HENGELER MUELLER

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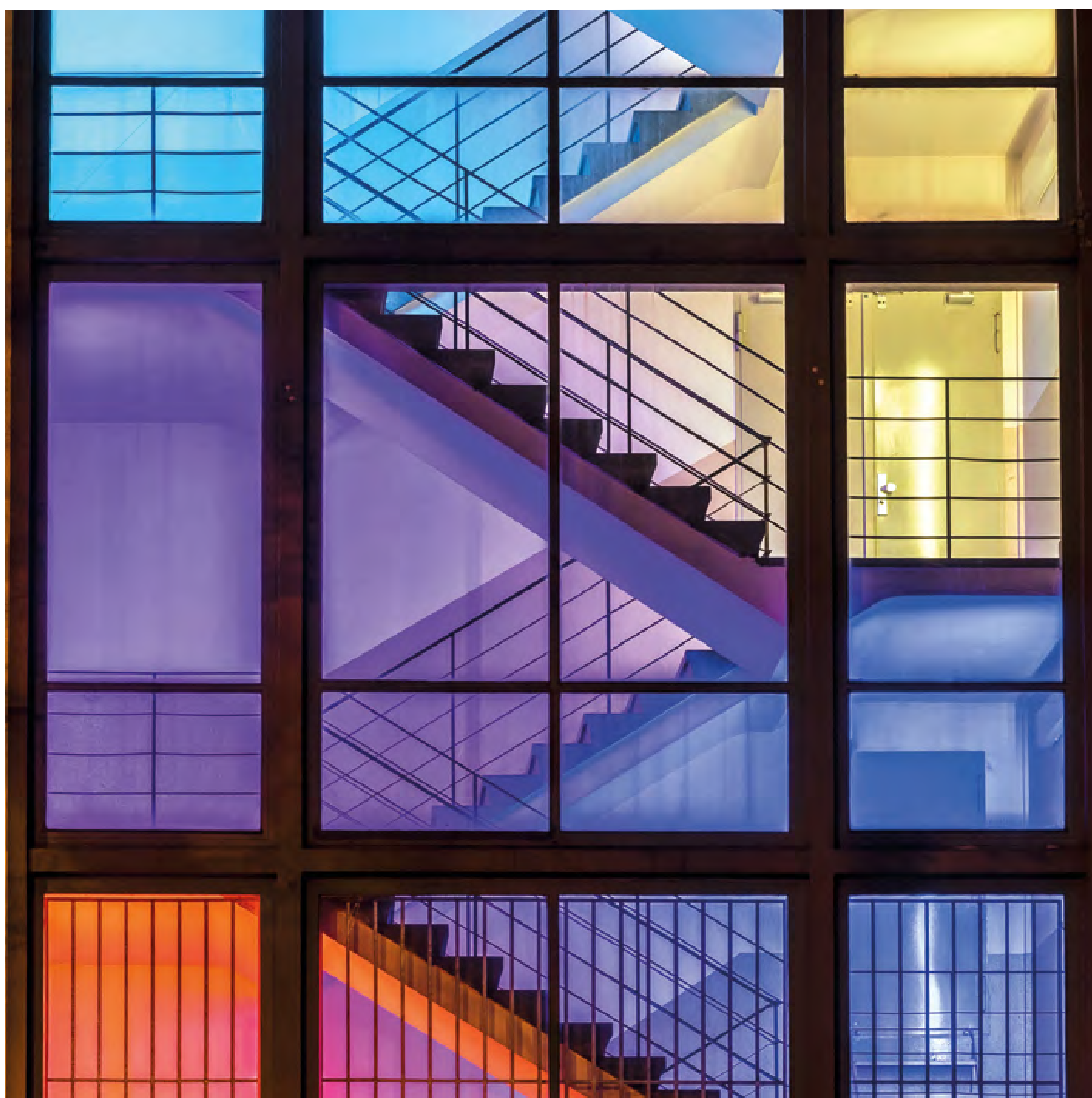
M&A SNAPSHOT | RESTRUCTURING OUTLOOK | TOMORROW'S AGMS | NEW PARTNERS AND COUNSEL



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Editorial

Dear friends,

A challenging year is behind us. Our work has changed, and much of what seemed a given in 2019 was put to the test in 2020. However, during the Covid-19 crisis, apart from all the difficulties, we have also experienced many positives, in particular the close team-up with our clients and our staff. And for that we are especially grateful.

We are equally grateful that we were able to support a significant number of our clients getting through the crisis – particularly in financing and restructuring matters. The ECM market was also active. In 2020, we were involved in all major initial public offerings in Germany. After a brief dip in the spring, transaction business recovered over the summer and we are delighted that, together with our Best Friends, we ended the year at the top of the league tables again.

Many of the articles in this newsletter deal with issues that are affecting us due to the pandemic, such as our experiences with virtual general meetings, which will also be relevant in the upcoming season. We also share what has been keeping our restructuring practice particularly busy since Covid-19 emerged.

What will 2021 bring? We are not over the pandemic yet, but we believe that despite all of the challenges we can look forward with great optimism towards the future. Please take care and stay safe!

Rainer Krause
Co-Managing Partner

Georg Frowein
Co-Managing Partner

Yours sincerely,

Georg Frowein

Rainer Krause

M&A SNAPSHOT

European and German M&A: cautious optimism, remaining risks

In line with the trend in global dealmaking, European and German M&A experienced a spectacular recovery in the second half of 2020. This followed a dramatic fall in activity during the first half of the year, particularly in Q2, when the spread of Covid-19 triggered global lockdowns which brought business to a standstill. Dealmakers appear to be cautiously optimistic about 2021, as the rollout of several vaccines will facilitate a gradual return towards normal life over the coming months.

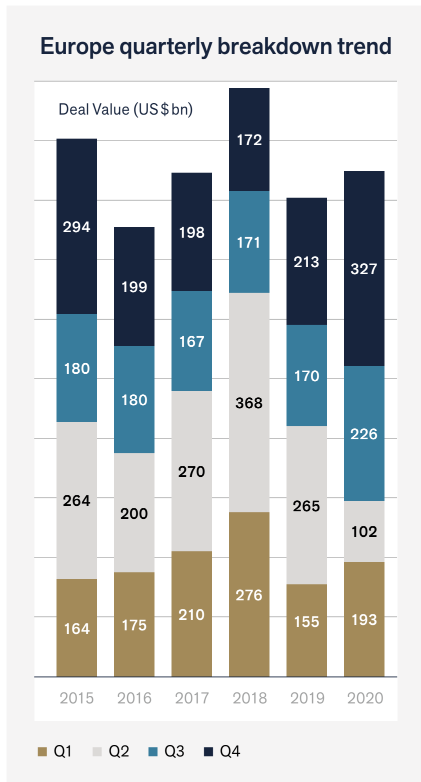
Notwithstanding the pandemic, 2020 deal numbers were still impressive: USD 847.2bn (USD 802.3bn in 2019) was spent on European assets across 6,658 deals, representing a 5.6% rise in aggregate value. This was primarily due to the recovery in the second half, when USD 552.7bn in deal values was recorded – 87.7% higher than the USD 294.5bn seen in the first six months. The strong second half was also reflected in German transactional business. In 2020 overall, a total of 866 deals with a combined value of USD 103bn were recorded.

Because of the restrictions limiting international travel and the traditional methods of conducting M&A, most European M&A was conducted internally last year. Foreign investment into Europe represented only 37.8% of the total value and just 15.4% of the volume, – the lowest value share since 2015 and the lowest volume share since 2009. In the wake of tightening investment controls in Europe and EU member states (please see article on page 6), this trend may continue.

Carve outs and restructurings driving M&A

Carve outs remained important drivers of M&A activity last year, not least due to the successful spin-offs of Siemens Healthineers and Siemens Energy. Such transactions have become increasingly appealing to boards of directors. In addition, the return of activist investors, who initially held back on new campaigns in Germany and Europe during the pandemic, could further fuel the spin-off business in 2021.

Post-Covid restructuring deals and distressed transactions could also play a significant role in shaping the transaction business this year. In sectors such as automotive, engineering and steel, valuations



are under pressure because of declining operating earnings. Other sectors, such as retail, are facing permanent changes to their market. It is uncertain to what extent changing consumer habits will also have an impact on companies in the travel, entertainment and tourism industries, as well as the hospitality sector, all of which were heavily affected by the pandemic, and how quickly they will be able to recover (please see dialogue on page 11).

