HENGELER MUELLER

NEWSLETTER | January 2022

M&A SNAPSHOT | DISTRESSED M&A | COMPLIANCE OUTLOOK | NEW PARTNERS AND COUNSEL

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Editorial

Dear friends,

Another challenging year is behind us. We have all adjusted to the 'new normal' as best we can, but very much hope that we can leave the worst effects of the pandemic behind us in the coming year. The economy was once again quite stable – as we now await the future impact of geopolitical shifts, supply-chain bottlenecks and imminent high inflation, a busy transaction pipeline at least gives us confidence.

Rainer Krause
Co-Managing Partner

Georg Frowein
Co-Managing Partner

Our newsletter is again full of topics that will affect the legal market in 2022 – among the highlights: distressed transactions may become relevant once again. Our restructuring partner Martin Tasma together with Henning Block, head of financial restructuring and Managing Director at Rothschild & Co., analyse the key parameters. On the 20th anniversary of the SE (European Company), our corporate law expert Hartwin Bungert looks back to offer a positive summary analysis: European legislation continues to be a fundamental driver of practice-oriented developments in national legal systems. And we are particularly delighted to introduce our new partners and counsel on page 24. This is one of the largest groups of appointees that we can remember at Hengeler Mueller!

We wish you all the best in the upcoming year – and again: please take care and stay safe!

Yours sincerely,

Georg Frowein

Rainer Krause

M&A SNAPSHOT

All-time record shattered, transactions continue at a high level

In 2021, M&A transactions worldwide smashed all previous records, surpassing the high-water mark set nearly 15 years ago.

This trend has partly been driven by pent-up demand from last year, but primarily by the continuing easy availability of financing, strategic corporate agendas and active private equity investors.

Coming in at USD around 6 trillion, annual global M&A activity has beaten the previous all-time record of USD 4.55 trillion set in 2007. European target and, specifically, German target transactions have greatly contributed to this development. Europe accounted for more than 10,304 M&A deals and a disclosed deal value of USD 1.56 trillion. In Germany, there were 1,190 deals and a deal value of around USD 237 billion.*

While mega deals, such as the merger of Vonovia and Deutsche Wohnen (we advised the Deutsche Wohnen advisory board), are still quite rare in Germany, there has been a multitude of inbound M&A deals in the mid-market category, e.g. the takeover of automotive supplier Hella by French automotive supplier Faurecia (we advised the Hella family owners).

Following the initial economic Covid-19 shock in 2020, the pandemic became a catalyst for deal activity in 2021. Companies have been reassessing their portfolios to position themselves with a greater strategic focus and to straighten out their balance sheets. This has led to more carve-out transactions (e.g. the adidas/Reebok carve-out, in which we advised adidas) and more spin-off transactions (e.g. the Siemens/Flender spin-off, in which we advised Siemens). The rapid rise in digitalisation that was accelerated by the crisis has also boosted acquisitions of technological knowledge businesses. Despite the increasing activity of private equity, strategic mergers and acquisitions remain the main driving force behind the German M&A market.

Investors are unfazed by macroeconomic factors

These buoyant market dynamics are also expected to continue in 2022. Despite major central banks such as the US Fed and the Bank of England having started to raise interest rates, which will increase the cost of financing transactions going forward, many market participants will try to preempt the central banks' tightening of monetary policy. So far, investors and corporates appear unfazed by macroeconomic factors such as the emergence of the Omicron variant of coronavirus, the recent rise in inflation, global supply chain issues and the increasing number of regulatory hurdles at an EU level.

Given the current level of global M&A activity, the number of private equity investors present in the market is expected to increase even further. Financing is available, the current market environment is favourable and PE investors are actively looking for suitable targets. They even have public deals on their agenda in spite of the increased risk profile of these deals. To some extent, the market for Special Purpose Acquisition Companies (SPACs) might also prove to be a driving force for global transactions, even if there has been disappointment in some SPAC deals. Private equity investors and the availability of financing might help to sustain momentum well into 2022.

We are expecting to see M&A transactions continuing at a high level in 2022.

*Source: Mergermarket

Best Friends in the lead

BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY
URÍA MENÉNDEZ

The Best Friends group of six international law firms, headquartered in the major business centres of Europe, has once more achieved a #1 position in the Mergermarket league table. Comprising BonelliErede in Italy, Bredin Prat in France, De Brauw Blackstone Westbroek in the Netherlands, Hengeler Mueller in Germany, Slaughter and May in the UK and Uría Menéndez in Spain and Portugal, the group provides clients with a 'best in class' service internationally through its fully integrated teams.

2021 European legal adviser league table ranked by value

Rank	House	Value (USD M)	Number of Deals
1	Best Friends Group	260,354	234
2	Cleary Gottlieb Steen & Hamilton LLP	183,840	56
3	Freshfields Bruckhaus Deringer LLP	174,215	131
4	Latham & Watkins LLP	167,876	161
5	Linklaters	153,434	185
6	White & Case LLP	148,035	231
7	Weil Gotshal & Manges LLP	128,498	85
8	Clifford Chance LLP	125,184	144
9	Allen & Overy LLP	119,495	174
10	Sullivan & Cromwell LLP	112,631	26

This customised Mergermarket league table was provided by Acuris Studios based on European target deals in 2021.

NEWS

Work highlights

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26 October 2021
Vonovia SE, a leading European private residential real estate company, has successfully completed its tender offer to the shareholders of Deutsche Wohnen SE. Together, Vonovia and Deutsche Wohnen manage a portfolio of approximately 568,000 apartments. Hengeler Mueller advised the supervisory board of Deutsche Wohnen SE on the transaction.

19 October 2021
Tencent Holdings Limited, one of the leading technology companies headquartered in the People's Republic of China, has participated in the Series E financing round of the mobile bank N26 alongside other co-investors. The USD 900 million funding round, which is led by Third Point Ventures und Coatue Management, increases the company's valuation to more than USD 9 billion. Hengeler Mueller advised Tencent on the transaction.

8 October 2021
Deutsche Lufthansa AG successfully completed a capital increase with subscription rights of the company's shareholders utilising the Authorised Capital C. The gross proceeds amounted to approx. EUR 2.16 billion. Deutsche Lufthansa AG used the capital raised, among other things, to repay the Silent Participation I of the Economic Stabilization Fund of the Federal Republic of Germany (WSF), thereby widely ending the state stabilisation measures. Hengeler Mueller advised Deutsche Lufthansa on the transaction with regard to the contractual relations with the WSF, as well on state aid and corporate law aspects.

