HENGELER MUELLER

Latin America Desk Newsletter

The purpose of this newsletter is to highlight the key legal developments and business trends in Germany and other parts of Europe in the first half of 2018. We have also included a few transactions which we have recently advised on, including the ones where we have worked jointly with our 'Best Friend' firms in Europe.

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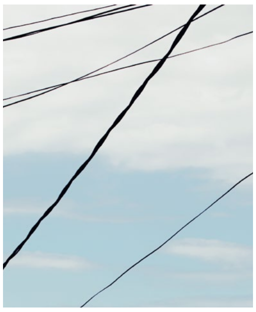
Joint Ventures in Germany

Joint ventures are currently a trend in certain situations, for example to consolidate/gain synergies in some markets. This was the case in the steel industry, as the joint venture between Germany's thyssenkrupp and India's Tata Steel shows.

Tata Steel and thyssenkrupp have entered into a joint venture agreement to create a leading European steel enterprise by combining the flat steel businesses of the two companies in Europe and the steel mill services of the thyssenkrupp group. Under the agreement, each company will hold a 50 percent stake in Thyssenkrupp Tata Steel B.V., based in the Netherlands. The merger, if approved by regulatory agencies, will create Europe's second-largest steel company. The joint venture would have annual shipments of around 21 million tonnes of flat steel products and have a pro forma turnover of around EUR 15 billion per year

Some other reasons for entering into a joint venture includes business expansion, development of new products or moving into new markets, particularly overseas, access to more resources, combining technical expertise of the two parties (as highlighted by the Continental-Osram joint venture included below), new revenue streams, better know-how, access to distribution channels, improved economies of scale, development of diverse products, better credibility and visibility, sharing human capital, technology and skills. Parties may also consider entering into a joint venture to better compete against other established players in the market.



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In April this year, Continental, auto-parts supplier and Osram, lighting company, entered into a 50-50 joint venture to develop lighting products for the automotive industry. The joint venture aims to combine Continental's and Osram's respective expertise in lighting, light control and electronics. The product portfolio will feature semiconductor-based lighting modules such as LED modules for front and rear headlights, laser modules and light control units.

The global joint venture will operate under the name **Osram Continental GmbH** and will be based in the Munich region. The aim is to generate annual sales in the mid-triple-digit-million-euro range with a workforce of around 1,500 employees across 17 locations worldwide.

Earn-out Clauses in M&A

The M&A market in Germany and Europe continues to be very strong, with high valuations and a very seller-friendly environment.

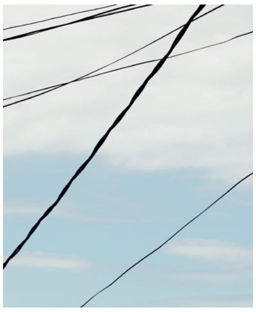
Given the extremely high valuations, there are more and more scenarios in which the purchase price gap cannot be overcome at signing/closing and seller and purchaser agree on earn-out provisions. In such a scenario, the purchaser and seller would often jointly define certain milestones (specific operational targets) and only when these milestones are achieved by the target company after completion of the transaction, that a further portion of the purchase price would become due and payable to the seller.

There are different types of earn-out clauses, including, EBITDA/revenue-based clauses and earn-out clauses based on proceeds from a future exit. The latter is easier to measure/control, but obviously only works if a purchaser is aiming for an exit (typically only if a financial sponsor is buying).

Some complex features can also be included in earn-out clauses such as minimum thresholds, caps on maximum payouts and tiered payment structures.

It is interesting to note that even though the market is very seller-friendly, we see sellers being pragmatic and agreeing on earn-out clauses, in spite of their strong position in the current market. At 28 percent, the share of earn-out clauses for M&A contracts in the German-speaking region is already above the European average (21 percent), according to a recent study.

However, a word of caution is necessary here – due to the conflicting interests of the purchaser and seller, the earn-out clauses often tend to be a subject matter of litigation. Therefore, it is imperative for both the purchaser and seller to carefully draft the earn-out clauses in the transaction documents.



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Financing Market and Recent Trends

Currently the competition in the financing market in Germany and the policy of the European Central Bank leads to very low interest rates and very favorable other terms for borrowers which are back to the pre-crisis conditions. It is a 'borrower market'.

Cheap funding also leads to higher purchase prices for shares and real property.

Lending funds have become increasingly active in special situations and acquisition finance for leveraged buyouts (LBO). High-yield is mainly for LBOs with a trend to have bond funding at closing. Although some high-yields were under German law (in the past, Hengeler Mueller has advised Phoenix Pharmahandel and HeidelbergCement on the issuance of high-yield bond under German law), but mostly use of New York law has an unbroken dominance on high-yields.

These days, a very popular product is *Schuldscheine*/Loan Notes. Very high volumes have been seen. In July 2018, Hengeler Mueller advised JOST Werke AG (JOST), a leading global producer and supplier of safety-critical systems for trucks and trailers, on the issuance of its first Schuldschein loan with maturities of five and seven years.