Clear focus on technology

Corporates and sponsors alike have long been investors in technology. The pandemic has further accelerated their efforts to digitalise products and services, leading to an increased demand to acquire tech-related assets. Last year, European technology M&A surged to a record annual value on Mergermarket, reaching USD 119.5bn across 1,230 deals. Private equity firms have been particularly active in the sector. With 341 transactions, a 24.1% share of 2020 European buyouts, tech has now leapfrogged both industrials & chemicals as the primary destination for private equity investment by deal count.

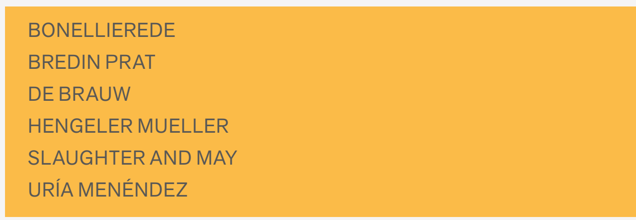
Private equity firms remained active throughout 2020, continuing to deploy the very large amounts of dry-powder at their disposal. Although there was a brief lull in sponsor-led investment immediately after the Covid outbreak, PE firms were one of the first movers when economies began to reopen over the summer. In 2020, a total of USD 205.2bn was spent by PE firms in Europe across 1,415 deals, which represents the highest annual value since 2007. As a result, private equity buyouts accounted for a 24.2% share of the total European M&A value in 2020 – its highest share since 2006. Fundraising also remained quite resilient throughout last year, indicating that European private equity firms should remain active in 2021.

Numerous challenges ahead

Despite the renewed optimism, numerous challenges still face dealmakers in the year ahead. There will have been a sigh of relief, however, that the EU and UK were eventually able to avoid a potentially chaotic no deal scenario. Nevertheless, many unanswered questions remain about how the deal will work in practice. In addition, there are the long-term economic and practical effects of the Covid-19 pandemic. The recovery process is likely to be very protracted, which could also have a strong impact on the vitality of the transaction business.

Best Friends run at the top

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.



2020 European legal adviser league table ranked by value

Rank	House	Value (USD M)	Number of Deals
1	Best Friends Group	248,693	220
2	Cleary Gottlieb Steen & Hamilton LLP	180,716	51
3	Freshfields Bruckhaus Deringer LLP	175,962	127
4	Latham & Watkins LLP	167,345	146
5	Linklaters	143,164	165
6	White & Case LLP	139,991	208
7	Weil Gotshal & Manges LLP	126,845	80
8	Clifford Chance LLP	121,060	132
9	Allen & Overy LLP	114,922	164
10	Simpson Thacher & Bartlett LLP	96,733	21

The League Table is based on announced deals with European targets between 01/01/2020 and 31/12/2020.

Source: Mergermarket, Global and regional M&A activity during 2020

Broad scope, tightened scrutiny

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Triggered by shifts in trade policy, Germany has been taking a tougher stance on foreign direct investment (FDI) screening. Transactions in sensitive areas have been subjected to statutory clearance requirements and the number of in-depth reviews is rising. As the global trend towards further FDI regulation continues, combined with the European cooperation mechanism under the EU FDI Screening (EUFIS) Regulation, FDI considerations will become an even more important part of cross-border M&A.

Fundamental changes in global trade have not only materialised in tariffs, sanctions and failed negotiations of trade agreements. The EU and Germany have also recalibrated their perception of the impact of certain state-supported investments and industrial strategies, as well as the vulnerability of certain sectors considering European digital and technological sovereignty.

Germany has had an FDI screening mechanism for over a decade, and on military and defence aspects for even longer. Several EU member states had not established specific mechanisms and existing screenings varied without institutionalised cooperation. Reflecting a wider scope, Germany, France and Italy, in particular, have pushed for European regulation based on the EU's exclusive competence for trade policy. Having entered into force in April 2019 and become fully applicable in October 2020, the EUFIS Regulation establishes a framework

for national screenings, including guidelines on screening factors and cooperation among EU member states and the European Commission. While the Regulation does not require introducing national FDI screenings, the European Commission has, also on the occasion of the Covid-19 pandemic, repeatedly called upon member states to do so. Several member states have since followed its request.

Germany has started amending its laws to align them with the EUFIS Regulation and to tighten them further. In particular, filing is now mandatory and clearance is required, not only in the military/defence sector, but also for non-EU acquisitions of German companies in the area of critical infrastructures (energy, water, nutrition, IT/TC, finance and insurance, health care, transport and traffic), certain sector-specific software, media with broad outreach, critical services for public communication infrastructures and, on the occasion of the Covid-19 pandemic, further health care and R&D. The statutory closing prohibition has been complemented by gun jumping prohibitions, all laden with significant criminal and administrative sanctions. The German government has already announced that it will soon add further sensitive sectors which have critical technologies, potentially including AI, robotics, semiconductors, cybersecurity and biotech.

In many cases, even where it is not mandatory, an FDI filing is prudent. The German screening applies across all sectors and to direct or indirect acquisitions of 10% or 25% of voting rights depending on the sector (no dilution up the chain) by non-EU/EFTA acquirers, or any non-German acquirer in the military/defence sector. If no filing is made, the possibility of an ex officio investigation, and thereby transaction insecurity, generally lasts for up to five years. The screening criterion has been lowered to that of a likely effect on security or public order of Germany, another EU member state or certain EU programmes. German authorities generally make an effort to clear uncritical transactions within several weeks. However, they can open an in-depth review, even if the German target is not active in sensitive sectors with a mandatory filing. In case of security concerns, negotiating mitigation agreements has become more common and can be time-consuming.

This has established FDI considerations as an integral element of cross-border M&A, in addition to merger control. The additional screening that the European Commission has been proposing for acquisitions, facilitated by third country subsidies, will probably soon become the third cross-sectoral regulatory pillar of cross-border M&A.

SURVEY

Technology drives and shapes M&A transactions

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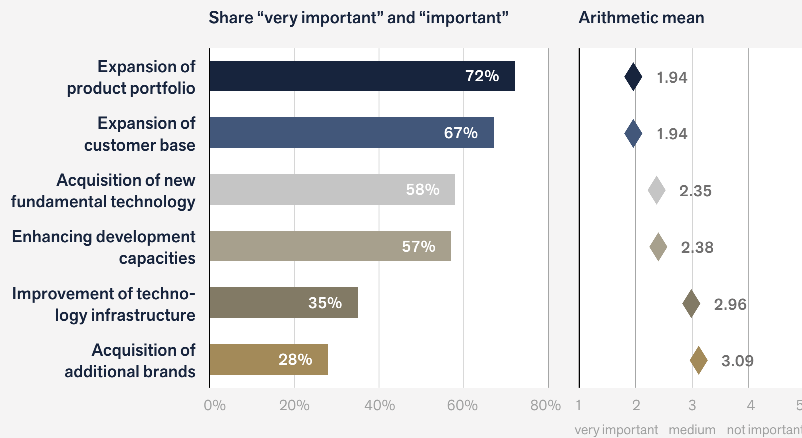
Digital technologies are now a core element of most business models. Both major technology players and companies from the "old economy" are continuously focused on acquiring technology to boost their own competitiveness, as well as developing solutions internally. So how do companies acquire new technologies and what are the challenges and risks involved? In order to find out, we surveyed M&A and technology experts, and company executives across a broad range of industries and sectors.

In our survey, more than half of the respondents (54 percent) cited IP/IT aspects as a key factor for M&A transactions. According to a further 30 percent of respondents, these are sometimes a factor. In this respect, the expansion of the product portfolio and the customer base, for example by entering new sales markets and segments, is a major driver for transactions. Other significant factors are the acquisition of new base technologies as well as the expansion of the company's own development capacities by acquiring particularly qualified employees.

Improved technology infrastructure (e.g., more modern IT platforms/systems) is only considered to be of medium overall importance. This relatively low acknowledgement is in line with our experience: only a few transactions are driven primarily by the technology infrastructure of the business partner. This usually plays an indirect role because technology infrastructure is used to operate a product or service, or enables access to a new customer group. Only rarely – for example in insourcing – is the technology infrastructure itself the object of the transaction.

Advantages of Technology-Driven Transactions

How would you rate the importance of the following aspects regarding your corporate acquisitions and joint ventures?