5 October 2021
Private equity firm BlackFin Capital Partners acquired DWS Group's digital investment platform IKS, subject to regulatory and antitrust approvals. DWS will hold 30% in the new venture. DWS and BlackFin have also agreed on a long-term strategic partnership to further develop the digital investment platform. Hengeler Mueller advised BlackFin Capital Partners on the transaction.

16 August 2021
The family shareholders of the German automotive supplier HELLA decided to sell their majority shareholding of 60% to the French automotive supplier Faurecia. Subsequently, Faurecia launched a public tender offer to acquire all shares held by the remaining HELLA shareholders. Hengeler Mueller advised the family shareholders on the transaction, together with Best Friends law firm Bredin Prat.

13 August 2021
adidas has entered into a definitive agreement on the sale of Reebok to Authentic Brands Group (ABG) for a total consideration of up to EUR 2.1 billion. Hengeler Mueller advised adidas on the transaction.

4 August 2021
Two affiliates of 1&1 AG entered into a long-term partnership with the Japanese company Rakuten to build and operate the fourth mobile network in Germany. Together with Rakuten as prime contractor, 1&1 will build Europe's first fully virtualised mobile network based on innovative OpenRAN technology. Hengeler Mueller has been advising 1&1 comprehensively on the rollout of its mobile network and its transformation into a mobile network operator since the initial preparations for the 2019 spectrum auction.

EXPERTISE

Distressed M&A – same same, but different

Although the Covid-19 pandemic caused the worst economic downturn since the global financial crisis of 2008/9, a significant wave of insolvencies and restructuring situations has not yet hit the German market. This might change, however, in the short to medium term since there is still a great need for a fundamental transformation of business models in many sectors – e.g. automotive, industrial and retail.

The transformation process requires a considerable amount of investment and liquidity that not every company is able to secure. Moreover, leverage ratios have increased especially in connection with Covid-19 rescue financings, which will considerably hamper the refinancing prospects for many businesses in the near term. The number of distressed M&A transactions is therefore likely to increase. The question arises: is the market adequately prepared for this, given that distressed transactions differ significantly from 'ordinary' M&A transactions?

Transactions under time pressure

In general, distressed M&A transactions are not initiated proactively, but are instead the result of extraordinary circumstances such as financial distress or insolvency events. In structuring the process, sellers hardly ever have much time to prepare, leading to many distressed M&A processes being started on the basis of incomplete information. In this context, the challenge is often to identify the value drivers for potential acquirers quickly so that not only the equity story, but also a sound restructuring concept can be promoted during the marketing phase of the transaction.

Compared to the classic two-step M&A process, another challenge is the lack of time and flexibility in structuring the process. In the first phase of a classic M&A process, bidders are initially approached using preliminary information, and full-scale due diligence is performed with a smaller group of bidders in the second stage. By contrast, a distressed M&A process often only consists of one stage, where potential bidders are identified during a brief bidder eligibility check and the due diligence is started early on in the process. In addition to the sale of the entire company, the sale of individual business units frequently also needs to be pursued in parallel.

Moreover, stakeholder management is complex: while ordinary M&A processes are often 'controlled' solely by the shareholder, distressed M&A transactions require additional coordination, specifically among lenders, suppliers and customers. They are also subject to stricter transparency requirements.

Buyer dynamics and value drivers

In distressed M&A transactions, approaching a long list of bidders is the starting point for ensuring transaction security and a maximum purchase price in a manner that is objectively verifiable (e.g. to a creditor committee). In this context, the approach of strategic buyers differs from that of specialised financial investors. The latter group, specialising in turnaround situations and familiar with structuring options, can use their experience to put a price tag on levels of risk and are used to meeting tight deadlines. Strategic investors, by contrast, often require more time to assess and execute distressed M&A transactions, and they frequently apply the same acquisition criteria as for 'healthy' acquisitions.

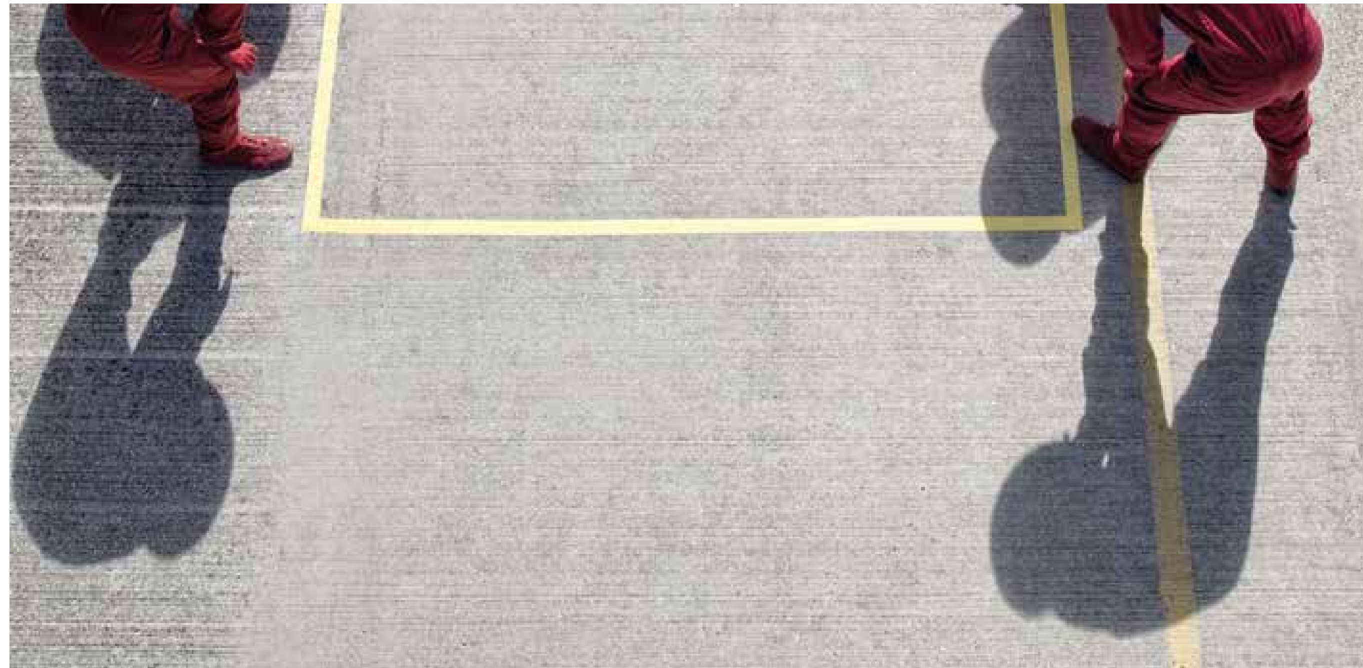
This particular bidder environment brings opportunities to promote competition. Acquiring companies in distress offers strategic buyers the opportunity to increase the transaction's synergy potential significantly as the organisational structure of the target can be modified, for example through insolvency proceedings, even before the transaction is closed. This increases the pricing pressure on financial investors. On the other hand, the speed at which distressed M&A transactions can be executed by financial investors places added pressure on strategic investors, who might otherwise miss out on making a transformative acquisition.