Due to high demand from institutional investors, the placement was oversubscribed and the total volume was increased from EUR 100 million to EUR 150 million. JOST will use the proceeds of the Schuldschein issue to redeem existing financial debt.

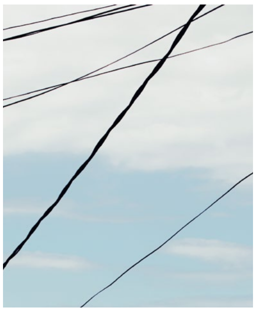
Corporate Criminal Liability in Germany

Earlier this year, the coalition government in Germany has agreed on some important changes in the laws on corporate criminal liability.

The new coalition agreement states that authorities should be obliged to conduct investigations and, in the event that wrongdoing is discovered, to impose penalties on corporates for the respective violations. Currently, under the 'opportunity principle' in German administrative offences law, enforcement authorities decide at their discretion whether and to what extent, they should impose penalties on corporates or whether they should terminate investigations against a corporate without a penalty.

Further, the amount of monetary penalties is supposed to be based on the economic strength of the respective corporate. For corporate entities with an annual revenue above EUR 100 million, the maximum amount of monetary penalties is proposed to be 10 per cent of the annual revenue. This represents a significant increase, especially for the large corporates, from the current maximum limit for corporate administrative fines of EUR 10 million.

In addition, there will be legal requirements for internal investigations, especially regulatory amendments regarding searches and seized documents. This is expected to create legal incentives for people who aid in 'internal investigations' and for the subsequent disclosure of the investigation results.



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Finally, it is proposed that imposed sanctions should be publicly announced (naming and shaming).

In summary, the proposal seems to aim at providing corporates with some incentive to proactively bring matters to the attention of enforcement authorities and cooperate with their investigations.

Hengeler Mueller is advising clients on commercial criminal law related matters. Recently, Constantin Lauterwein, who was previously a local German partner for a leading US law firm, has joined Hengeler Mueller to strengthen the existing practice. The firm's white collar practice has a particular focus on multi-jurisdictional and extraterritorial enforcement against global enterprises in Germany, supporting in particular, German and international companies in investigations by the US Department of Justice and other US prosecutors and regulators and assisting with complex internal investigations.

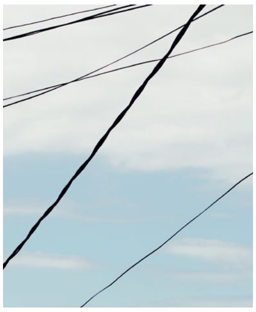
Recent transactions

Hengeler Mueller, as part of an integrated team with Slaughter and May in the UK and De Brauw Blackstone Westbroek in The Netherlands, is advising **Tata Steel Group** on its definitive agreements to enter into a 50/50 Joint Venture with **thyssenkrupp AG** to create a leading European steel enterprise by combining the flat steel businesses of the two companies in Europe and the steel mill services of the thyssenkrupp group.
» *Please refer to page number 1 for more details regarding this transaction.*

E.ON and **RWE** have agreed that RWE will transfer its entire stake of 76.8 percent in innogy to E.ON via a far-reaching exchange of assets and businesses. RWE will receive a 16.67 per cent participation in E.ON, a substantial part of E.ON's renewables business and the entire innogy renewables business. In April 2018, E.ON published a voluntary public takeover offer to the shareholders of **innogy SE** for the purchase of their no-par value bearer shares in innogy SE against a cash consideration for the amount of EUR 36.76 per innogy share. Hengeler Mueller is advising innogy SE on the acquisition by E.ON, as well as the group reorganisation.

Technology companies **Osram** and **Continental** have signed a contract to establish a joint venture. The joint venture, in which each of the partners has a 50 percent stake, aims to combine Continental's and Osram's respective expertise in lighting, light control and electronics and is scheduled to start in the second half of 2018. Hengeler Mueller advised Osram on the transaction.
» *Please refer to page numbers 1 and 2 for more details regarding this transaction.*

Broadview Holding B.V. through its indirect subsidiary **Broadview Industries AG**, recently announced that it would make a voluntary public takeover offer to the share-holders of **Westag & Getalit AG** to acquire all ordinary shares and all preference shares. The total value of the takeover offer amounts to EUR 31.00 per ordinary and preference share in cash. In addition, Broadview and the Gethalia Foundation – which owns 75.5 per cent of the voting rights of Westag – signed an agreement for the purchase and transfer of



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all shares held by the Gethalia Foundation. Hengeler Mueller is advising Broadview on the transaction.

EQT has entered into an agreement to sell **CBR Fashion Group** to UK based **Alteri Investors**. CBR is one of the top five women's fashion manufacturers in Germany with over 1,200 employees. It supplies more than 8,300 sales outlets in 19 European countries, operating under two well established brands: Street One and CECIL. Since EQT acquired the company, CBR has developed from being a fast fashion wholesale retailer to a contemporary multi-channel women's fashion provider with a strong e-commerce platform. Hengeler Mueller advised EQT on the transaction.