Company acquisitions prioritised over complex joint ventures

The acquisition of companies with technology is clearly the preferred way to secure the necessary technologies, followed by licences and partnerships, and the separate acquisition of technology. Despite the cost efficiency of the latter alternative, participants often cite the limited development possibilities that result both from employees with the necessary know-how not transferring to the acquirer and from a lack of integration into their own corporate structures as disadvantages to separate technology acquisitions.

Joint ventures with technology providers also tend to be less popular. This comparatively unfavorable view of JVs is surprising – after all, they are usually perceived favourably given the opportunity to combine different strengths while sharing costs and risks. Although JVs are often thought of by respondents as necessary to combine different expertise (e.g. cross-industry co-operation), they were also frequently seen as challenging to implement and associated with a high degree of dependence on the respective cooperation partner.

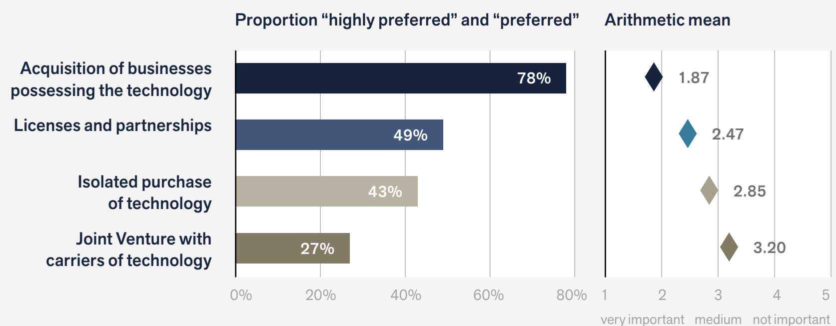
Accordingly, in our experience it is crucial that parties come together to think through every phase of their joint venture's "life" from the outset, and find good contractual provisions for all essential scenarios in advance. This particularly applies to the rules for resolving disputes over the joint venture, which can arise for a variety of reasons. Just as important is careful planning of the JV's corporate governance structures, since this must be suitable for day-to-day operations as well as permitting the resolution of – possibly fundamental – differences of opinion.

Technology increases the complexity of M&A deals

Significant complexity in technology acquisition is another common feature of traditional M&A transactions. For example, the desired know-how does not necessarily have to be protected by patents or other registered property rights of the target company. It might also manifest itself in a knowledge advantage of the founders or employees, or in market leadership regarding implementation of a new technology, which is not, or cannot, be meaningfully documented. Overall, this suggests that employee retention in the context of transactions is of considerable importance in achieving the technology goals which are being pursued. Apparently, study participants assess different ways of acquiring technology (company acquisition, joint venture, etc.) with a view to securing the transfer of key employees. Mechanisms for the transfer and retention of employees with know-how are a central feature of M&A transactions, in addition to securing traditional IP rights portfolios. >

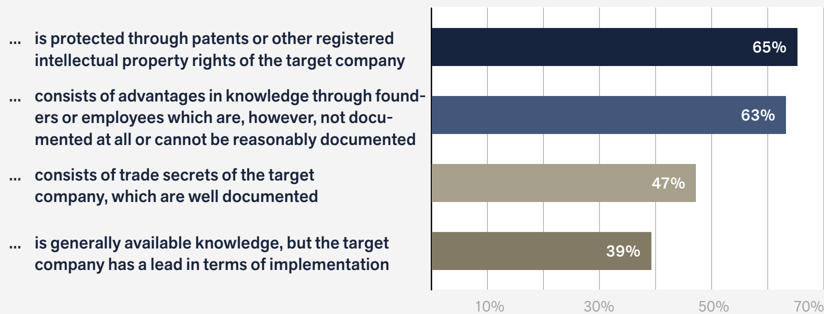
Paths to Technology Acquisition

How do you generally prefer to secure technology necessary for your products?



Forms of Technology Protection

Frequently, the relevant technology when expanding the product portfolio or acquiring a fundamental technology …



According to respondents, the geographical or subject matter scope of the target company's IP portfolio is the most commonly problematic IP/IT factor in corporate transactions. Risks due to change of control clauses follow in second place and, finally, the effectiveness and scope of licences is in third place. The prominence of these factors is not surprising since they all play a major role in determining whether the business case for a transaction is valid. Should it provide for expansion into technology fields, or countries where the target company does not enjoy IP protection as owner or licencee – and therefore does not have exclusivity over competitors – revenue and profit projections are called into question. If – as is common, for example, in the pharmaceutical sector – a start-up's main asset is a licence, e.g., from a university, the entire business model may be at risk if that licence is lost, or it becomes more expensive due to a change of control provision.

Extended toolkit demands creativity

The toolkit used to deal with IP/IT problems is fairly typical for M&A transactions (e.g., due diligence on IP/IT issues, warranties, indemnities, closing conditions, purchase price deductions, termination of the deal if necessary). No particular variant seems to be particularly dominant. This suggests that solutions are usually tailored to the relevant transaction and specific problems identified. For this reason, they vary as widely as the transactions and problems themselves.

However, participants also mentioned mechanisms that are generally less often used in M&A transactions – in particular, negotiations and agreements with third parties. The involvement of (unpredictable) third parties often poses challenges for the usual "roadmap" for M&A transactions. Think of tight schedules and high demands on confidentiality and transaction security. Accordingly, experience and creativity are required equally in these cases to fit negotiations with relevant third parties into the transaction structure. In our experience, alternative solutions are routinely used to reduce friction caused by the involvement of a third party. These include earn-out provisions, or adjusted transaction structures such as a staggered closing across different regions. In practice, however, it is often challenging to design these solutions to be sufficiently "air tight" so that no new points of contention arise between the parties at a later date.

We expect that the importance of technology aspects, and the associated complexity in M&A deals, will continue to increase. To solve the special challenges of technology transactions and to achieve the transaction's objectives, creative approaches and practicable mechanisms will be required more often. Experienced transaction experts will have to develop new provisions and tools to ensure that the assorted goals pursued with different transactions are achieved.

> www.hengeler.com/tech-ma-survey

FOCUS TOPIC

What will 2021 bring on the restructuring and insolvency front?

By late summer 2020, Germany somehow started to recover from the spring lockdown. It looked like Germany had come through the Covid pandemic comparably well with relatively low death and unemployment rates while it was anticipated that the acceleration of China's economy would help German export-oriented industries to recover. However, in December Germany went into a second lockdown which will probably be extended for many weeks into 2021. So what do our financing and restructuring partners expect?

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Martin: I became a partner a few years ago and had not yet joined Hengeler when the financial crisis hit in 2007/8. By contrast, you are something of a veteran in the German financing and restructuring market. How do you see the measures taken by the German government in response to the Covid crisis compared to those taken in 2007 and 2008?

Johannes: Well, I don't feel like a veteran yet, but it is true that I was a young partner during the financial crisis. Compared to the situation back then, this time the crisis hit "real" industry directly. Through KfW, Germany's state owned promotional bank, the German government did a great job in keeping companies liquid whilst making sure that support was only given to likely survivors by requiring that 20% of the new liquidity had to come from commercial banks which took additional risk. At the same time, the government enabled companies to keep their skilled workforce by providing financial support for short time labour to avoid employees having to be made redundant. Do you share this view?

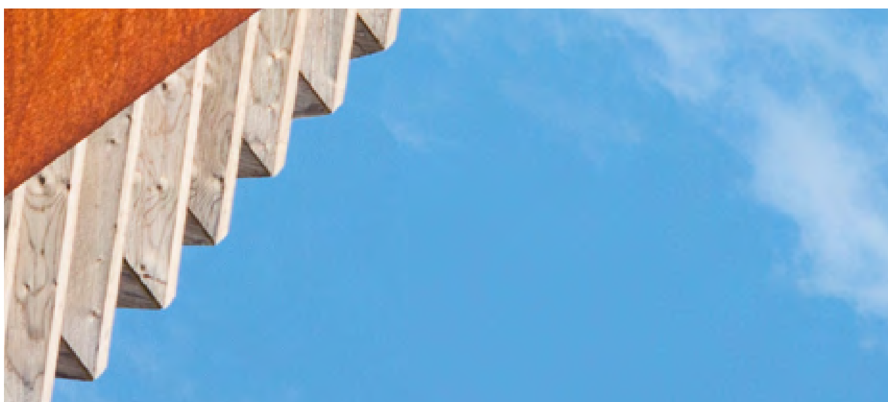
Martin: Generally, yes. However, to understand the impact of the current situation we have to consider that the Covid crisis has occurred in parallel with, and in addition to, radical changes caused by various megatrends. Automotive suppliers and OEMs are heavily shaken by the trend towards electric vehicles and, on top of that, they now have to adjust to an unforeseen drop in production after ten years of stability, or even growth. And traditional retailers – in particular fashion – have lost a lot of business to online retailers which will not come back

"To understand the impact of the current situation we have to consider that the Covid crisis has occurred in parallel with, and in addition to, radical changes caused by various megatrends. We expect that we will see a consolidation in several sectors. And since cheap money, as a consequence of central bank policy, didn't help lenders to price risk adequately either, we will also see banks in trouble again."

since consumers have changed their shopping habits – not to mention the travel, leisure, hospitality and entertainment sectors. I expect – and Johannes, we have seen this coming in the mandates we have received over the past couple of months – that we will see a consolidation in the retail and travel sectors. As a result, the commercial properties currently used by them will become empty, landlords will not be able to meet their mortgage payments and our inner cities will have to be reinvented.

