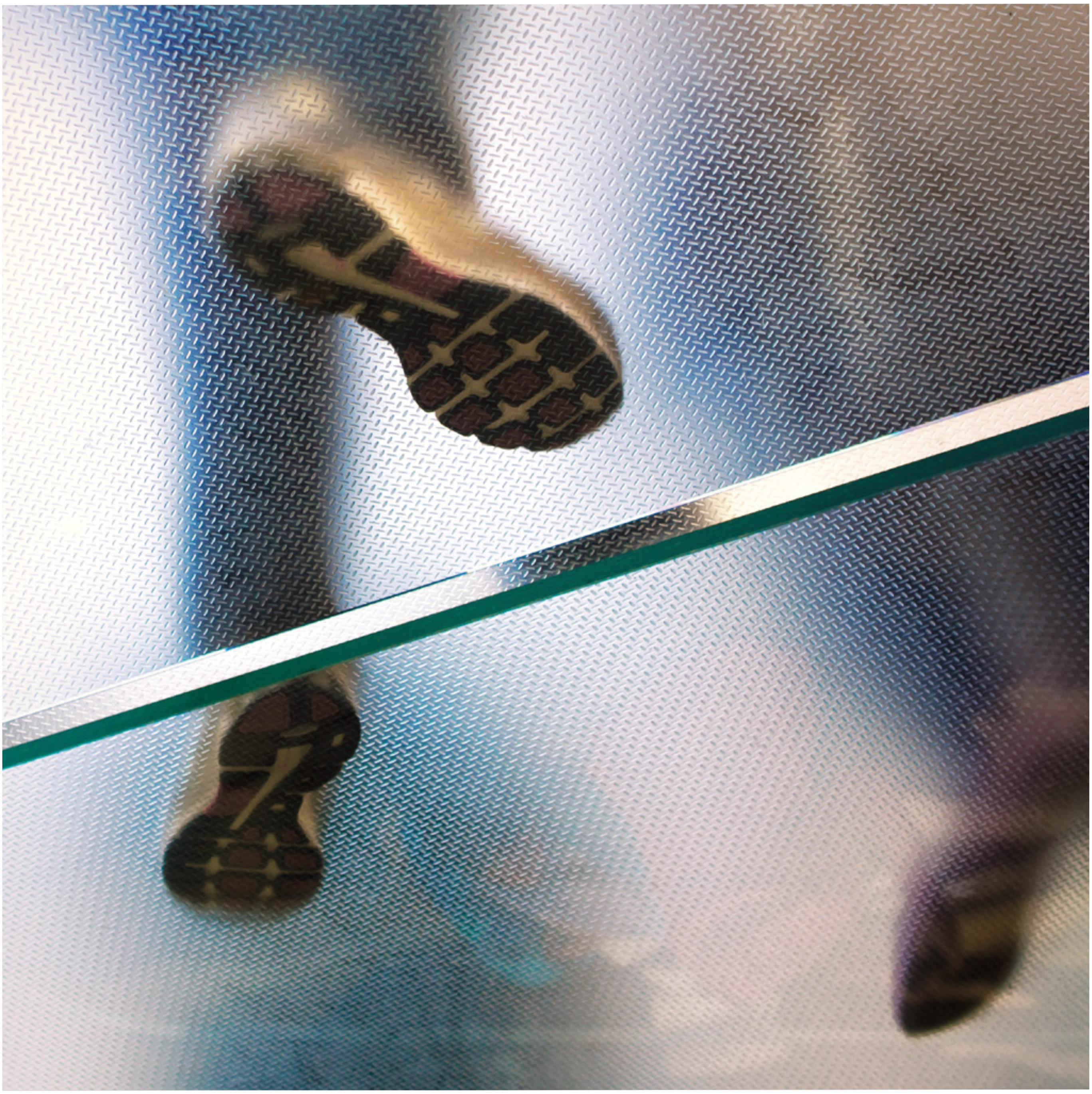
NEWSLETTER | January 2020

M&A SNAPSHOT | THE US PILING ON POLICY | NEW PARTNERS AND COUNSEL



Content

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Editorial

Dear friends,

We hope you had a wonderful Holiday Season and a good start into 2020!

With the beginning of the New Year, we have four new partners and four new counsel at Hengeler Mueller (page 16). We are very proud and confident that all of them will make a significant contribution to the further development of our firm.

Looking back, 2019 was again a busy and successful year for Hengeler Mueller: despite the difficult global environment, we saw a stable number of transactions above EUR 1bn. Again we finished the year at the top of the Mergermarket league table for Europe together with our Best Friends (page 5). Our work translated into a series of awards: Hengeler Mueller was named 'Law Firm of the Year' in the 'Regulated Industries' and 'Energy Law' categories at this year's JUVE Awards. The firm was named 'Germany M&A Legal Adviser of the Year' at Mergermarket's European M&A Awards 2019 and 'Law Firm of the Year: Germany 2019' at the IFLR European Awards.

As ever, markets and the legal environment are in a constant change: we are very pleased that Loretta Lynch, partner of US firm Paul, Weiss and former U.S. Attorney General (2015 - 2017), has contributed an article on the status of global enforcement matters and the deepened cooperation between regulators to this edition (page 7). Our competition team in Brussels provides an outlook on EU competition law in the light of the new Commission (page 12). A new survey on the remuneration of board members can be found on page 10. Finally, we look at the current challenges to implementing the GDPR (page 14).

We hope that you will find our newsletter useful and enjoy reading it. Let's stay in touch!