Apart from securing the highest possible purchase price, it is crucial to identify alternative value drivers. Depending on the structure of the transaction, the 'transaction value' can be increased significantly for the seller by minimising post-closing risks and implementing potential earn-out mechanisms.

Purchase agreements follow their own rules

Purchase agreements in distressed M&A transactions follow their own rules. Sellers frequently take a clean-cut approach – especially in cases where the seller 'pays' the buyer a dowry in the form of a negative purchase price. In such instances, sellers demand that risks associated with the target's past business operations be allocated exclusively to the buyer and that there be as few representations and warranties as possible, which under different circumstances would be considered aggressive. Usually, agreements for the purchase of distressed targets also include provisions addressing the seller's liability risks that might materialise in an insolvency after closing, especially if the intended restructuring fails. In this context, liability risks associated with intra-group financing measures (e.g. loans granted during the crisis), intra-group transactions and pre-closing carve-outs are of paramount importance – particularly when considering risks posed by insolvency avoidance actions (Insolvenzanfechtung).

The linchpin of the contractual defence mechanism is found in provisions stipulating that the buyer is obliged to indemnify the seller against any and all claims asserted by third parties, such as creditors or an insolvency administrator, in the event of the target's insolvency, also known as 'insolvency indemnity'. Mirroring that indemnity, purchase agreements frequently provide for positive covenants, specifically so-called 'solvency covenants', under which the buyer undertakes to provide the target with ongoing financing for a certain period of time. Closely connected with such covenants are ring-fencing provisions. These prohibit the buyer from taking certain measures with respect to the target for a specific period of time post-closing, e.g. withdrawing company funds in the form of dividends or management fees. In the event that the seller is unable to obtain reliable buyer commitments, the seller may seek to protect itself against certain insolvency risks by having the transaction implemented on the basis of a restructuring opinion prepared by an independent expert. In bidder processes, great care and skill are especially required when it comes to the restructuring opinion: it needs to be based on the business plan of the successful bidder validated by the opinion provider, although the selection of the successful bidder depends to a large extent on the business case presented by the bidder.



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Exercising great care and skill when acquiring insolvent companies

Buyers also require specific expertise on insolvency if a restructuring has failed and the target has already filed for insolvency. In that event, the buyer may opt for buying either the insolvent company by way of an asset deal (übertragende Sanierung), or shares in the insolvent entity by way of an insolvency or restructuring plan. While both options generally permit the settlement of existing liabilities, they differ quite considerably in other respects and must be weighed up by taking the facts of the individual case into account. Finally, buyers of insolvent companies benefit from transaction experience: only buyers who are familiar with the demands of an insolvency administrator, and who manage to steer clear of the no-nos under insolvency law, will succeed in competitive bidding processes.

Due to the many unique characteristics of distressed M&A transactions, such processes are not carried out via a standardised approach. Distressed M&A transactions require not only a holistic approach when preparing and executing the transaction, but also the experience that is necessary to be able to respond with flexibility in extremely dynamic processes and special circumstances. In view of the expected increase in deal volume in the short and medium term, market participants are well advised to familiarise themselves with the special aspects of transactions involving distressed companies in order to be able to successfully execute accretive acquisitions as well as value-maximising sales that also safeguard jobs. Distressed transactions are usually perceived as carrying a high inherent risk at the time of execution. Accordingly, only those sellers and investors who are well-prepared and well-positioned when entering these processes will be able to achieve a high selling price/an attractive and predictable long-term investment return.

EXPERTISE

Pre-closing covenants and integration planning – antitrust challenges remain

In its 2018 landmark judgment in the Ernst & Young case (C 633/16), the European Court of Justice provided much needed clarification on the scope of the EU Merger Regulation's gun-jumping provision. The Court held that conduct amounts to gun-jumping only if it does, in whole or in part, in fact or in law, contribute to a change in control of the target undertaking – that is to say, the conduct must be required for that purpose. The fact that conduct is caused by the transaction, or yields market effects, is not deemed sufficient.

M&A practitioners are still left facing unanswered questions, however, with some of them being highly relevant. Since the EU Commission's decision in the Altice matter, this is particularly true for issues that come up in connection with pre-closing covenants and integration planning. On 22 September 2021, the General Court largely confirmed the EU Commission's decision – unfortunately without providing greater clarity for M&A practitioners.

Typically, pre-closing covenants impose certain obligations on the seller and/or the target company such as requirements to seek the acquirer's consent for certain measures in order to preserve the value of the target company preserved between signing and closing. In addition, for a number of years, parties have increasingly been using the time between signing and closing to conduct integration planning. Ideally, the target company should be able to continue operating its business seamlessly within the organisational structure of the new group from day 1 after the closing. In both cases, the merger control law's gun-jumping provisions (e.g., Article 7 of the EC Merger Regulation) and the general prohibition of cartel behaviour (specifically Article 101 TFEU) must be observed. Under the gun-jumping rules, the parties are forbidden from implementing the transaction before the competent antitrust authority, such as the EU Commission, has granted the required merger control approval. The prohibition of cartel behaviour is relevant in particular if the acquirer and the target company are actual or potential competitors. The prohibition obliges the parties, until the date of closing, to conduct their business as separate undertakings and to refrain from coordinating their (market) behaviour and exchanging commercially sensitive information.