Johannes: I agree – and cheap money, as a consequence of central bank policy, didn't help lenders to price risk adequately either. So it's likely that we will see banks in trouble again. On top of that, German legislators suspended the insolvency filing obligation for companies hit by the pandemic for several months. While this is, of course, a sensible instrument to avoid insolvencies of healthy companies with short-term liquidity problems, it has unfortunately also been used by so-called zombie companies, i.e. companies with a broken business model which have only survived over recent years because liquidity has been so cheap and easily available in the market. However, I do not foresee a huge wave of insolvencies coming up.

Martin: This is true – at least across the spectrum of the economy for which we work. Here, we will not see a big wave of insolvencies, although I expect that overall insolvencies will go up substantially. Most of our clients are very professionally organised. If they come to the conclusion that their business model is broken, and it is clearly foreseeable that their company will not survive beyond the pandemic, they soon understood that clinging to Covid reliefs was not the way forward. They instead opted for insolvency to restructure operationally and reposition



the business. Having said that, I nevertheless fear that a considerable number of smaller businesses, on the back of the Covid reliefs, have turned a blind eye to the fundamental effects which Covid has had on their business. Sooner or later, these companies will have to file for insolvency, which will probably lead to a substantial uptick of insolvencies in this segment of the market. I am hearing the same when I discuss the outlook for 2021 with other restructuring advisors and the various receivers with whom we regularly work.

Johannes: Maybe some companies are waiting for our pending new law on pre-insolvency reorganisations with the – unfortunately cumbersome – name "StaRUG". It remains to be seen whether the new law will become a star, but I think it will be.

Martin: I couldn't agree more. As a consequence of the pandemic, many companies in the hands of PE investors will run the risk of insolvency. In the past, many of them used a scheme of arrangement under English law to deal with hold outs and reduce their financial burden since the relevant mechanics are very borrower friendly. The StaRUG, which was initially only thought to transform the EU Directive 2019/1023 on Preventive Restructuring Frameworks into German law, delivers much more. It is clearly focused on

financial restructurings as the position of employees cannot be touched and onerous commercial contracts cannot be terminated. However, beyond these two constraints, German borrowers, on the basis of a majority vote, can now overrule dissenting minority creditors as well as obstructing shareholders. This means that they can do everything parties could only previously do within insolvency proceedings or under a scheme of arrangement in the UK, and even more. For example, we will be able to interfere with the rights of financial creditors while omitting others – debt-to-equity-swap, extinguish collateral and guarantees provided by affiliates of the borrower irrespective of their jurisdiction, no absolute need to comply with the absolute priority rule – and overrule even a whole creditor class based on a majority vote of the other groups, also referred to as "cross-class cram down". Overall, StaRUG looks like a quite powerful addition to the German restructuring toolbox, which takes the German regime to a new level when compared to other jurisdictions.

Johannes: Yes, indeed. From recent enquiries I take it that StaRUG has also aroused interest amongst our international clients. In this respect, it is important to note that StaRUG will only be open to companies which have their main centre of interest (COMI) in Germany. There will, therefore, not be the sort of easy restructuring tourism that we have seen in the UK. But, given that in these cases there are so many uncertain questions, which will become even more uncertain following Brexit, we currently anticipate that there is huge potential for German companies to restructure in Germany in future.

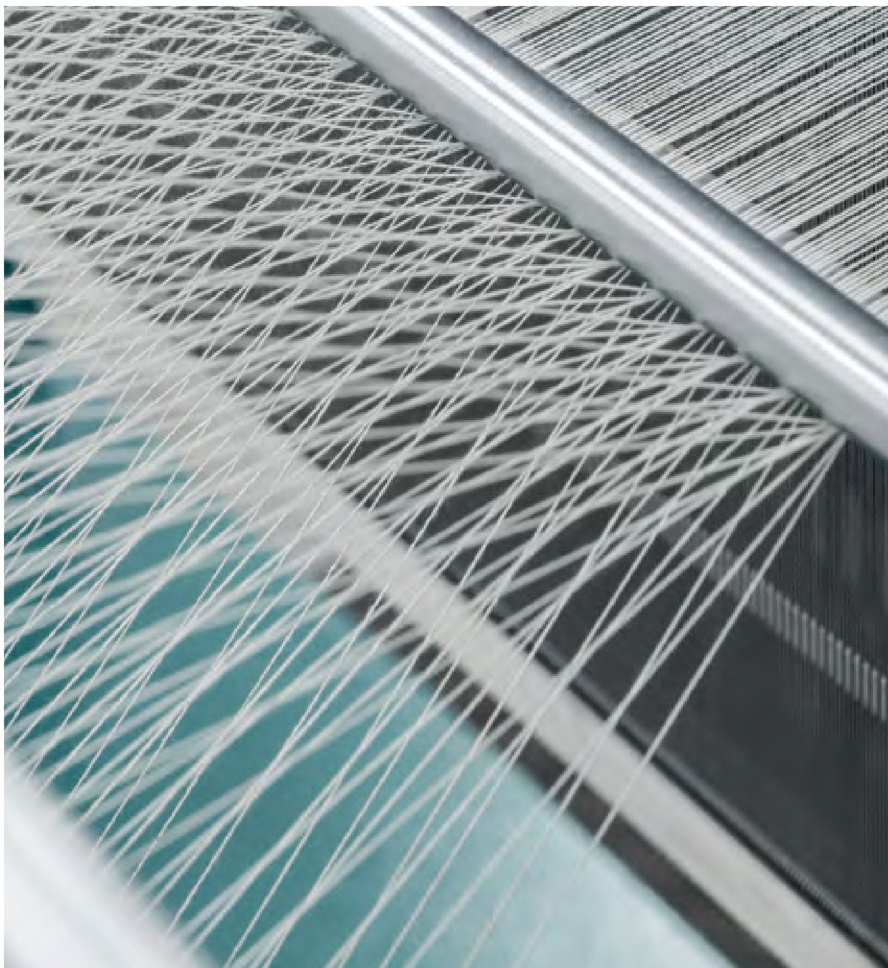
Martin: Not to mention German entities under PE ownership which will no longer have to take the costly road to London to work-out their balance sheets. From this perspective, Covid may accelerate further change in the German restructuring industry.

Johannes: Just for our readers: The law was pushed through the legislative process shortly before Christmas 2020 and entered into force on 1 January 2021 (please see article on this subject on page 14). It seems that the legislator sees StaRUG as a tool to support post-Covid workouts – also of companies that received Government funding. Hence, we may see restructurings on the basis of the new law starting in January 2021.

RESTRUCTURING, INSOLVENCY

Insolvency law revolution – pre-insolvency reorganisation procedure as a driver for a new reorganisation culture?

On 1 January 2021, the "Law on the Further Development of Reorganisation and Insolvency Law" entered into force. At its core, the new law provides for the introduction of a pre-insolvency reorganisation procedure by implementing an EU directive, thereby closing a gap in German reorganisation law. In view of its far-reaching changes, the new law feels like a revolution.



Unlike some foreign legal systems, German has not previously provided for general reorganisation mechanisms outside formal insolvency proceedings. Restructurings in the vicinity of insolvency were dependent, in many situations, on voluntary contributions from each relevant creditor. This meant that individual creditors could obstruct meaningful restructurings. As a consequence, companies in difficulties may have had no other choice than to pursue a financial restructuring in insolvency proceedings or resort to reorganisation proceedings under a foreign legal system – in either case, with considerable costs and other disadvantages. The new act aims to improve this situation by providing novel restructuring instruments.