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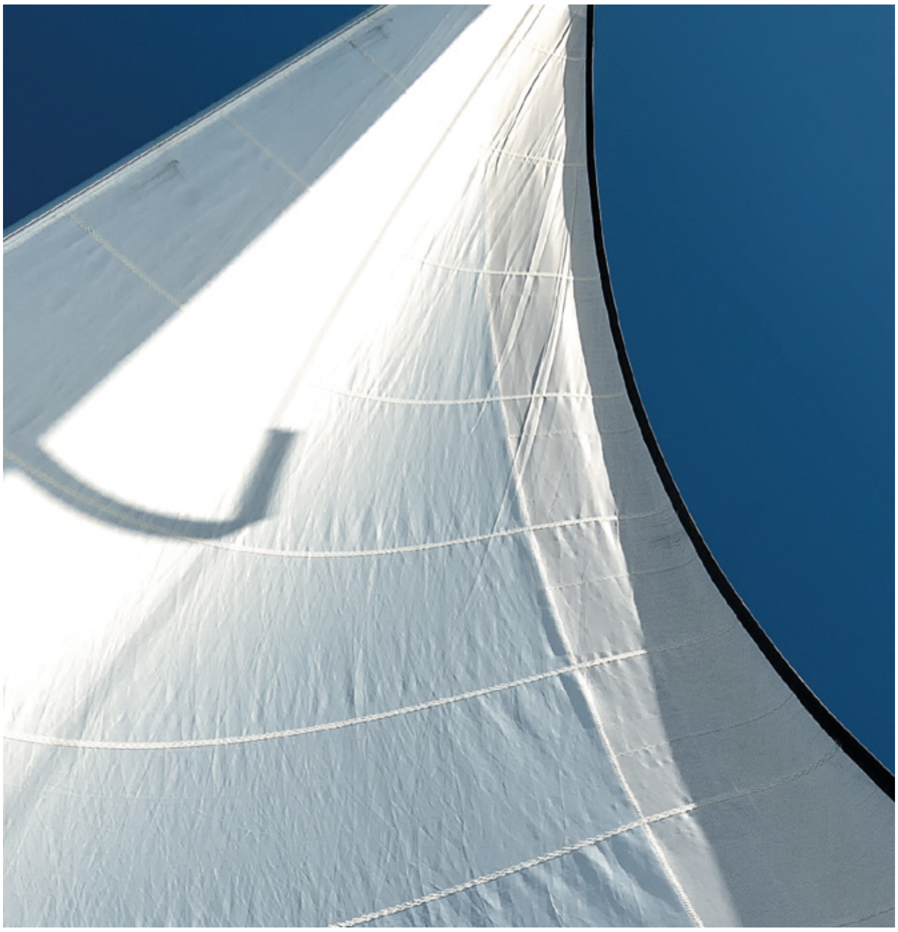
M&A SNAPSHOT

European and German M&A market dampened by uncertainty



Source: Mergermarket,
Global & Regional M&A Report 2019

Following an uneventful summer, European M&A saw a slight uptick in the final quarter of 2019, although the continent was still subdued by notable geopolitical and economic uncertainty. Trade wars and slow global growth drove activity down to USD 770.5 bn (7,579 deals) across the year, a 21.9% fall compared to 2018 (USD 986.4 bn). Continental Europe accounted for just 23.1% of global dealmaking by value in 2019, the lowest recorded annual share of European M&A in Mergermarket's history.

An absence of big-ticket deals was central to the decrease, with just five megadeals (>USD 10 bn) announced in 2019: the lowest since the 2009 crisis when just four such deals were completed. Only one European deal above the USD 10 bn mark was undertaken in the final quarter: the USD 16.4 bn tie-up between PSA and Fiat Chrysler. This was a rare example of high-profile intra-European dealmaking following a number of failed attempts to create 'European champions' with the ability to compete against American and Chinese giants.

Greater protectionism caused many corporates to refrain from spending on high-profile assets, resulting in a marked decline in foreign investment into Europe. Inbound M&A recorded a 30.3% drop in value from USD 454.2 bn to USD 316.5 bn.

German target M&A volume dropped significantly

A similar pattern was seen in the German deal arena. Although a few major deals involving German participants were done, transformational transactions in the double-digit billion range – such as the 2018 deal between Vodafone and Liberty Global – largely failed to materialise.

The number of announced German target or seller transactions fell to approx. 950, while deal value decreased to approx. USD 100bn. This decline is not entirely surprising, especially when compared to 2017 and 2018 – two extraordinary M&A years which were characterised by large cross-border transactions.

P2P and carve-outs remain major drivers

Amid lower levels of corporate activity and with vast amounts of readily available dry-powder, private equity investment in Europe remained steady throughout 2019. A total of 1,445 deals worth USD 168.5 bn were announced, the third successive year above the USD 150bn mark. Comparable high level activity seems to be on the horizon.

Public-to-private (P2P) buyouts were key to the sustained levels of European private equity activity, reaching USD 38.8 bn across 31 deals, which represents the highest annual value and volume since 2007 (USD 82.8bn, 42 deals). Significant German target P2P deals included Traviata's (a consortium comprising KKR, Canada Pension Plan Investment Board and Partners Group) stake in Axel Springer (USD 5.6 bn) and AMS' offer to the shareholders of Osram (USD 4.0 bn).