In 2018, the EU Commission startled M&A practitioners with its decision in the Altice matter, in which PT Portugal, a Portuguese telecommunications and multimedia company, was to be acquired by Altice, a competing cable and telecommunications provider.

Extensive interference with the target company

The share purchase agreement provided for an extensive list of measures that required the prior consent of Altice, not to be unreasonably withheld. The EU Commission determined that Altice had also given instructions to the target company, and had requested and received commercially sensitive information from the target company in a number of instances between signing and closing. The EU Commission viewed this as a breach of both the gun-jumping rules (Article 7 EU Merger Regulation) and the obligation to notify the Commission of the concentration prior to its implementation (Article 4(1) EU Merger Regulation). The Commission imposed a fine of EUR 62.5 million for each of these breaches, i.e. a total of EUR 125 million.

On 22 September 2021, the General Court confirmed the EU Commission's decision on the merits of the case, slightly reducing the amount of the fine by c. EUR 6.3 million to a total of now EUR 118.7 million (Altice Europe v Commission, Case T-425/18). Specifically, the Court shared the EU Commission's view that granting Altice the right to veto the following measures was unlawful: to appoint and dismiss any officer or director of the target company; to change the target company's pricing policy or to amend its existing standard terms and conditions, excluding, however, any day-to-day action specifically aimed at preventing customer churn; to enter into any transaction or commitment, or assume or incur any liability, the value of which exceeds certain (low) monetary thresholds; to conclude, amend and terminate any contracts that are material for the target company; and to acquire assets the value of which exceeds certain (low) monetary thresholds. Similarly, the Court held that Altice had committed gun-jumping in several instances in which Altice gave instructions to, and/or coordinated with, the target company concerning a campaign to promote post-paid mobile services; concerning the renewal of a distribution agreement, specifically for a certain TV channel; concerning the selection of, and the conclusion of agreements with, specific suppliers, particularly providers of radio access network services and television content; concerning the expansion of the range of products offered, specifically the inclusion of a new television channel; concerning the acquisition of certain assets, namely parts of the national telecommunications network; and concerning a call for tenders for the provision of outsourcing services and solutions by third parties.

Bad cases – bad law

Any hope by M&A practitioners that the Court might correct the EU Commission's decision at least in part was crushed by the judgment of 22 September. One might also – and not entirely without reason – criticise the judgment for being marked by a 'certain' ignorance of real-world practice. For example, the Court suggested that, if the contracting parties have any doubt as to the permissibility of individual SPA clauses or of any particular course of conduct, it is for the parties to consult the EU Commission or to seek an exemption from the duty to comply with the prohibition of implementation. Given the dynamics of an M&A transaction, this is simply unrealistic. The EU Commission will not have itself been roped in as a legal adviser of the contracting parties, and being granted an exemption from the gun-jumping rules is conceivable in exceptional circumstances only. Ultimately, however, the judgment did not come as a total surprise. In substance, it must be conceded that the scope of some of the covenants was unusually wide and that Altice did interfere rather extensively with the target company's day-to-day business in individual cases. 'Bad cases make bad law,' you might say.

But still: M&A practitioners will continue to use pre-closing covenants even after the Altice judgment – and, in general, justifiably so. However, the parties and their legal advisers will have to give (even) more attention to the wording of such covenants. In any event, the Court considers pre-closing covenants permissible, if and to the extent that they are necessary to preserve the value of the business acquired between the date of signing and the date of closing. The Court has also left the door slightly open for provisions necessary to prevent the commercial integrity of the target company from being affected. In both cases, however, the purchaser must not be afforded the possibility to exercise decisive influence over the target company. Where exactly the 'red line' is drawn unfortunately still remains unclear even after the Altice judgment. At any rate, contracting parties should refrain from

stipulating consent requirements or veto rights as regards the business plan, annual budget and personnel of the target company's management; the target company's ordinary course of business; and measures that will have a relatively minor financial impact when compared to the value of the acquired business.

Uncertainties remain

It is unclear whether the judgment will have consequences for the integration planning process. The Court decision was eagerly awaited to weigh in on whether and, if so, under what conditions the mere exchange of commercially sensitive information (also) constituted gun-jumping. If so, any such sharing of information would be subject to restrictions where the acquirer and the target company are not competitors (these cases would not raise issues under Article 101 TFEU). Regrettably, the judgment does not contain any clear message on this point. According to the judgment, the EU Commission did not consider the exchange of commercially sensitive information as a separate infringement, but merely as having contributed to demonstrating that Altice had exercised decisive influence on the target company by taking the measures listed above. Consequently, this could not be deemed as a 'mere' exchange of information. On the other hand, the Court pointed out that the exchanges of information continued after the signing of the SPA and, therefore, were not needed by the acquirer to assess the value of the business. In addition, according to the Court, the information so exchanged was highly sensitive both commercially and competitively. Accordingly, Altice as the acquirer had access to information to which it should not have had – the consequences of this remain to be seen.

In light of the above, M&A practitioners will not be able to gain any new insights from the Altice judgment with regard to the issue as to whether and to what extent contracting parties are permitted to prepare integration in the period leading up to closing. Therefore, it is not necessary to introduce new or more stringent limits on what is permissible in terms of integration planning. Instead, the following continues to apply: measures are considered permissible if they are purely preparatory and serve the purpose of preparing for the closing a transaction. Measures are not considered permissible, however, if they amount to early implementation of the concentration in that the acquirer has already been given the possibility of exercising decisive influence over the target company or in that both companies are already acting as if they were a single entity. If the acquirer and the target company are competitors, commercially sensitive information may be exchanged only through a clean team. Likewise, the purpose of any such exchange must not be to promote measures that ultimately, per se, constitute an interference with the target company's business.

