to the greater cautiousness of strategic investors, who are increasingly focusing on the industrial manufacturing sector. This sector was particularly hit by the geopolitical conflicts in 2023. Due to higher financing costs and business risks, strategic investors have apparently postponed new investments more frequently. This may be due to the fact that PE investors can often adapt more quickly to shifting market conditions and still have large amounts of uninvested capital at their disposal.

It is particularly remarkable that the PE market share has increased significantly, especially for small- and mid-cap transactions of less than EUR 50 million, to around 77% compared to 57% in the previous year. This can be explained by the fact that the financing of larger transactions is often accompanied by major difficulties.

## The year ahead

We look back on a year that was dominated by geopolitical events and high inflation. The trouble spots around the world combined with high interest rates resulted in the transaction volume not increasing, again.

Contrary to the medium-term figures of recent years, the attractiveness of German companies for foreign companies appears to have currently decreased. Cross-border deals had the biggest decline at around 17%. At the same time, the labour market is increasingly affected by a shortage of skilled workers. Furthermore, approval procedures are often time consuming. The Foreign Subsidies Regulation (EU *Drittstaatensubventionsverordnung* 2022/2560) imposes additional requirements on the M&A process. The latter primarily focuses on the control of foreign investments in cases of changes of control over companies and makes it necessary to register numerous transactions with the Commission of the EU and to have them audited with regard to a potential distortion of competition. A transaction cannot be closed without the approval of the Commission of the EU.

Central banks around the world tightened their monetary policy in 2023 in order to counteract persistent inflation. At the same time, high interest rates are weighing on the economy and restricting growth. The current interest rate level has a direct impact on company values and has further reduced the appetite of financial investors in particular. A change in interest rate policy is therefore beneficial, which could boost the transaction business in order to bring the accumulated investment assets into the M&A market.

Despite the recovery of most industrialised countries to pre-pandemic production levels, growth in the EU in 2023 was lower than expected. The GDP growth forecast for the EU for 2023 was lowered to 0.75%, which corresponds to only one fifth of the previous year's growth.

In addition, key elections in the USA, Taiwan, India, the EU and the UK are due to take place or have taken place in 2024, casting their shadows ahead. This will likely have an impact on the global M&A market.

It is also important not to lose sight of the fact that Europe is a pioneer in terms of ESG-related regulation. However, environmental and sustainability aspects of acquisitions are also becoming increasingly important worldwide. Thorough ESG due diligence is no longer just a negligible sideshow. A robust ESG profile is increasingly a positive factor for long-term corporate growth as well as for an attractive company valuation. In 2024, companies should ensure that they pay attention to this ongoing development.

Despite these diverse challenges, it is nevertheless remarkable that the renewed decline in transactions has been much more restrained than many experts had predicted. Higher interest rates and the weaker economic outlook have left their mark on the purchase prices on offers.

Nevertheless, strategists are repositioning themselves – also with regard to supply chains and sales markets. Financial investors have at least held back on transactions this year, although they are keeping a lot of investment assets.

The high and available liquidity is looking for investment opportunities.

Retrospectively, the German M&A market has had a journey of remarkable ups and downs, proving time and again its ability to bounce back from economic shocks. The resilience seen in the face of the dotcom boost, the financial crisis of 2008 and the COVID-19 pandemic suggests a robust German economy. Historical data shows that the market is capable of recovering.

Conclusively, we assume that the appetite for M&A on the German market deals will slightly increase, but the protagonists will initially act humble before clear trends become apparent.

**Dr. Thomas Schnülle-Weingart**

**Tel: +49 69 95 957 125 / Email: schnuelle@fps-law.de**

Dr. Thomas Schnülle-Weingart is an experienced M&A attorney at FPS. He advises national and international clients in all areas of M&A transactions and corporate law. His main practice areas include advising on complex M&A transactions, joint ventures and venture capital financing rounds. In addition, Dr. Thomas Schnülle-Weingart advises on all aspects of corporate law, in particular stock corporation law, limited liability company law and transformation law.

Dr. Thomas Schnülle-Weingart has a wide range of experience in national and cross-border transactions, structural measures and corporate disputes. Before joining FPS, Dr. Thomas Schnülle-Weingart worked for several years at Freshfields Bruckhaus Deringer in the areas of corporate law and M&A in Frankfurt am Main and New York City.

He is also a Lecturer at the Südwestdeutsche Fachakademie der Immobilienwirtschaft e.V. and regularly publishes articles on current corporate law issues.

**Dr. Christoph Trautrims**

**Tel: +49 69 95 957 125 / Email: trautrims@fps-law.de**

Dr. Christoph Trautrims advises on M&A and distressed M&A, real estate transactions and corporate matters. A focus of his corporate advice is the preparation of national and cross-border reorganisations (mergers, spin-offs, changes of legal form) as well as shareholders' meetings.

As a Civil Law Notary based in Frankfurt am Main, Dr. Christoph Trautrims covers the full spectrum of notarial services, with a focus on M&A, real estate, corporate law and cross-border reorganisations.

**Daniel Herper**

**Tel: +49 69 95 957 125 / Email: herper@fps-law.de**

Daniel Herper is an experienced transactions lawyer specialising in M&A transactions and restructurings. Among other industries, he has substantial expertise in the healthcare sector.

He advises the governing bodies of companies in crisis, both in and out of court. This involves accompanying them during crises and judicial restructuring proceedings (company voluntary arrangements/insolvency protection proceedings).

Daniel Herper also supports shareholders, prospective buyers, lenders and insolvency administrators in the development and implementation of financing and transaction structures. Another focus area of his work is advising creditors in crisis and insolvency situations. He prepares and implements restructuring concepts and supports the management in out-of-court and in-court restructuring measures.

**FPS Rechtsanwaltsgesellschaft mbH & Co. KG**

Eschersheimer Landstraße 25-27, 60322 Frankfurt am Main, Germany

Tel: +49 69 95 957 0 / URL: www.fps-law.de

**Global Legal Insights – Mergers & Acquisitions** provides analysis, insight and intelligence across 13 jurisdictions and with one expert analysis chapter, covering:

- Overview
- Significant deals and highlights
- Key developments
- Industry sector focus
- The year ahead