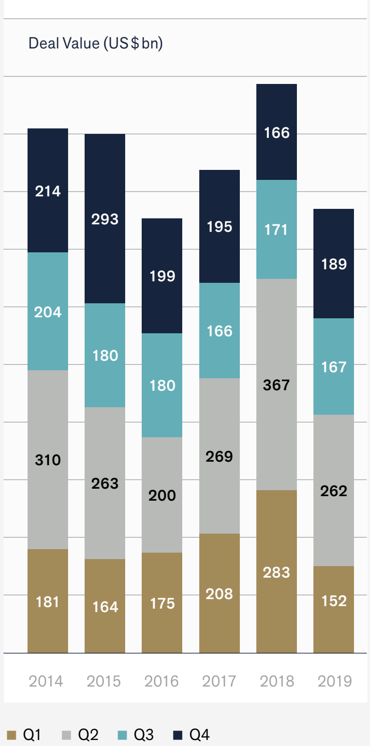
Another trend that appeared in 2018 gained further momentum last year: more and more companies divested areas that no longer fit in with their core business. BASF, for example, sold the two business units pigments (EUR 1.15 bn) and construction chemicals (USD 3.5 bn), while Bayer and Lanxess divested their stake in chemical park operator Currenta (USD 3.9 bn), and Bayer's animal health division was acquired by Elanco (USD 7.6 bn).

Historic high for pharma, medical and biotech

The European pharma, medical & biotech sector was an area of growth, reaching USD 163.6 bn in 2019 in value – 8.9% more than 2018 and the highest annual Mergermarket figure on record. Meanwhile the tech sector continued to attract investors, reaching 1,094 deals – also the highest Mergermarket annual deal count on record. The USD 76.1bn spent on European tech assets, which represents a 26.3% increase from 2018, following deals such as Mastercard's USD 3.2bn acquisition of Danish payments firm Nets' corporate services business.

Dealmakers once again faced turbulent geopolitical headwinds in 2019: trade wars, Brexit uncertainty and a low growth environment led to lower confidence in the market. While areas such as private equity may provide some optimism, the market will remain wary of a further downturn in 2020.

Europe Quarterly Breakdown Trend



However, economic uncertainty could spur another M&A trend: distressed transactions. This year, we could see more acquisitions out of bankruptcy or debt restructuring.

Best Friends run at the top

European legal adviser league table ranked by value, Full Year 2019

Rank	House	Value (USD M)	Number of Deals
1	Best Friends Group	265.650	250
2	Kirkland & Ellis LLP	172.861	103
3	Freshfields Bruckhaus Deringer LLP	133.038	149
4	Linklaters	128.981	171
5	Weil Gotshal & Manges LLP	128.486	93
6	Davis Polk & Wardwell LLP	123.046	25
7	Latham & Watkins LLP	115.265	128
8	Clifford Chance LLP	105.884	158
9	Sullivan & Cromwell LLP	101.337	32
10	Debevoise & Plimpton LLP	98.413	15

The League Table is based on announced deals with European targets between 01/01/2019 and 31/12/2019.

Mergermarket
An Acuris company

The **Best Friends** is a group of six international law firms headquartered in the major business centres of Europe. It comprises 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. By delivering fully integrated teams, the group provides clients with a 'best in class' service internationally.

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

M&A HIGHLIGHTS

Hengeler Mueller & Best Friends

08/11/2019

In further streamlining its structure in Europe, State Street Group has completed a cross-border merger of State Street Bank Luxembourg S.C.A., Luxembourg, with and into State Street Bank International GmbH, Munich. The project is part of State Street's European Legal Entity Management initiative. The overall objective is to reduce the number of legal entities, which will enable a more efficient use and generation of capital, allow for greater flexibility to provide services across the European Union and drive infrastructure and governance efficiencies. Hengeler Mueller advised State Street Group on the transaction.

09/10/2019

Fortum Oyj has entered into agreements to acquire all Uniper shares held by funds managed by Elliott and Knight Vinke, a total in excess of 20.5%, increasing Fortum's share in Uniper to more than 70.5%. The purchase price amounts to approx. EUR 2.3bn. The transaction will be financed with existing cash resources and committed credit facilities. Hengeler Mueller advised Fortum on the transaction and its financing.

16/09/2019

Hengeler Mueller, together with Simpson Thacher & Bartlett in London and New York, Davies Ward Phillips & Vineberg in Toronto as well as various other European local counsel, advised funds managed by The Blackstone Group on the acquisition of Dream Global REIT. The Canadian real estate investment trust listed in Toronto and Frankfurt holds a pan-European real estate portfolio with the majority of the properties located in Germany. The all-cash transaction is valued at CAD 6.2bn (appr. EUR 4.2bn).

23/08/2019

innogy SE has sold its 49 per cent stake in the business of the Slovakian VSEH (Východoslovenská energetika Holding a. s.), based in Kosice, to RWE. VSEH is a holding company whose subsidiaries are engaged in the business of electricity supply and distribution as well as retail in Slovakia. Hengeler Mueller advised innogy on the transaction.

> www.hengeler.com/deals

20/08/2019

Elanco Animal Health Incorporated entered into an agreement with Bayer AG to acquire its animal health business in a transaction valued at USD 7.6bn. The transaction will be financed by a 70% cash/30% equity combination. Hengeler Mueller has advised Elanco on the acquisition together with Paul, Weiss, Rifkind, Wharton & Garrison.

19/07/2019

As part of an extended Series D Funding round, Tencent Holdings Ltd., a leading technology company, has increased its investment in N26, a provider of mobile banking services. All previous investors from the Series D funding round in January 2019 have participated in this latest investment in N26. Hengeler Mueller advised Tencent on the transaction.

09/07/2019

Global Infrastructure Partners (GIP) has divested its 50 per cent stake in the German offshore wind farm Gode Wind 1. For this purpose GIP has sold a 25 per cent stake in the project to each of the investors Glennmont Partners and The Renewables Infrastructure Group Limited (TRIG). Ørsted, a global leader in offshore wind and developer of the wind farm, will continue to hold a 50 per cent stake in the wind farm. Hengeler Mueller advised Ørsted on the transactions and has been advising Ørsted on the Gode Wind 1 project since the development of the wind farm.

FROM A DIFFERENT ANGLE

The US Piling On policy –

Is relief in sight from multiple fines from dueling regulators?