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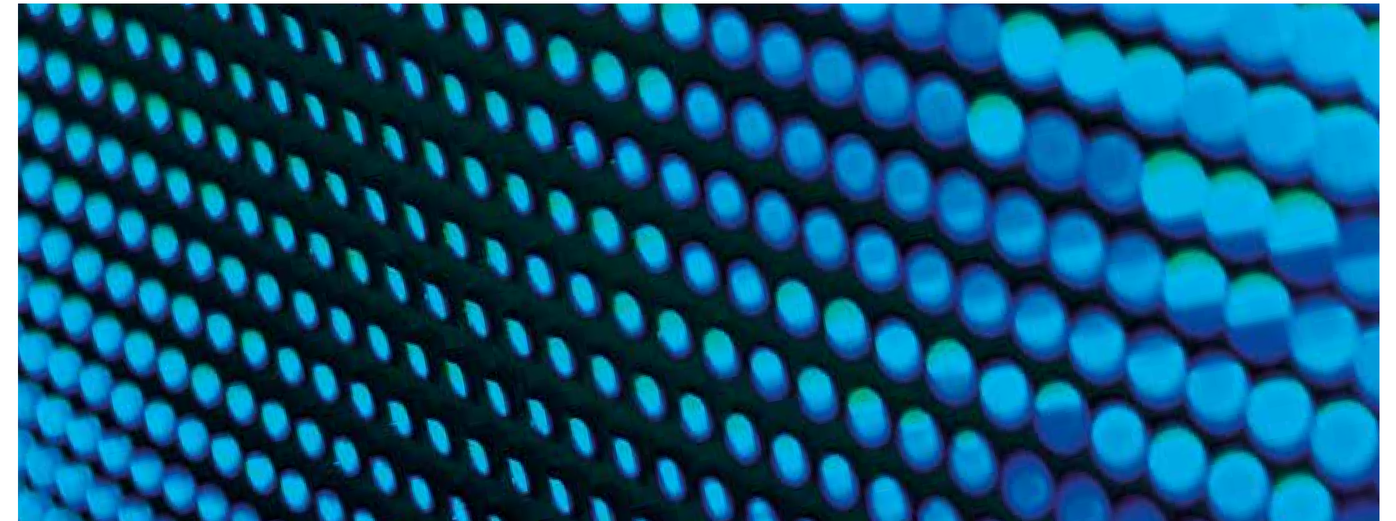


SURVEY

The supervisory board – providing impetus beyond compliance

Supervisory board members of German companies would like the position of the supervisory board to be strengthened and the legal framework to be reformed. This is one of the main findings of the 2021 supervisory board survey conducted by Hengeler Mueller and the Arbeitskreis deutscher Aufsichtsrat e.V. (German Supervisory Board Working Group – AdAR e.V.).

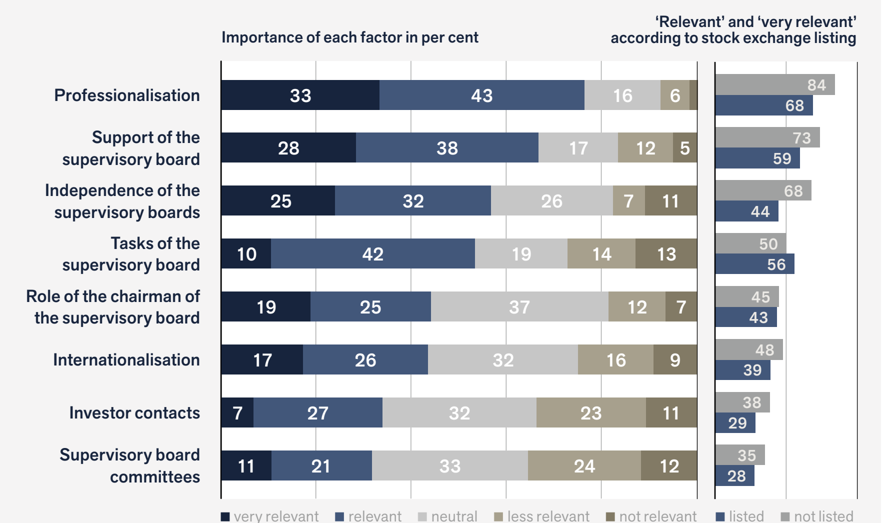
Roughly three-quarters of respondents would like to see professionalisation of the supervisory board. They do not believe that self-regulation is sufficient to bring about this change; instead, they consider that the legislature needs to act. This particularly applies for unlisted companies, 84% of which support the idea, while just 68% of listed companies' supervisory board members agree. Two-thirds of respondents want the supervisory board to receive greater support, for example having its own budget, which should also be a legal requirement.

Growing time commitment

The desire for more support is also reflected in the challenges facing supervisory board

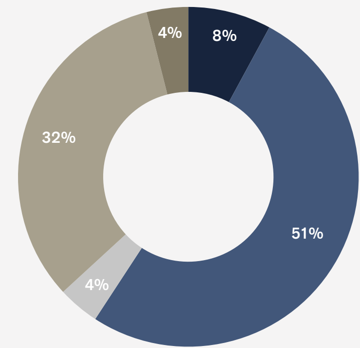
Supervisory boards of listed companies see less need for reform

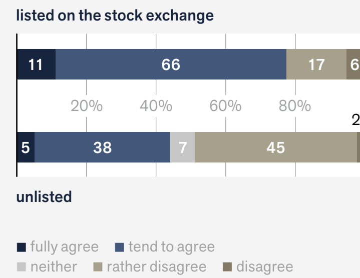
On which topics do you see a need for reform with regard to the legal framework of supervisory board activities?



Supervisory board members of unlisted companies under greater time pressure

Do you think that supervisory boards usually have sufficient time resources available?





members. Two-thirds of those surveyed consider the adequacy of their resources to be the biggest challenge when it comes to performing their services. As the complexities of the role require an ever greater commitment, members of supervisory boards do not always consider themselves able to meet this increased demand on their time. One reason may be that there is insufficient support infrastructure at individual companies to assist board members in their preparation of certain topics.

At just two percentage points behind, the qualifications of supervisory board members is the next most significant challenge. Separated by the same percentage margin, efficiency is seen as the third biggest challenge. The importance of qualifications reflects supervisory board members' desire for greater professionalisation. In this context, the members of supervisory boards of listed companies attach the same importance to further training for individual supervisory board members as they do to company-specific training provided by the company itself. By contrast, the members of supervisory boards of unlisted companies prefer individual development opportunities or training offered by external providers.