Bosch has acquired an indirect 5 per cent stake in **HERE** Technologies from **Audi, BMW** and **Daimler**. The mapping service HERE provides data for automated driving. Hengeler Mueller advised Bosch on the transaction in an integrated team with Best Friends law firm De Brauw Blackstone Westbroek. Dorsey & Whitney advised on US legal aspects of the transaction. In a parallel transaction, **Continental** acquired another indirect 5 per cent stake in HERE Technologies from the same sellers.

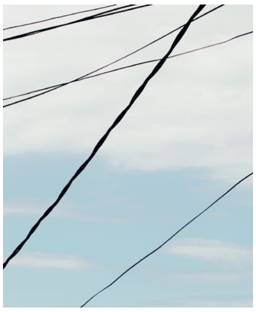
As part of a Series C Funding round, **Tencent Holdings Ltd**, a leading technology company, particularly in China, and **Allianz X**, the digital investment unit of **Allianz Group**, together with other co-investors have invested significantly in **N26 GmbH**, a provider of mobile banking. The funding represents the largest equity financing round (non IPO) in the fintech industry in Germany to date, and one of the largest in Europe. Hengeler Mueller advised Tencent together with US law firm Davis Polk & Wardwell on the transaction.

Hengeler Mueller's role as international deal counsel

Examples of our work as international deal counsel include:

TURKEY – Vitol's acquisition of **Petrol Ofisi** from **OMV**: Hengeler Mueller advised Vitol on the transaction which won the CEE Legal Matters Deal Award 2018 for Turkey. Petrol Ofisi is the market leader in fuel products and distribution in Turkey with a market share of around 23 per cent. Vitol is an energy and commodities company; its primary business is the trading and distribution of energy products globally – it trades over seven million barrels per day of crude oil and products and, at any time, has 250 ships transporting its cargoes.

AUSTRIA – BAWAG IPO: On 25 October 2017, **BAWAG Group AG**, Austria's fourth-biggest bank, successfully completed an IPO with the listing of its shares on the Vienna Stock Exchange – the first non-German IPO on which Hengeler Mueller has advised. In view of a total offer volume of approximately EUR 1.9 billion, the transaction is the biggest IPO ever on the Vienna Stock Exchange. BAWAG has also appointed Hengeler Mueller as international deal counsel beyond advising on its IPO: With the firm's support, the Austrian bank successfully completed the issuance of undated additional tier 1 instruments valued at EUR 300 million, thereby strengthening its regulatory tier 1 capital.



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AUSTRIA – Siemens's sale of a subsidiary to **Atos**: Hengeler Mueller advised Siemens on the sale of its subsidiary, **Convergence Creators Holding GmbH (CCH)**, a global multi-industry digital transformation solutions provider headquartered in Vienna, to Atos, a global leader in digital transformation. CCH delivers software-based solutions in the fields of communication networks, service and customer management, public safety and security, multimedia infotainment, as well as space technology.

SOUTH AFRICA – ATON's public tender offer for **Murray & Roberts**: ATON GmbH, an investment company of the Helmig family, whose portfolio companies are mainly active in business-to-business segments (AT Engineering, AT Mining and AT Med Tech) has published a tender offer for all outstanding shares of Murray & Roberts Holdings Limited, South Africa. Murray & Roberts, listed on the Johannesburg Stock Exchange, is a multinational engineering and construction group mainly active in Underground Mining, Oil & Gas, and Power & Water. Based on the offer price, the group is valued at approximately EUR 460 million. The transaction is one of the largest foreign direct investments of a German company in South Africa in recent years. Hengeler Mueller is advising ATON on the transaction.

Further advisory matters for other clients include joint ventures in Asia, USA and Latin America, inter alia SET-listed auto parts maker Somboon Advance Technology Plc's joint venture with the German company, Mubea Engineering AG, to manufacture vehicle springs. Mubea Group is a leading German parts manufacturer with 12,000 employees located at 36 production, sales and development sites worldwide.

ITALY – GEA Group (GEA), an international engineering group based in Düsseldorf, has acquired the Italian **Pavan Group**, a leading supplier of extrusion and milling technology for processing all kinds of fresh and dried pasta, pelleted snack products and breakfast cereals.

GEA is one of the largest suppliers of process technology for the food industry and a wide range of other industries. The company focuses on process technology and components for sophisticated production processes in various end-user markets. In 2016, GEA generated consolidated revenues of about EUR 4.5 billion.

Hengeler Mueller advised GEA on the transaction.

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About the firm's Latin America Desk

The Latin America Desk advises Latin American companies and financial investors on their business activities in Germany and throughout Europe and in accompanying German companies and financial investors to Latin America. Members of the Latin America Desk regularly visit Latin America to meet corporates, financial investors and law firms and to attend conferences.

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