Loretta E. Lynch

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US enforcement matters increasingly cross international borders. From wherever in the world they are located, traders can access US markets, putting them within the reach of US regulators. US authorities often pursue investigations into violations of the US Foreign Corrupt Practices Act (FCPA) based on the international conduct of corporations and their employees. And as companies integrate globally their business units, desks, and teams, it becomes all the less likely that conduct will be cabined to a single country.

US regulators are hardly alone in their efforts to investigate and prosecute global activity. As a consequence, corporate conduct is very often scrutinized by regulators from multiple jurisdictions all at the same time. As just one example, the alleged manipulation of Interbank Offered Rates like LIBOR was reportedly investigated by regulators from, among others: the US; the United Kingdom (UK); Germany; the European Union; Japan; Singapore; Hong Kong; Canada; Switzerland; the Republic of Korea; and the Netherlands. Other recent matters – including those involving foreign exchange benchmarks, corrupt payments, money laundering, and economic sanctions – have likewise attracted the attention of numerous regulators from across the globe.

As enforcement matters have become more globalized, regulators have taken steps to deepen their cooperation. Press releases announcing resolutions of regulatory matters issued by US enforcement authorities like the United States Department of Justice (DOJ) routinely recognize the assistance provided by their foreign counterparts. And this year alone, US and foreign regulators have taken a number of steps to formally augment their cross-border capabilities. In February, for example, the UK passed the Crime (Overseas Production Orders) Act (COPO Act), which allows UK courts to compel certain organizations to provide electronic data stored outside of the UK. In May, the chairs of the US Securities and Exchange Commission (SEC) and the US Commodity >

Futures Trading Commission (CFTC) announced that they had joined financial regulators from a number of other countries in signing an Enhanced Multilateral Memorandum of Understanding intended to improve the global enforcement of securities and derivatives laws. And this past fall, the US and the UK signed an executive agreement pursuant to the US Clarifying Overseas Use of Data Act (CLOUD Act), which allows American and British law enforcement agencies to demand electronic data regarding serious crimes directly from tech companies based in the other country.

While this international cooperation is a boon to the regulators' global enforcement capabilities, it adds complexities for companies under investigation for their cross-border conduct. And the increased regulatory cooperation has not extinguished the risk that companies will be forced to defend multiple investigatory streams or will have to pay incremental fines to numerous regulators for the very same conduct.

The DOJ itself appears cognizant of these risks. In May 2018, then-Deputy Attorney General Rod Rosenstein announced what has been called the "Piling On" policy. Among other things, the policy invites DOJ prosecutors to "endeavor, as appropriate, to ... consider the amount, fines, penalties and/or forfeiture paid to federal state, local or foreign law enforcement authorities that are seeking to resolve a case with a company for the same misconduct."

While the introduction of the Piling On policy is a positive development for corporations facing cross-border inquiries, the policy does not, by itself, eliminate the risk of duplicative fines. That is because, under the policy, DOJ prosecutors retain the discretion to "determin[e] whether coordination and apportionment ... with other enforcement authorities allows the interests of justice to be fully vindicated."

In making that determination, the federal prosecutors are encouraged to consider: *the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the Department, separate from any such disclosures and cooperation with other relevant enforcement authorities*

These considerations provide useful guidance to companies seeking to benefit from the Piling On policy — and seeking, more broadly, to effectively manage multi-regulatory cross-border enforcement matters.

First, the policy refers to "the risk of unwarranted delay in achieving a final resolution." This speaks to the importance of facilitating coordination amongst various regulators when possible and appropriate. Having multiple investigations proceed at disparate paces can cause any number of complications for a company, including the risk that the various regulators may not be on equal footing with respect to their access to the documents and facts. And if a regulator's investigation lags significantly behind the DOJ's, the DOJ (i) may not be willing to delay a resolution to allow for a coordinated announcement; and (ii) would thus not be able to factor in the other regulator's fines in negotiating its resolution. While it is the enforcement authorities themselves that are empowered to decide the extent to which they are willing to coordinate with one another, a company can often strengthen its position by transparently encouraging open channels of communication.

Second, the DOJ makes clear that it will consider the "adequacy and timeliness of a company's disclosures and its cooperation with the [DOJ]," specifically – not the company's global cooperation, more broadly. Other regulators tend to take much the same view. Companies thus need to be very sensitive to managing the impression that they consider one regulator as "primary" or more important than the others. Coordination among counsel in various jurisdictions can help to ensure that a company is being consistent in approach and in the information it is sharing with regulators across the globe.

Third – and further complicating the issue – regulators may differ as to what they weigh in measuring a company's cooperation. For example, while the DOJ cannot predicate cooperation credit on a company's willingness to waive attorney-client privilege, other global regulators do give credit for so doing. The US also differs from many countries in providing individual defendants with deeply enshrined protections against self-incrimination. That means that companies often must take particular care to ensure that they do not share with US regulators "compelled" testimony that was given in other jurisdictions. And while the DOJ requires companies to provide them with material held abroad, many countries outside of the US have strict data privacy protection laws that can complicate the production of those materials. Regulators are often – but not always – sensitive to these conflicting considerations. But managing them requires careful and strategic forethought. If a company wants to hold back from the DOJ materials held abroad, for example, it needs to carefully evaluate whether foreign privacy laws absolutely prohibit their production, or else risk the impression that it is exploiting foreign rules to evade full cooperation.