Wide scope for action and high degree of flexibility

The declared aim of the law is to provide debtors with a flexible, legally secure and efficient framework for restructuring projects. Debtors should be largely free to decide when to initiate proceedings and which groups of creditors (financial creditors, bondholders, suppliers, customers, etc.) to involve. Even shareholders can be included.

The central prerequisite for reorganisation proceedings is imminent insolvency. This crisis stage is sufficient to justify

interventions in creditors' and shareholders' rights – if necessary, against the will of a minority. The new act does not provide for judicial review when proceedings are initiated: The debtor simply needs to notify the appropriate court and submit a restructuring plan. However, judicial review will often take place later on when the debtor wishes to take advantage of specific restructuring instruments. A restructuring adviser who is given monitoring and auditing tasks will not be appointed automatically, and his/her appointment by the court becomes compulsory only in certain situations.

Control mechanisms and minimum standards

As a counterbalance to the extensive procedural autonomy of debtors and to protect creditor interests, the new law provides for procedural control mechanisms and minimum content standards. Claims arising from employment relationships are excluded from the scope of the new procedure, i.e. they must continue to be fully satisfied. As a rule, the court will annul a reorganisation procedure if the company becomes cash-flow insolvent, over-indebted, or if the reorganisation project has no chance of success.

A new toolbox for restructurings

The common objective of the new restructuring instruments is the sustainable elimination of the threat of insolvency. The debtor will be able to use the tools individually or cumulatively. The central instrument is a restructuring plan which needs to be adopted only by those creditors affected by it. In this way, claims and rights can be transformed, i.e. subjected to a haircut in particular. If the groups of creditors agree in each case with a qualified majority of at least 75% of the total claims, and with respective confirmation by the court, the restructuring plan can also have a binding effect on the creditors who refuse. A cross-class cram-down is also possible in principle.

The new reorganisation instruments include enforcement protection during reorganisation negotiations. Reorganisation proceedings will not be open to the public in order to prevent any undesirable impact on the company's operational business.

A first conclusion

The new law was passed on a fast-track process and in line with the political goal to provide the new legal instruments in good time to cope with the anticipated wave of corporate crises in 2021. Accordingly, it was not possible to discuss and address some of the complex aspects underlying the new proceedings as thoroughly as would perhaps have been desirable. However, the introduction of a pre-insolvency reorganisation procedure is undoubtedly a big step forward. The new law appears, broadly speaking, suitable to achieve its ambitious objectives and to further promote the German restructuring market.

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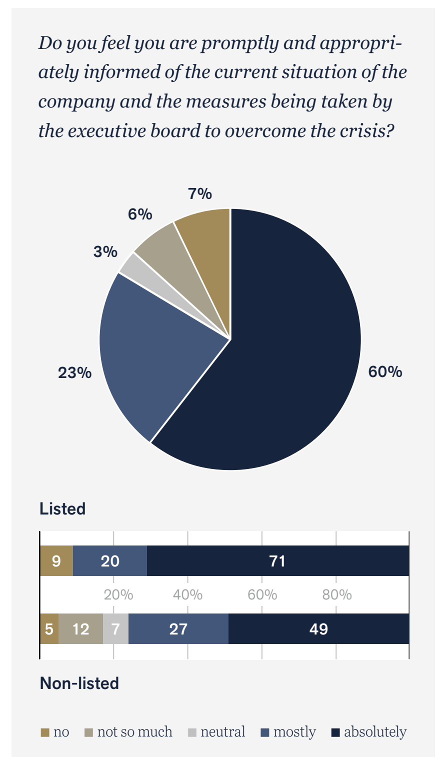
SUPERVISORY BOARD SURVEY

Good, but not good enough

If a company is facing a crisis, more often than not the supervisory board is held responsible. Could the supervisory board, the highest such body of a company, not have – or should have – known better? The current pandemic is putting supervisory boards in a special situation: Due to the disruption of supply chains, the loss of sales, and accompanying financial challenges many companies are operating in crisis mode. Hengeler Mueller, together with the German Working Group Association for Supervisory Board Members (Arbeitskreis deutscher Aufsichtsrat), has conducted an empirical study to assess the crisis resilience of supervisory boards, and their ability to act in these circumstances.

The situation is surprisingly relaxed at first: Our study paints a mostly positive picture with regard to the resilience of the supervisory board function in the current environment. Almost 70 percent of supervisory boards think that the organisation of their supervisory board is very well adapted to crisis management. However, 15 percent do not agree and see a need for action in their companies.

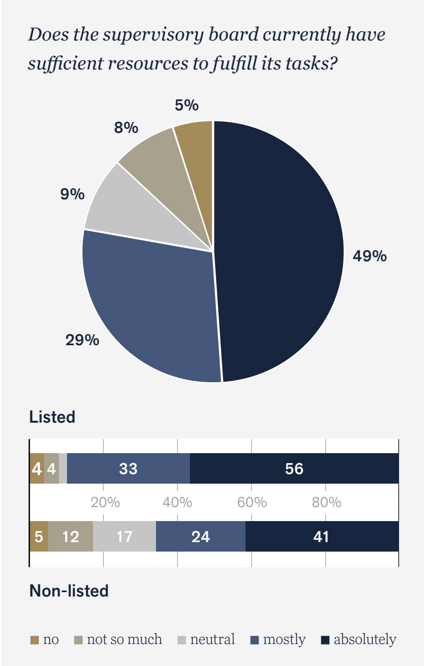
Furthermore, more than three quarters of the supervisory board members surveyed feel that they are promptly and appropriately informed about the current situation and the measures taken by the executive board (Vorstand) to overcome the crisis. Also, the majority of the supervisory board members surveyed believe that they have adequate resources to fulfil the tasks at hand. More than three quarters consider it "correct" or "absolutely correct" that they currently have sufficient resources at their disposal, although about 13 percent do not see it that way. This means that at nearly one in eight companies, the supervisory board does not have



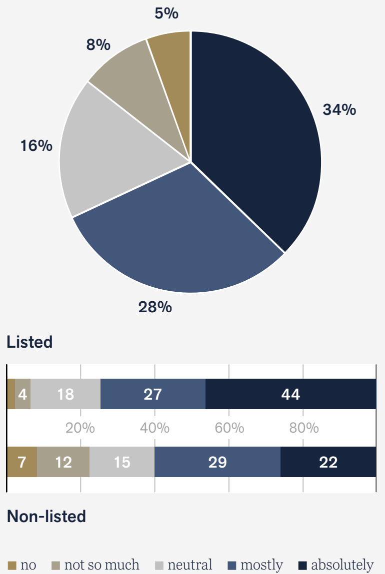
sufficient resources to perform its duties during this crisis in the best possible way. However, communication is working well in most companies: Around two thirds of the supervisory board members surveyed

feel that there is sufficient discussion of the work and results of the committees, insofar as they are involved in crisis management.

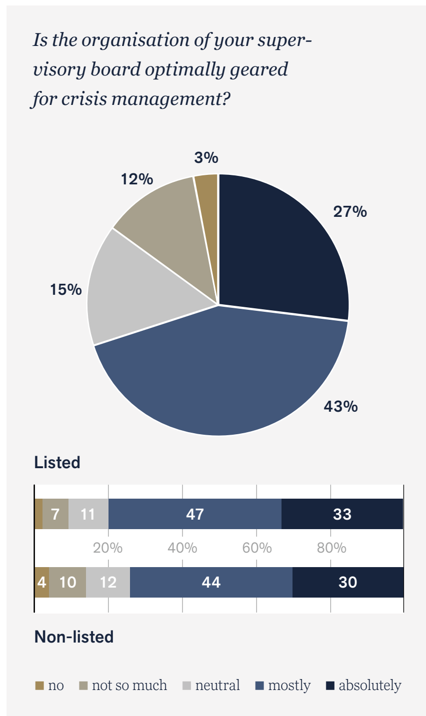
Yet this does not apply equally to every company: There is a difference between listed and non-listed companies. Among listed companies, 91 percent were satisfied with the information-sharing practices of the executive board, while the figure for non-listed companies was only 76 percent. Meanwhile, 89 percent of representatives from listed companies rate their resources better than their colleagues from non-listed companies (66 percent). This means that one in three supervisory boards of non-listed companies rate their resources as currently inadequate. In terms of communication within supervisory bodies, around 20 percent of the supervisory bodies of non-listed companies feel the need to catch up (compared to only 7 percent for listed companies).