Compliance has priority

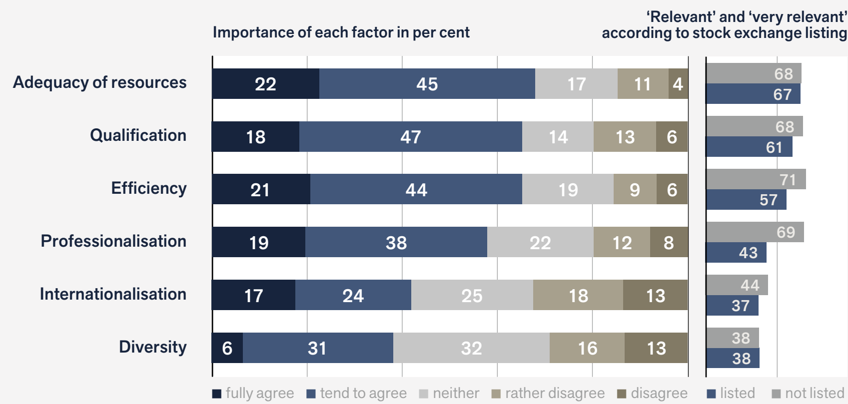
But where does the obvious desire to see the position of supervisory boards strengthened originate? The answer can be found by taking a look at what is on the agenda of many supervisory boards: compliance issues are not only continually making headlines in the business media, they also rank second on supervisory board agendas following the handling of urgent problems arising from the coronavirus pandemic. This shows that supervisory boards have recognised that compliance is a top priority which they need to address. A further indicator of its importance is that half of the companies surveyed – and nearly twice as many listed as unlisted companies – have already established a direct reporting line from their compliance or internal audit departments to their supervisory boards. Moreover, at almost all of the listed companies surveyed, compliance and internal audit staff are giving a presentation in at least one supervisory board or audit committee meeting each year. Supervisory board representatives of unlisted companies still have a lot of catching up to do in this respect; the same applies when it comes to audit committee chairpersons gathering information directly from senior staff.

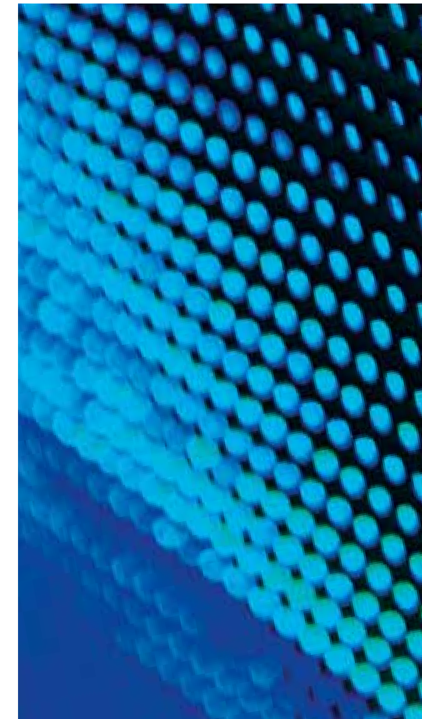
Decarbonisation falls far behind

But what about other major issues relating to the future of society besides compliance? Notably, ESG ranks fourth on the agenda with just under two-thirds of respondents finding it relevant or very relevant. Decarbonisation as an individual issue is relevant or very relevant for slightly more than one-third of supervisory board members. However, that means it only manages to take the penultimate place on supervisory board agendas. Slightly ahead of decarbonisation, diversity is only marginally more relevant, even though just under half of the supervisory board members surveyed do consider it relevant or very relevant. One reason for this could be that many companies are currently still working on further developing appropriate metrics and governance structures before submitting them to the supervisory board for deliberation and monitoring. In last place, co-determination is virtually a non-issue receiving no priority on agendas.

Resourcing and skills development are the biggest challenges, with strong differences between listed and unlisted companies

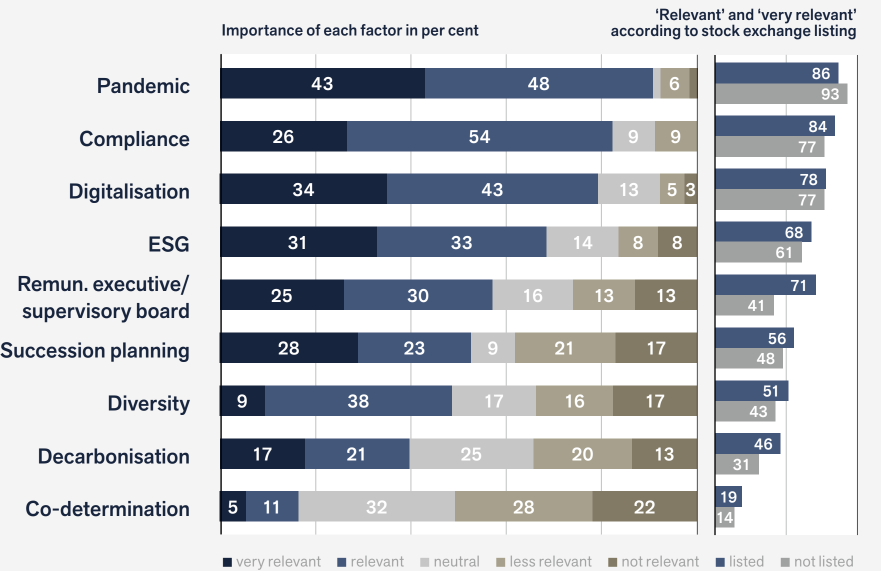
Where do you see the biggest challenges for your own supervisory board's activities?





The pandemic dominates the agenda of supervisory boards

Which topics are particularly high on your agenda in 2021?



More resources needed

The study shows that continuous adjustments are being made to reflect increased demands on supervisory boards. If these adjustments are successful, then the position of the supervisory board as a company's most senior supervisory body will be appreciably strengthened. Through measures such as laying their own reporting lines into the company and obtaining better resources, supervisory board members will be on a more equal footing – in organisational terms – with the executive board members whom they monitor. The strong focus on compliance aspects in this context is understandable, not least because of the risks that supervisory board members themselves face in performing their services, but also because of headline-grabbing corporate scandals leaving enormous collateral damage in their wake. The priorities are ambitious and complex, but priorities alone will not ultimately be enough.

Wanted: impetus provider

Although limited in its indirect role as the executive board's sparring partner, the supervisory board must also be an impetus provider and monitor with regard to significant changes that are already looming, but cannot yet be found in domestic legislation. Accordingly, it needs to be stronger in manoeuvring itself ahead of a wave of change. For this reason, additional resources would be justified – and well invested.