* * *

Shortly after the Piling On policy was announced, the DOJ resolved an FCPA investigation with Société Générale S.A and SGA Société Générale Acceptance N.V. Of $585 million in bribery penalties that the DOJ assessed, the DOJ credited over half ($292 million) to Société Générale for payments the company made to the French financial prosecutorial authority, the Parquet National Financier (PNF). Several months later, the DOJ declined to prosecute Guralp Systems Limited for potential FCPA violations on the basis of, among other things, the company's "substantial cooperation" with the DOJ's investigation and the company's commitment to accepting responsibility through a resolution with the UK's Serious Fraud Office. But even as the DOJ has embraced the anti-piling on approach in some cases, other recent resolutions underscore that the policy's application is discretionary and far from guaranteed. This dynamic is consistent with a broader DOJ trend: the encouragement of corporations to self-disclose to and cooperate with the DOJ to the extent possible. The substantial benefits that can be gained from application of the Piling On policy provide the DOJ with another lever to help secure cooperation and self-reports.

INSIGHTS

Supervisory boards surveyed on the subject of remuneration

The remuneration of top managers, especially that of listed companies' executive board members, has become a common topic for public debate. It is regularly the subject of intense dispute at shareholder meetings. Also at supervisory board meetings, executive remuneration at times ends up in some heated discussion. But what factors really influence how executive remuneration is structured? And how important is it for companies that certain stakeholder groups approve of the executives' remuneration? Together with the Arbeitskreis deutscher Aufsichtsrat e.V. (German Supervisory Board Working Group), we examined these and other prevailing questions in an empirical study which yielded some surprising results.

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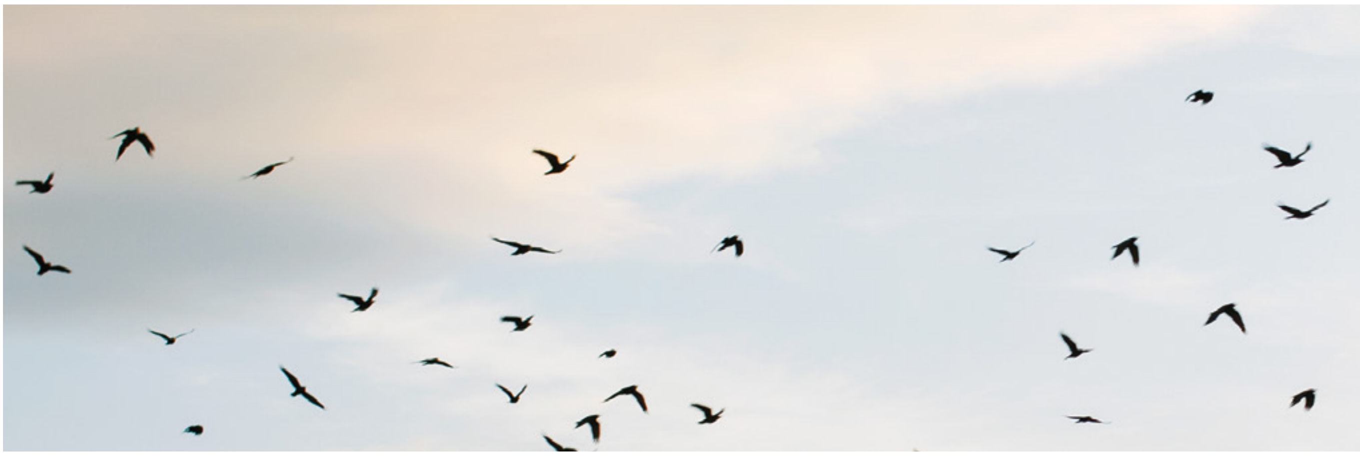
Major stakeholder focus

The study examined to what extent public debate has in fact influenced companies' actions. One finding is particularly interesting: in two-thirds of the supervisory boards of the companies surveyed, executive salaries are not contentiously debated at all. And yet companies attach great importance to their remuneration models being approved of by different stakeholders. For instance, supervisory boards find it especially important that institutional investors approve of directors' remuneration. Somewhat less important is – in the following order – the approval of the works council, minor shareholders, the general public, labour unions and, lastly, proxy voting advisory firms. Therefore, the greatest weight is given to stakeholders which have direct relations with the company, either through capital or cooperation.

As regards the criteria that supervisory boards use for actually structuring executive remuneration, one aspect has notable priority: the German Corporate Governance Code. The latest revision was passionately discussed among experts, in particular the guidelines on executive remuneration. For the supervisory boards surveyed, the Code has the greatest impact when executive remuneration is structured. After that, other criteria, such as 'international standards' and 'suggestions from important institutional shareholders', follow. Proxy voting advisory firms are considered to have only moderate relevance.

Clawback clauses are often found

When it comes to structuring variable remuneration, one instrument is finding its way into executive board contracts more and more, which by law is only required for major credit institutions, but is recommended by the German Corporate Governance Code: clawback clauses. Such provisions entitle the company to withhold or reclaim variable remuneration components if certain negative events or developments occur. Nearly four in ten of the companies surveyed (39%) use such clauses and more than one-tenth (11%) intend to introduce them. Unlike claims for damages, clawback clauses do not require any proof of a financial loss caused by a breach of duty. They can also sanction damage made solely to a company's reputation. Here, the contentious public debate surrounding directors' liability manifestly



appears to be influencing the contents of these agreements.

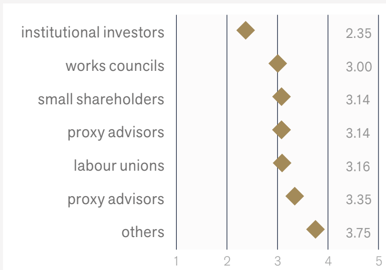
Different designs of long-term variable remuneration systems

Generally, directors should base their management decisions on what is best for their company in the long-term. It would stand to reason that long-term variable remuneration is given in the form of stock. In doing so, variable remuneration will reflect the company's performance. Slightly more than half (53%) of the supervisory boards surveyed use company shares as a component in executive remuneration. Conversely, just under half have deliberately decided against including shares as a component of their remuneration concepts. One reason for this certainly is the public debate surrounding insider dealing and the risk of having to explain rather 'timely' sales or purchases to an attentive public, even though the exercise period had already been stipulated long beforehand.