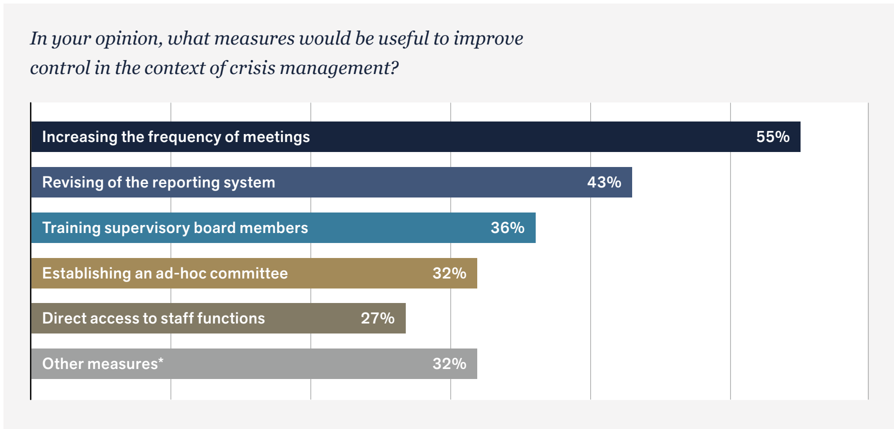


What measures can supervisory boards take? Slightly more than half of the respondents consider an increase in the frequency of supervisory board meetings to be reasonable. However, there are differences depending on stock exchange listing. Within the group of all listed companies, 47 percent of the surveyed supervisory boards would approve more frequent meetings. By contrast, almost two thirds (64 percent) of the supervisory board members of non-listed



companies support this measure. Another measure would be to revise the reporting system. However, only 31 percent of the supervisory boards of listed companies see the need for this measure (compared to 56 percent for non-listed companies). The establishment of an ad-hoc committee for crisis management is considered as an option by 38 percent of the surveyed supervisory boards of non-listed companies, compared to only around 27 percent for listed companies. A similar situation applies to providing direct access for the supervisory board to staff functions, such as Head of Legal, Head of Risk, Head of Controlling, etc. In the case of listed organisations, the approval rate for this measure is only 22 percent, whereas it is one third (33 percent) for non-listed companies.





Smaller companies also see a much greater need for action than larger corporations (around 42 percent of companies with sales of less than EUR 100 million versus 0 percent for companies with annual sales of more than EUR 10 billion).

Overall, the survey shows that supervisory bodies of listed companies tend to be better prepared for the crisis. This is pretty good news for investors. Stricter governance and a more complex set of rules for listed companies has professionalised the work of the supervisory board. These results are good, but not yet good enough. Even among listed companies, the standardisation of quality in the company's highest supervisory body must remain a priority. In addition, non-listed companies must catch up and a more uniform, unbroken standard of professionalism must be established. The current crisis is hitting many companies equally hard and often calls business models into question only temporarily. The situation is completely different with specific, individual company crises. These have the potential to place even greater demands on supervisory bodies. Not all companies are sufficiently prepared for this today.

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OUTLOOK

Tomorrow's annual general meeting – finally reaching the online age

Overnight, the Covid-19 pandemic suddenly changed the character of German shareholder meetings. Because annual general meetings (AGMs) with hundreds or even thousands of participants have not been possible since March 2020, pending resolutions can only be passed online, without shareholders being physically present. In a coordinated effort, ministries and legislators created the necessary legal basis for this as a pragmatic response to the pandemic. This emergency regime will be in place until the end of 2021.

Now we can look back on the first season of virtual general meetings. Opinion is divided: On the one hand, issuers welcome the fact that prior to the online resolution passing, the management could read its statements and reports, and answer previously submitted shareholders' questions without disruptions or surprises. Spontaneous questions, countermotions and procedural motions were not possible. There were practically no actions for annulment, while a handful of suits aimed at reviewing the constitutionality of the legal bases will almost certainly fail. Shareholder associations, on the other hand, regard last season's virtual general meetings not only as a lost opportunity for discussion, but also as a severe curtailment of shareholder rights. They are calling for extensive reforms. As a first response, legislators have introduced a couple of changes to the existing regime aimed at improving the shareholder position. Effective at the end of February 2021, the rights of shareholders to ask questions and submit countermotions will be strengthened. A reform that is sustainable as a permanent solution is still pending: it will hopefully be discussed and adopted by legislators in the course of 2021.

Where does the road ahead lead? Certainly not backwards: From the 1960s to the 1980s, under the terms of today's company law, the physical AGM was a huge display of more or less self-satisfied management.

Over the following 30 years, under the influence of small activist shareholders, it developed into a formal event in which the executive and supervisory boards mainly read out pre-written texts and seldom dared to leave their safe, legally secure position. No tears need to be shed for this tiresome format. Covid-19 brought about long overdue reform in an instant.

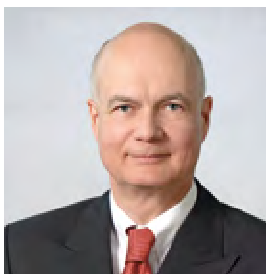
So how will AGMs of the future look? They will neither continue to serve as an investor relations event for issuers, nor be a stage for shareholders to disseminate ideological or generally political, social or economic views. They will no longer be a suitable pastime or meeting place for shareholders in person. Free catering and giveaways will also become a thing of the past. The general meeting itself will not even be the main source of shareholder information in preparation for the adoption of resolutions.

Instead, the AGM will almost certainly take place entirely online, avoiding the costs and – in pandemic times – the inherent health risks of large crowds. It will concentrate on what a general meeting is supposed to do at its core: to make and take legally binding decisions. This will also make it more attractive for foreign investors. The trend towards greater attendance at general meetings, which we observed last season, is likely to continue.

To be able to take appropriate decisions, shareholders need to be informed. That should happen in advance of the general meeting. Accordingly, the verbal explanations previously provided by the executive and supervisory boards should be made available prior to the general meeting so that shareholders can factor them into their questions. At the general meeting, there should only be updates of the reports, where necessary. The management's answers should also be available beforehand so that shareholders can ask for clarifications online during the general meeting. Excessive and abusive lists of questions can be countered using legal means which are currently available.

If necessary, legislators can make adjustments to the right to information and the reasons for refusing to provide it. Spontaneous countermotions during the general meeting and objections should be possible online. It should also be feasible to make certain procedural motions during the general meeting. Notably, these could include motions to pass discharge resolutions individually per board member, to remove items from the agenda and to postpone the entire general meeting; whereas a motion to remove the chairman of the meeting from office should definitely not be entertained any longer. Naturally, voting will be conducted online.

The greatest challenge will be giving shareholders the opportunity to form coalitions. To this end, the electronic shareholders' forum of the Federal Gazette might provide an answer. Introduced in 2005 as an institution independent of the company, but lifeless ever since, it could be revived and structured in such a way as to allow real interaction between shareholders in the run-up to and during the general meeting. Technically, the proposals put forward here are already feasible. With little regret, we bid farewell to the physical general meeting and look forward to genuine online general meetings, in line with the times and technological developments.



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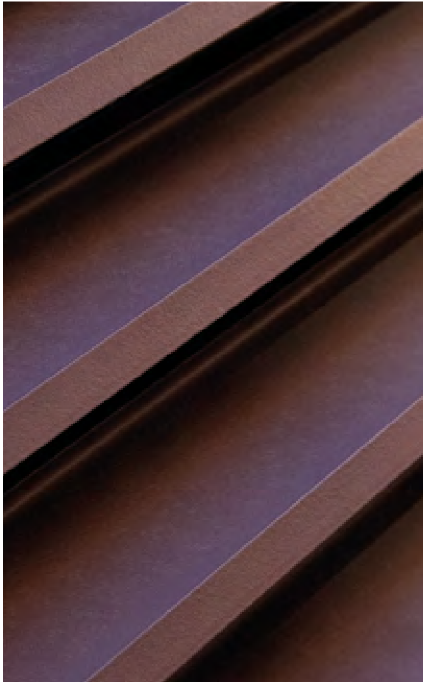

LEGAL TECH

Collaboration platform and incubator

Legal Tech continues to be an exciting and trending topic. Within the last few months, we have put the spotlight on collaboration. We launched our cloud-based deal and project management platform "Hengeler Mueller Connect" to channel all the relevant information about a project in one place. And we joined the legal tech incubator "Collaborate" to develop relationships and network with legal tech start-ups.