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EXPERTISE

The Germany-wide digital Competition Register is up and running

Digitalisation is advancing in public procurement. In the new digital Competition Register, data on offences that can result in exclusion from tender procedures is now being collected from across Germany. Entries in the Competition Register can be retrieved by public authorities with just a few clicks, making compliance systems and cooperation with investigative authorities even more important. In the long run, the importance of the Competition Register will probably not be confined to public procurement. As is often the case with digitalisation, it can be expected that this digital transformation will also have an impact on other areas.

More than four years have passed since the German legislator decided to introduce a Germany-wide Competition Register to protect competition in public contracts and concessions. It is designed to facilitate public authorities' review of whether companies must, or can, be excluded from tender procedures due to offences attributed to them. Since 1 December 2021, German authorities have been obliged to notify certain offences to the Federal Cartel Office (Bundeskartellamt), which collects and registers this information. Simultaneously, public contracting authorities have also been able to access the Competition Register for the first time. From 1 June 2022, they will be obliged to retrieve the information stored in the Competition Register before awarding a contract above a certain value.

The offences recorded in the Competition Register include: money laundering, corruption, fraud affecting public budgets, the non-payment of social security contributions, tax evasion, violations of both the Act to Combat Clandestine Employment (Schwarzarbeitsbekämpfungsgesetz) and the Minimum Wage Act (Mindestlohngesetz), as well as cartel infringements and public procurement fraud. This list will probably be expanded further. For example, violations of the Supply Chain Act (Lieferket tensorgfaltspflichtengesetz), which comes into force on 1 January 2023, will be registered. It is also being evaluated whether the EU Commission's antitrust decisions can be included in addition to antitrust decisions taken by the Federal Cartel Office. Legal infringements of companies and company representatives are registered if there is a conviction by final judgment, a penalty order, or an unappealable decision to impose fines. Cartel infringements are an exception to the rule. Due to the typically lengthy appeal proceedings, they are registered at the same time that a fine is imposed.

No automatical exclusion from public procurement procedures

An entry in the Competition Register does not automatically result in a company being excluded from public procurement procedures. This decision will continue to be made based on the nature of the violation recorded in the Competition Register and a prediction about the respective company's legally compliant, proper and diligent performance of the contract. Corruption and money laundering offences, for instance, result in mandatory exclusion from tender procedures. In contrast, an exclusion in the event of cartel infringements is at the discretion of the public contracting authorities.

The importance of the Competition Register could extend far beyond public procurement. Companies may request access to information on the entries in the Competition Register concerning them. That information notice could become a 'certificate of good standing' for companies. It must be expected that, in preparing their audit opinions, auditors will request that an information notice be submitted and explanations be given where there are entries. Furthermore, it is conceivable that contracting partners and investors might do the same in contractual negotiations.

Information on violations of the law is digitally stored in the Competition Register for three or five years, depending on the category of offence. Companies that depend on public contracts or concessions, or which need a clean 'certificate of good standing' and therefore want to delete entries from the register earlier than provided for by law, may 'self-clean'. To delete an entry, they must provide proof that they have actively cooperated with the investigating authorities and the public contracting authorities: by comprehensively clarifying the facts and circumstances associated with the registered offence, that they have undertaken to compensate any damage, taken effective compliance measures, and remedied any default of payments of taxes, charges or social security contributions.

Compliance systems' review

Due to the cooperation requirement, companies will have to plan a course for successful 'self-cleaning' at an early stage and prepare themselves to actively cooperate in case an investigation is launched. Moreover, companies will have to review their compliance systems and adapt them to the standards required by the authorities. The Federal Cartel Office has provided some guidance. On 25 November 2021, it published guidelines on the early deletion of an entry from the Competition Register that, among other things, includes indications of compliance standards.

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EXPERTISE

Celebrating the 20th anniversary of the European Company: an unexpected success story

After a tantalisingly long process, EU Member States finally reached agreement on the Statute for a European Company (SE) at the Nice Summit in December 2000 (the 'miracle of Nice'). Ten months later, in October 2001, the Council adopted the SE Regulation and the SE Employee Involvement Directive.

Many at the time doubted whether the SE would prevail or if it was actually a viable legal form for a company because it was perceived as being too unwieldy, too complex and too time-consuming in terms of formation. They would be proved wrong. By the end of 2020, an impressive 3,358 companies were operating in the EU as an SE entity, 718 of them in Germany. Admittedly, there are only 413 operationally active SEs much smaller than the number of shelf companies or SEs without employees. But a large number of well-known SEs exist. After Allianz's spectacular early conversion into an SE, there are now 13 SEs included in the DAX and 9 in the MDAX. Familiar examples of SEs include: Airbus, BASF, Bilfinger, E.ON, MAN, Porsche, ProSiebenSat.1, Puma, SAP, Sixt, Springer, Vonovia and Zalando. German companies are therefore well represented. The surprise frontrunner in Europe, however, is the Czech Republic, where c. 2,160 companies are operating as SEs. Besides shelf companies, most of them are intermediate holding companies with fewer than five employees that prefer the SE's corporate governance structure over the alternatives provided under national corporate law.

Co-determination as a driving force

In many cases, the corporate form of an SE was chosen for co-determination reasons. Unlike a German corporation, the SE makes it possible to negotiate the regime governing co-determination with employee representatives and to 'freeze' the co-determination level, in principle, at the time when the SE is being formed. Of the 413 German SEs that have employees, 21 are co-determined with equal representation of shareholder and employee representatives on the supervisory board, while 48 are co-determined having one third of the supervisory board members being employee representatives or are co-determined in some other way. Other German SEs are not co-determined.

One peculiarity of a co-determined SE with equal representation is that its general meeting can determine the number of members on the supervisory board. This decision therefore rests with the shareholders. Unlike co-determination with equal representation at companies subject to German corporate law, there is no mandatory legal provision as regards SE co-determination that would require the number of supervisory board members to be determined depending on the number of employees (working in Germany). This means that, for example, reducing the supervisory board of a German stock corporation (Aktiengesellschaft) with 20 members to an SE supervisory board with 12 members might actually help in making the work of the board more efficient.

During the last decade, the total number of SEs with employees has risen continuously, both in Germany and in the EU as a whole. Compared to 2011, when 92 SEs with employees had their registered office in Germany, that number more than quadrupled by 2020. The total number of SEs in the European Economic Area shows a similar increase – from 197 SEs with employees in 2011 to 749 in 2020.