The majority of companies (62.5%) take quantitative financial measures as well as specific qualitative criteria into account in order to determine the long-term variable remuneration. While only one of the supervisory boards surveyed (2.5%) considers qualitative progress alone to be decisive, more than one-third of respondents (35%) link long-term variable remuneration exclusively to the achievement of certain key performance indicators (KPIs) such as profit, returns or cash flow. Using such indicators as a basis certainly promises greater objectivity in principle – whether business targets have been reached or not can easily be read. However, this approach also has its drawbacks: first, financial figures can be materially affected by external factors and, because of that, they may only inadequately reflect an executive's individual performance. Second, it must not be overlooked that tying variable remuneration to financial figures can create false incentives.

Overall, the German Corporate Governance Code has already delivered an important impetus, but the debate surrounding executive remuneration is by no means over. Since a definitive formula does not seem to be coming anytime soon, we are eager to see how this subject will develop further.

Importance with regard to the acceptance of executive board renumeration

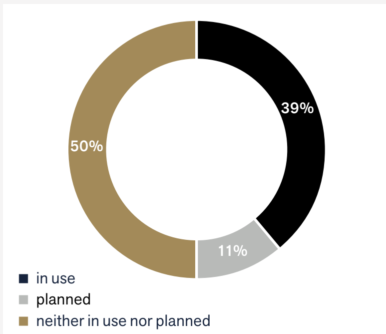


from 1 'very important' to 5 'not important'

Significant factors influencing the structure of executive board renumeration

from 1 'very important' to 5 'not important'

Relevance of clawback provisions



LEGISLATIVE OUTLOOK

EU competition law – quo vadis?

On 1 December 2019, the new EU Commission took office with the Dane Margrethe Vestager as Executive Vice President and Commissioner for competition and digital policy. Reason enough to take a look at recent developments in EU competition law.

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The President of the EU Commission, Ursula von der Leyen, has allocated additional responsibilities to Margrethe Vestager, who has held a Commission office since 2014. In her new role, she is not only in charge of enforcing the competition rules, but also responsible for the EU Commission's digital policy: a mammoth assignment, which she is certainly capable of handling. However, this new 'dual role' for competition and digital policy has met some concerns: on the one hand, Vestager is to enforce competition rules against tech giants. On the other, a digital strategy for Europe can only be devised by way of a cooperative dialogue with precisely those companies. Therefore, some see a potential conflict between the two roles. During her hearing before the European Parliament, Vestager emphasised that independence in competition law enforcement is 'non-negotiable'. Any potential conflict of interest, according to the Commissioner, is prevented by impartial and transparent decision-making procedures within the EU Commission. Google, Apple, Amazon and Co., in particular, will be watching very carefully.

As EU Commission President von der Leyen made clear in her 'Mission Letter', making Europe fit for the Digital Age shall be one of the main objectives for Vestager's second term in office. In this context, various questions arise with regard to competition law policy, e.g. on how new kinds of digital business models like platforms and pricing algorithms should be dealt with. Put briefly: is current EU competition law still suited to effectively prevent and penalise potentially restrictive practices in the digital economy? Some believe that EU competition law might be a bit out of its depth and that lawmakers are now called upon to act by passing specific regulation. Others point to the risks of over-regulation that could stifle important incentives for companies to innovate. Although the digital economy may present regulators and courts with new issues, like access to data as a competitive factor, to conclude that the existing toolbox of EU competition law has failed goes too far. Vestager will likely take a mediating approach. During her hearing before the European Parliament, the Vice President-designate made clear that, in her opinion, regulation should be the absolute last resort. On the other hand, however, she does not seem to shy away from regulatory intervention when necessary. One example is the geo-blocking regulation adopted in 2018 at the instigation of the EU Commission: it is aimed at preventing corporate practices that are intended to hinder cross-border online shopping of EU citizens, such as redirecting customers to a specific national version of an online shop based on the customer's nationality, place of residence, or location.

It is conceivable that the Federal Government will try to utilise the German EU Council Presidency in 2020 to inject its own ideas into the discussion on the need to reform existing EU competition rules in light of the evolution of the digital economy. The 'Commission Competition Law 4.0', a commission of experts set up by the German Federal Minister for Economic Affairs and Energy, Peter Altmaier, recently published some far-reaching ones, such as establishing stricter rules for dominant platforms. Additionally, as shown by the recently published draft bill, the upcoming 10th amendment of the German competition law is expected to introduce various new rules specifically designed to address the digital economy. Not all of these proposals and legislative initiatives in Germany will meet with unanimous approval in Brussels.

Legitimate R&D cooperation vs. illicit collusion

Major challenges await Vestager in other areas as well. Recently, for instance, the EU Commission intensified its investigation into German car manufacturers. The EU Commission suspects BMW, Daimler, VW, Audi, and Porsche of having cooperated with one another in a manner impermissible under EU competition law in their development and roll-out of emission-reducing technology for petrol and diesel passenger cars. The case poses difficult questions of how to distinguish between legitimate R&D cooperation and illicit collusion: where does one end and the other begin? The upcoming reform of the 'horizontal' block exemption regulations that permit certain cooperation agreements between competitors in the area of R&D and specialisation and which are due to expire at the end of 2022, might provide much needed guidance. The EU Commission has recently opened public consultation about the reform. Vestager will also have to confront the ever more noticeable decline in the number of leniency applications. The EU Commission is faced with becoming a victim of its own success in this area. For years, it has pursued the goal of making it easier for the victims of cartel agreements to enforce damages claims. The flip side: companies have recognised the risk associated with actions for damages and have shied away from self-reporting to the EU Commission. Here, the EU Commission will have to consider new approaches so as not to jeopardise its leniency programme, perhaps by granting leniency applicants additional protection against claims for damages.