Platform "Hengeler Mueller Connect"

Recently, we launched our digital collaboration tool "Hengeler Mueller Connect", through which we offer document exchange, file storage and versioning, project planning and management for a wide range of mandates (e.g., M&A transactions, litigation, investigations, financing and other large-scale projects), all on one cloud-based platform. This platform enables task and document-specific controlling and reporting. It accelerates communication internally, as well as with clients and other parties involved in a project, by integrating and centralising work streams, providing easy and secure worldwide access to project documentation and coordination. Standardised processes can also be automated, which we open up to all those involved (e.g., clients, counterparties) to improve efficiency in complex projects. This step forms part of our sustained initiative to further develop our firm-wide legal project management. Since this discipline is very dynamic, we continuously re-assess our legal project management best practice as an essential part of our own training programme "HM Academy St. Gallen", which, of course, now uses Hengeler Mueller Connect for teaching legal project management. We also share our best practice with our Best Friends law firms to enable seamless cross-border projects, and to achieve an even closer integration in an international context within our Best Friends network.

Legal tech incubator "Collaborate"

Speaking of our Best Friends network, we also work closely together in the field of innovation and now support legal tech start-ups within the "Collaborate" incubator, which was initiated by our partner firm, Slaughter and May. The incubator is a legal tech programme, open to innovators and entrepreneurs at all stages, with products relevant to the legal tech sector. The programme offers the opportunity to collaborate with the brightest international minds in this space – helping to develop, test and expand legal tech products. This year's programme cohort included seven members focusing on artificial intelligence, collaboration, project management, mediation platforms, as well as IT Security and document automation. Over an exciting six-month period, we offered these entrepreneurs insights into the legal markets of our Best Friends network, gained a much better understanding of the technical possibilities and limitations, and tightened the exchange within the legal tech community in these virtual times.

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SPOTLIGHT

Sustainable finance

Hardly a day now goes by in which corporates do not announce that they have issued a Green Bond, or included a sustainability component in other financing agreements with their lenders. Sustainability linked finance sits high atop the agendas, not only of lenders, such as funds and banks, but also borrowers, including corporates and even sovereign borrowers.

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In what directions do you see sustainable finance developing?

When it comes to loans granted by the German state-owned development bank, KfW, or by supranational institutions like the European Investment Bank (EIB), it has long been the case that borrowers are obliged to use the funds loaned to them for certain purposes, such as investing in energy-saving solutions. In turn they could secure financing cost which were below market. But similar finance products are also being increasingly offered by capital market investors and banks. Numerous corporates, and recently even the German federal government, have issued Green Bonds, all of which have featured the issuer undertaking to use the proceeds for investments to combat climate change and environmental protection. There are also bonds entering the market, known as sustainability-linked bonds, where only the interest rate is linked to the achievement of specific key performance indicators that relate to sustainability. In the case of bonds recently issued by ENEL, for example, investors receive an additional payment if a certain percentage of the electricity produced by ENEL does not come from renewable energy sources when the bond reaches maturity. A similar bond has been issued by Chanel. A 2020 Novartis bond ties its interest rate to whether certain medications (in particular to treat malaria and leprosy) are made accessible to more of the population in developing countries.

There are also bank loans and German Schuldschein loans that are used as sustainability-linked instruments. What makes these formats different?

With these finance instruments, most of the time it is not about how the funds are used, but how business activity is set up to achieve sustainability goals, like the reduction of CO_2 emissions, for example. The improvement of corporate governance, employee

protection and equal rights may also be used as goals. In credit financing the interest rate is more often linked to the achievement of predetermined sustainability goals through improvement of a so called ESG rating which is assigned by specialised rating institutions. Thus, funds have not to be earmarked for a specific use. ESG compliant loans are therefore also accessible to companies that want to improve the sustainability of their business, but cannot tie that to any investment in specific projects. Except for (subsidised) loans granted by state-owned banks, loans where the proceeds have to be used for specific investments into environmental improvements are not yet very common, even though the key standard-setters in the lending market, the Loan Market Association in London (LMA), the American Loan Syndications and Trading Association (LSTA) and the Asia Pacific Loan Market Association (ALPMA), have all published guidance documents on green and sustainability linked loans to establish a framework for the fundamental aspects. The spectrum ranges from specifying which projects can receive funding under the 'green' label to establishing selection criteria for eligible borrowers (i.e. corporates that have sufficiently committed themselves to pursuing sustainability goals), and from including KPIs in the sustainability strategy to ensuring transparency on how funds are used through regular reporting.

What is driving corporates to take out loans with an ESG component?

One of the reasons why corporates negotiate and set provisions with their lenders, particularly in syndicated loans and Schuldschein loans, is to publicise their efforts in doing business more sustainably. And it is perhaps only a matter of time before corporates that are not committed to achieving these kinds of goals will have a harder time accessing debt financing because lenders – either out of conviction, due to political pressure, or even because of regulatory incentives – will favour granting loans to those corporates who pledge to be more sustainable. As regards banks' costs of capital, however, the sustainability aspect is not yet relevant. Nevertheless, in a position paper, the Association of German Banks (Bundesverband deutscher Banken) has proposed that capital requirements for sustainable finance instruments, i.e. finance vehicles with an ESG component, be reduced. In doing so, the Association does not overlook that sustainable loans are not, per se, less risky. Instead, it focuses on capital costs: if they were lower, banks would generate significantly more sustainable business. It remains to be seen how regulators and the Basel Committee on Banking Supervision will approach this issue. In the same context, the EU Commission announced in its Action Plan, Financing Sustainable Growth, that it would explore the feasibility of including risks associated with environmental factors in risk management policies and the capital requirements of banks, as part of the Capital Requirement Regulation (CRR) and the Capital Requirements Directive (CRD). This is already reflected in Article 501c CRR. Under that provision, the European Banking Authority (EBA) is to assess whether the dedicated prudential treatment of loans, associated substantially with environmental and/or social objectives, would be justified.

What economic benefits are there for corporates in taking out loans with an ESG component?

Financing costs can only be reduced marginally through ESG loans since the agreed higher or lower interest rates, payable in the event of achieving or missing predefined sustainability goals have, so far, been just a few basis points. If the relevant ESG targets are not met, the reputational damage may often be greater than the immediate financial disadvantage. However, the pursuit of ESG targets also serves to develop loyalty among institutional investors, who have taken up the cause of promoting sustainable business, and are increasingly turning away from corporates whose business, for example, harms the environment. Furthermore, corporate customers are becoming more and more mindful of whether they are buying a product from a company that is committed to sustainability.

NEWS

New partners and counsel 2021

"We are very pleased to announce the appointment of three new partners and five new counsel. They have all impressed with their commitment and professional quality in advising our clients, as well as with their personality and team spirit. We sincerely congratulate them and look forward to continuing our successful journey together."

Georg Frowein and Rainer Krause, Co-Managing Partners

Caspar Haarmann

Counsel, Düsseldorf

Caspar Haarmann advises corporates and investors in every field of capital markets law, on a broad range of corporate matters, as well as on corporate reorganisations and M&A transactions. He has particular experience in advising companies and bank syndicates on a wide variety of equity capital markets transactions: IPOs, capital increases requiring a prospectus and private placements which have admission to trading on a stock exchange.

Katharina Hesse

Partner, Düsseldorf

Katharina Hesse advises a wide spectrum of corporate clients, as well as private equity funds and other financial investors, mainly in M&A projects with regulatory implications. She has a particular focus on the structuring and implementation of private M&A transactions, as well as corporate reorganisations and different kinds of cooperation agreements. Katharina also advises companies on their ongoing corporate and capital markets-related matters.

Johannes Honzen

Counsel, Frankfurt

Johannes Honzen advises corporates, as well as private equity and other financial investors, on M&A transactions and joint ventures with a particular focus on real estate as well as corporate matters. In recent years, he has been involved in a large number of portfolio real estate and single asset transactions in all asset classes, advising large international real estate funds as well as domestic corporate clients.

Daniel Illhardt

Partner, Munich

Daniel Illhardt advises corporate clients and investors on a broad range of corporate and equity capital markets matters. He has a particular focus on corporate reorganisations, including mergers and takeovers, spin-offs and the structuring of corporate groups, often in cross-border scenarios. Another important aspect of his practice is preparing and guiding shareholders' meetings and advising boards and directors on liability and compliance issues.

Elisabeth Kreuzer

Partner, Munich

Elisabeth Kreuzer advises on a broad range of M&A transactions, reorganisations, including carve-outs, and other corporate law matters. Her practice covers domestic and international transactions, advising clients on both the sell-side and buy-side in private as well as public M&A. She advises a wide spectrum of private equity funds, other financial investors and corporate clients. Her practice also includes work on management participation programs.