Many difficult legal issues, very few disputes

In addition to the special co-determination regime, there are further obvious benefits: it is not necessary within an SE group to have subsidiaries in many different European countries. Instead, subsidiaries can be integrated into the SE as enterprises (Betriebe), provided that it is not necessary for tax reasons to have a corporate law function in a different EU Member State. Other benefits are the European 'Corporate Identity' and the ability to transfer the registered office to another EU Member State while keeping the legal form. The latter benefit is, however, significantly offset by the planned implementation of the Mobility Directive of 27 November 2019 (Directive 2019/1212) and the related future opportunities for cross-border conversions (change of legal form, spin-off and revision of the already established merger).

It is also surprising that notwithstanding many difficult legal issues arising from the relationship of the provisions of the SE legislation at an EU level, the German SE Implementation Act and the standard rules of the applicable German stock corporation law, there have hardly been any legal disputes with regard to SE-specific law before the German courts, with the exception of a few disputes under co-determination law. Apparently, minority shareholders do not engage in disputes in this area.

German lawmakers – like those of other EU Member States – must implement the EU Mobility Directive by the end of December 2023. It contains some innovative elements that should also be extended to apply to the formation of an SE; in particular, a spin-off to found a new company should also be permitted as a way in which an SE can be formed. The possibility for the acquiring company to correct the exchange ratio related to the merger due to appraisal proceedings before a court, by issuing additional shares instead of making an additional cash payment, should also be provided for the formation of an SE. In fact, this possibility will also be granted – as provided for in the Mobility Directive – to the shareholders of the acquiring company.

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OUTLOOK

Additional compliance burdens to be expected

In November 2021, Germany's new governing parties, the Social Democrats (SPD), Greens and the Free Democrats (FDP), presented their coalition agreement. It was formally signed in December. On three key compliance issues – corporate sanctions, whistleblower protection and human rights protection in supply chain management – there are indications that, in the medium term, implementation of the new Government's plans will create significant additional regulatory burdens for German business.

Corporate sanctions

According to their agreement, the coalition parties intend to review the provisions on corporate sanctions, including those on sanction amounts, in order to increase legal certainty for companies with regard to their compliance obligations and to create a precise legal framework for internal investigations. Even from an initial review, one cannot help thinking that the new provisions will be principally designed to introduce higher sanctions for companies. Even though the primary reason given for their introduction is to create greater legal certainty, this does not necessitate a corporate sanctions law, as apparently favoured by representatives of the SPD and the Greens. By the same token, discussion on the draft German Act on the Sanctioning of Entities (Verbandssanktionengesetz) during the last legislative term showed that lawmakers very quickly reached their limits in providing for specific compliance obligations due to the diverse nature of the parties affected by the regulations. The same is likely to apply to the establishment of detailed provisions on internal investigations: among other reasons, this is because of the immediate relevance to labour and co-determination law, as well as to data protection law, which is primarily established by European law.

Whistleblower protection – implementation of the EU Whistleblower Directive

Another item on the Government's agenda is the legal certainty and practical transposition of the EU Whistleblower Directive. Whistleblowers are to be protected against any legal disadvantages - not only when reporting breaches of EU law, but also when reporting significant rule breaches or other significant misconduct where detection is notably in the public interest. During the last legislative term, implementation of the EU Whistleblower Directive failed due to opposition from the Conservatives to over-achieving the transposition of the Directive into national law (also known as 'gold-plating'). Now, gold-plating will be carried out, i.e. statutory whistleblower protection, not only in the case of breaches of EU law as provided for in the Directive, but also in cases far beyond that. What might seem appropriate from the whistleblower's viewpoint raises serious questions from the perspective of other affected parties. In some cases, whistleblower protection may entail far-reaching encroachments on the affected companies' fundamental rights (and possible restrictions on the functions of relevant government bodies). The coalition agreement appears to provide for such protection even where there has been no violation of law but (lawful) 'considerable misconduct'. –If this policy decision would be transposed into law, the transposition act's conformity with constitutional law would require a thorough review.

Supply chains

Furthermore, the new Government is backing an effective EU Due Diligence Act based on the UN Guiding Principles on Business and Human Rights that does not place undue strain on SMEs. Moreover, the German Act on Corporate Due Diligence in Supply Chains is to be implemented without alteration and will possibly be improved. From a company perspective, keeping the current version of the German Act on Corporate Due Diligence in Supply Chains and implementing it unaltered can be viewed as being in the interests of legal certainty and predictability. Supporting an 'effective EU Due Diligence Act' will, however, probably result in further increases to the administrative burden and create sanction risks for companies. In light of how the European law-making process has evolved, it is anticipated that obligations beyond those which are applicable under national law – in particular for SMEs – will be included at the EU level.

Outlook

Implementation of the amendments, as proposed in the coalition agreement with regard to current compliance matters, would materially change the legal framework for the companies concerned. Currently, it appears probable that this will result in an additional burden on them for preventive compliance and possibly lead to subsequent stricter sanctioning as well. Companies should therefore assess the draft legislative proposals in good time and address any necessary concerns. Equally, this may also present opportunities, particularly with a view to refining compliance management systems and taking account of ESG considerations. Companies should exploit these opportunities at the earliest possible stage.

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NEWS

New partners and counsel 2022

> *We are very pleased to announce that 14 outstanding lawyers from within our own ranks have become partners and counsel at the firm. Above all, our new partners and counsel have impressed upon us their expertise, personality and team spirit. Thanks to them, we are strengthening important growth areas of the firm in a focused manner.*

Georg Frowein and Rainer Krause, Co-Managing Partners

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AWARDS

Recent recognition

Benchmark Litigation Europe Awards 2021

Hengeler Mueller has been named 'Germany Firm of the Year' at Benchmark Litigation's Europe Awards 2021.

IFLR Europe Awards 2021

Hengeler Mueller has been recognised as both 'Germany Firm of the Year' and 'Germany Corporate Firm of the Year' at the IFLR Europe Awards 2021.

Private Equity Rising Stars: Europe's Best Up-and-Coming Lawyers 2021

Hengeler Mueller partner Daniel Möritz has been listed by Legal Week among the 25 best young private equity lawyers across the U.K. and Europe.

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