Over the last few years, the EU Commission has placed great emphasis on vertical issues, an area that it had previously left more to national regulators – the German Federal Cartel Office in particular. As a result of its e-commerce sector inquiry from 2017, the EU Commission has opened several investigations. Most recently, it imposed multi-million-euro fines against Guess (EUR 40m) and Sanrio/Hello Kitty (EUR 6.2 m) because the distribution and licensing agreements entered into with their distributors restricted cross-border selling of products to consumers in other EU member states, besides providing for other restrictive practices. Other investigations into vertical restraints are currently still ongoing. It is expected that the 'new' EU Commission will continue to focus on tracking down and punishing such practices.

VBER reform

Also on the EU Commission's current agenda is reforming the so-called Vertical Block Exemption Regulation (VBER) and the accompanying 'Guidelines on Vertical Restraints'. The VBER sets out under what conditions distribution agreements, e.g. between a manufacturer and its resellers, are exempted from the prohibition of restrictive agreements and therefore allowed. Although it is still uncertain how the EU Commission will formulate them exactly, it appears likely that new rules on online sales will constitute the reform’s centrepiece. In this regard, the EU Commission will presumably take recent European Court of Justice case law into account – for instance, regarding bans on the use of third-party platforms – and potentially build upon it. It is also conceivable that 'online sales' will find their way into the VBER as a distinct regulatory subject matter for which specific, generally unlawful, hardcore restrictions will be defined along with a catalogue of exceptions. From the corporate standpoint, hope remains that the new VBER will provide greater legal certainty regarding (many) presently contentious issues on what EU competition law allows in terms of the distribution of goods – especially online.

Finally, it will be interesting to see how Vestager will react to calls for reform of the EU merger control system. The prohibition of the Siemens/Alstom tie-up has brought about sharp criticism for the EU Commission, not least from Peter Altmaier. The rebuke: the merger was necessary in order to ensure the competitiveness of European companies Siemens and Alstom in the global arena against Chinese manufacturer CRRC. On 4 July 2019, the German, French and Polish economy ministers sent a clear message to Brussels. In a paper titled 'Modernising EU Competition Policy', they called for greater flexibility in EU merger control in order to protect common European interests. In other words: laxer rules for 'European champions'.

LEGISLATIVE OUTLOOK

Companies struggling with the implementation of the GDPR

More than 18 months after the introduction of the General Data Protection Regulation (GDPR), companies are still having difficulties in complying with its provisions, as evidenced in the considerable fines imposed by German and European data protection authorities. So how well positioned are companies now?

Over the last few years, the vast majority of companies have made significant efforts to increase their compliance with data protection law. In particular, these efforts have focused on verifying the lawfulness of data processing, informing employees and business partners about data processing, documenting the commissioning of service providers and reorganising data protection teams. Nevertheless, some weak spots remain. For instance, the Berlin Data Protection Commissioner has criticised that some companies continue to store data although they are no longer needed and that there is a lack of concepts for erasing data.

What's keeping companies from complying with the legal requirements?

The reasons are diverse: not all companies have been able to convert their GDPR projects, some of which were launched ad hoc, into lasting compliance activities. For many, it is not easy to find sufficient resources to manage the digitisation of their business operations in reasonable time because of the technical complexities. In order to comply with erasure requirements, for example, some companies must first replace older IT systems with modern ones that allow data to be erased. International corporations are also struggling with the differences between European legal requirements and those in other jurisdictions. Even within Europe, some rules differ considerably from country to country, e.g. in the use of cookies.

Will the fines imposed against individual companies compel other companies to improve their compliance with data protection law?

Just as the regulators intended, this will certainly have the desired effect of being a wake-up call for every company. However, court decisions are still pending in numerous proceedings where fines may be imposed. For instance, when the amount of a fine is determined to sanction the failure to comply with erasure obligations, the extent to which the continued storage of the relevant data is a genuine risk, or even a violation of the data subject's privacy, will certainly need to be taken into account.

In any event, the model for setting fines recently published by the German data protection authorities can lead to severe fines for companies with a high turnover, even if the violation is minor. But instead of an evaluation of the violation, a type of daily rate is to be determined solely on the basis of (group) turnover. That daily rate is then modified depending on the severity of the violation and other factors. However, the guidelines do not set out in what cases a fine is appropriate and what constitutes a severe violation. Accordingly, the model has been subject to criticism.

How can the data protection authorities assist companies in their compliance efforts?

The data protection authorities in Germany and Europe remain required to advise companies on the practical application of data protection law and to assess business models, products and data processing. Based on our experience, however, individual enquiries are often not processed because of a lack of resources. At the same time, the general statements that the authorities issue do not reflect the multifarious real-world situations in which data protection law applies, and their rigid requirements make it difficult to find appropriate solutions for individual cases. The requirements also tend to be restrictive – for instance, when they require consent for the use of external providers' tracking tools. Acceptance of data protection law requirements will increase when their application focuses more on the needs of corporate practice.

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NEWS

New partners and counsel 2020








'We are delighted to appoint such talented lawyers as partners and counsel at our firm.

In recent years, all of them have impressed both us and our clients with their excellent work and collaborative team spirit.

Our new partners and counsel will make a significant contribution to the further development of the firm. We sincerely congratulate them and look forward to continuing our successful journey together.'