Jakub Lorys

Counsel, Munich

Jakub Lorys advises a wide spectrum of corporate clients as well as private equity funds, venture capital funds and other financial investors in M&A projects. He also advises corporates and investors in all aspects of capital markets and corporate law, and has particular experience in advising companies on a wide variety of equity capital markets transactions, covering IPOs, and capital increases requiring a prospectus.

Matthias Rothkopf

Counsel, Düsseldorf

Matthias Rothkopf advises on antitrust and intellectual property law. A particular focus of his practice is advising technology companies on antitrust law, as well as on licence agreements and licence cartel law. Matthias is experienced in litigation, as well as providing corporate intellectual property and antitrust legal advice.

Marvin Vesper-Gräske

Counsel, Berlin

Marvin Vesper-Gräske advises on a broad range of corporate matters, corporate reorganisations and M&A transactions. His practice also includes capital markets work, as well as financing structures in connection with M&A transactions and public takeovers. Marvin further advises on a broad range of commercial agreements. In addition, he represents clients in commercial litigation and succession matters before civil courts.

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NEWS

Work Highlights

18 November 2020

Deutsche Börse AG has entered into binding agreements on the acquisition of approximately 80% in Institutional Shareholder Services Inc. ("ISS"), a leading governance, ESG data and analytics provider. Hengeler Mueller advised Deutsche Börse on the transaction, together with Cravath Swaine & Moore LLP.

30 October 2020

Siemens AG sells Flender GmbH, a world-leading supplier of mechanical and electrical drive systems, to Carlyle. The transaction is expected to close in the first half of 2021, and is subject to foreign-investment and antitrust approvals. Hengeler Mueller advised Siemens, both on the sale and the originally planned spin-off and public listing of Flender (dual track).

29 October 2020

Hengeler Mueller advises GRENKE AG, a global financing partner for small and medium-sized enterprises, with respect to a recent short-seller attack and the related internal and external investigations.

28 September 2020

Siemens AG has spun-off its energy business. Siemens Energy, a world-leader in the transmission and generation of electrical power, is now listed on the Frankfurt Stock Exchange. Hengeler Mueller advised Siemens on the transaction.

25 September 2020

HENSOLDT AG, Europe's largest electronic sensor solutions house for defence and security equipment, successfully went public. Hengeler Mueller advised HENSOLDT and its owner, a company owned by funds advised by KKR, on the IPO.

03 September 2020

The private equity firm Centerbridge Partners Europe, LLP, has acquired a majority stake in the German digital lending marketplace, auxmoney. The transaction was one of the largest fintech funding rounds in the eurozone in 2020. Hengeler Mueller advised Centerbridge on the transaction.

14 July 2020

E.ON SE has sold innogy SE's electricity and gas retail business in the Czech Republic, operated by innogy Ceska republika a.s., to MVM Group. The transaction marked a further step in the fulfilment of remedies offered by E.ON in the context of the antitrust approval of E.ON's takeover of innogy. Hengeler Mueller advised E.ON on the transaction.

4 June 2020

After a ruling from the CJEU that the German ancillary copyright for press publishers is inapplicable due to a violation of EU law, the collecting society VG Media has formally withdrawn its claims against Google, which were based on an alleged infringement of rights. This ended a dispute, which lasted more than six years, on the question of whether VG Media, or its rightholders, had claims against Google under the ancillary copyright introduced in Germany in 2013. Hengeler Mueller represented Google in the proceedings before the Berlin Regional Court and the CJEU.

www.hengeler.com/recent-work

AWARDS

Recent recognition

2020 JUVE Awards

Hengeler Mueller has been named "Law Firm of the Year" at the 2020 JUVE Awards. In their congratulatory speech, the JUVE editorial team highlighted the leading market position that Hengeler Mueller has held for years, combined with its professional distinction. In particular, the development and establishment of the restructuring and white-collar practice groups was strategically prudent and well timed. The most recent partner appointments in the regulation and litigation groups also demonstrated Hengeler Mueller's sustainable approach.

2020 The Lawyer European Awards

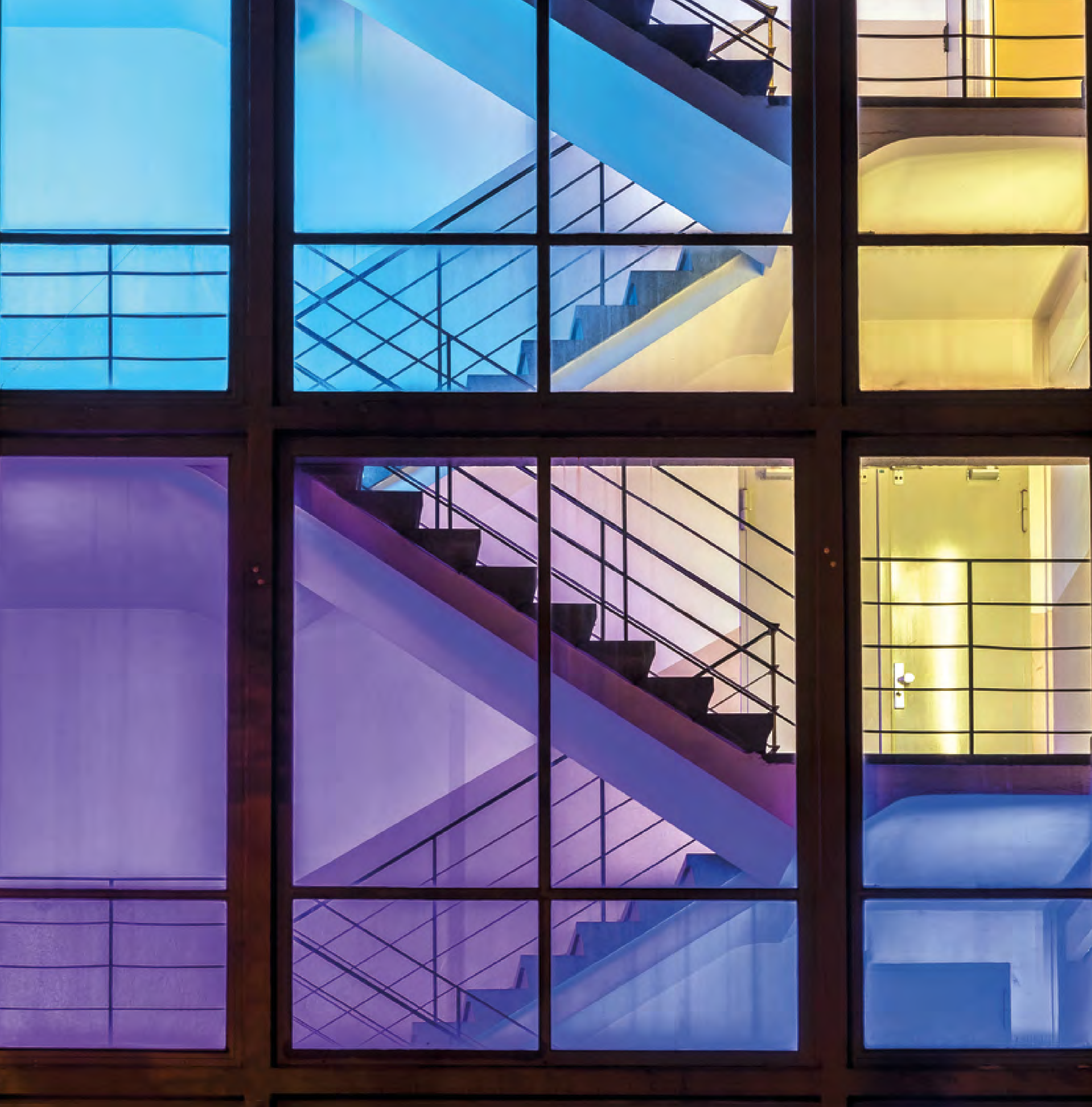
Hengeler Mueller has been recognised as "Germany Law Firm of the Year" at The Lawyer's 2020 European Awards. In addition, we were highly commended in the "European Law Firm of the Year" category.

Further recognition in 2020

— Benchmark Litigation 2020 Europe Awards: "Dispute Resolution Firm of the Year"

— IFLR European Awards 2020: "Germany's most innovative national firm of the year"

www.hengeler.com/awards



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