Georg Frowein and Rainer Krause, Co-Managing Partners

Johannes Baumann

Counsel, Frankfurt

Johannes advises on M&A transactions, including complex corporate reorganisations, and on corporate matters, representing corporate clients as well as private equity and other financial investors.

Alexander Bekier

Counsel, Berlin

Alexander advises on a broad range of corporate matters and corporate reorganisations as well as M&A projects. His practice also includes capital markets work, in particular in connection with M&A transactions. Additionally, Alexander's practice covers representation in legal disputes with a focus on directors' liabilities issues.

Maximilian Bülau

Partner, Frankfurt

Maximilian's practice covers a broad spectrum of complex commercial litigation, international and national arbitration and alternative dispute resolution issues. He focuses on securities litigation as well as contract and corporate law disputes.

Markus Ernst

Partner, Munich

Markus advises on tax issues in connection with transactions, reorganisations, financings, tax audits and contentious proceedings. In addition to tax law issues arising in M&A transactions and reorganisations, he also focuses on assisting financial institutions in tax-driven internal investigations.

Antonia Hösch

Partner, Frankfurt

Antonia represents companies in complex disputes before state courts, in international and national arbitration proceedings and in alternative dispute resolution processes. She focuses on commercial and corporate law disputes (including post-M&A matters). Antonia also advises in antitrust related matters.

Susanne Koch

Counsel, Düsseldorf

Susanne specialises in public law and advises investors, companies, associations and the public sector on all public law and regulatory matters involving both European and national law. In addition, she is an experienced litigator who represents clients in administrative proceedings and legal disputes.

Moritz Rademacher

Counsel, Düsseldorf

Moritz has a broad public law practice and advises investors, companies and public sector entities in all public law matters. He has a particular focus on the energy sector and other regulated industries, aviation law, banking regulatory matters, product and food law, mining and environmental matters as well as European law.

Daniel Zimmer

Partner, Düsseldorf

Daniel specialises in all areas of competition and energy law. In energy matters, he supports investors and energy supply companies in M&A transactions and advises clients on regulatory issues. In competition matters, he mainly focuses on the representation of companies in cartel damage claims and their extrajudicial conflict resolution.

> www.hengeler.com/lawyers

HM Akademie St. Gallen

'For me, the shared experience at the Academy is one of the main cornerstones of the team spirit and the collegiality at Hengeler Mueller.'

Martin Tasma, Partner

'The excellent education about subjects beyond just law played an important role in my decision to join Hengeler Mueller.'

Nikita Gontschar, Associate

'The Academy is more than just an interdisciplinary continuing education programme. It is primarily also there for friends and colleagues to share thoughts and ideas face-to-face.'

Anja Balitzki, Associate

'The HM Academy is the benchmark in the German and international market when it comes to taking the development of legal talent seriously.'

Bruno Mascello, Vice Director,
Executive School, University of St Gallen

'By promoting professional excellence and economic understanding, the HM Academy St Gallen is the perfect preparation for advising demanding corporate clients.'

Leo Staub, Director,
Executive School, University of St Gallen

INSIDE HM

Happy anniversary, HM Academy St Gallen!

Hengeler Mueller can look at its HM Academy St Gallen as a ten-year success story, which remains unrivalled in the market. With its three pillars of 'law', 'economics' and 'soft skills', this institution is a key component in the development and legal training of our lawyers. When they join the firm, they are automatically set up to be part of a continuing education programme at the University of St Gallen.

We have worked closely with St Gallen to design a tailor-made, five-year curriculum for our associates. The aim: for our young attorneys to understand how our clients think, to continuously broaden their horizons and to think outside the box. In addition to aspects of business law that are particularly relevant to the work we do at Hengeler Mueller, our associates study relevant facets of economics and business administration and attend seminars to build soft skills, ranging from presentation techniques to leadership tools.

Over the past decade, nearly 500 participants have attended over 125 modules on more than 600 days of instruction. Almost 400 exams have been taken. The result: more than 200 certificates and 99 diplomas. All of us are proud of this achievement.

Besides fostering the development and legal training of our associates, the programme allows them to network extensively when they meet twice a year for a five-day Academy module. The tremendous team spirit within the Academy classes has grown increasingly over time and was clearly tangible at last autumn's anniversary celebration.

We are already looking forward to the next incoming cohorts.

AWARDS

Further recognition in H2 2019

Mergermarket Europe M&A Awards 2019
HENGELER MUELLER
GERMANY M&A LEGAL ADVISER OF THE YEAR
WINNER 2019

2019 Mergermarket Europe M&A Awards

Hengeler Mueller was named 'Germany M&A Legal Adviser of the Year' at Mergermarket's European M&A Awards 2019. Following a rigorous judging process, the prizes are awarded for creative advisory work on complex transactions.

JUVE AWARDS 2019
Germany
Law Firm of the Year
Regulated Industries

2019 JUVE Awards

Hengeler Mueller has been named 'Law Firm of the Year' in the 'Regulated Industries' and 'Energy Law' categories at the JUVE Awards ceremony, which was held in Frankfurt. In its congratulatory speech for the Regulated Industry Award, the JUVE editorial team emphasised, among other things, the firm’s unique combination of comprehensive regulatory knowledge and high-profile transaction business. The Hengeler team was praised for its 'outstanding expertise' in the market, which increasingly includes the junior lawyers. 'In addition, the team succeeded in important model proceedings before the Federal Court of Justice (Bundesgerichtshof)', JUVE added.

2019 Europe Rising Star Awards

Euromoney Legal Media Group recognised Hengeler Mueller counsel Jörg Meinzenbach at the 2019 Europe Rising Stars Awards which celebrate leading lawyers of the future across 20 practice areas and 19 European countries. Jörg was the recipient of a Country Rising Star Award for Germany.

www.hengeler.com/awards

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