February 2020

HENGELER MUELLER

India 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 second half of 2019. We have also included a few transactions which we have recently advised on.

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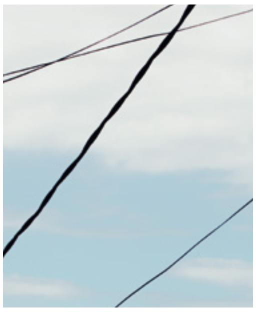
I. Key Legal Developments and Business Trends in Germany and Europe in 2019

1. Spotlight M&A: Carve-outs and Distressed M&A Sell-side Drivers of M&A Activity in Europe, Strong Deal Flow for Technology and E-Commerce Deals

Corporates continue to pursue divestments to streamline operations, refocus on profitable core divisions and consolidate control of their home markets, which will also free up funds they can invest in innovation to combat newer, disruptive players.

Recent examples for this trend are the following transactions on which Hengeler Mueller advised:
– BASF on sale of global pigment business to DIC Corp.
– Linde plc on sale of the majority of its US- and part of its South-American gas business to Messer, CVC
– Innogy on sale of RWE stake in Innogy and sale of Innogy's Czech gas net operations to RWE (details below)
– Elanco on purchase of Bayer's animal health business (details below)

In the area of distressed M&A we expect a further rise in activities, particularly in the automotive sector and retailers. In the automotive sector a considerable increase in restructuring and insolvency activities is expected in light of the imminent structural transformation (e-mobility and autonomous driving); the recent economic slowdown could reinforce this trend even more. Furthermore, the pressure to consolidate in the German finance sector will lead to restructuring situations in this sector in the future.



Some recent examples for this general development are the following transactions on which Hengeler Mueller advised:

– BorgWarner / August Küpper-Gruppe on insolvency proceedings
– Ericsson / Kathrein on acquisition of Kathrein's antenna and filters business
– Seifert / Poco on acquisition of 50% in furniture group POCO from LiVest
– Cerberus /HSH Nordbank / NordLB on privatisation and acquisition of shares of HSH Nordbank together with further shareholders
– Lufthansa / Airberlin on acquisition of Luftverkehrsgesellschaft Walter (LGW) out of Air Berlin's insolvency

E-Commerce and technology driven deals are strong drivers of M&A in Germany and Europe, attracting international companies. However, the EU's digital single market and rise of large e-commerce companies, have lead to regulatory and competition issues and have the potential to slow down M&A deals in this sector.

2. EU Closes Ranks in Screening Foreign Direct Investments – Implications for Indian Acquisitions into Germany

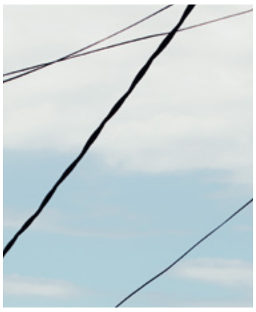
Stricter foreign investment rules in Germany contributed to a reduced appetite from investors. With the Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the EU, in force since April 2019, the EU has left the review procedure as a matter of national responsibility, setting minimum standards for any national procedures, and converting the inter-state exchange of information regarding security interests into an official cooperation mechanism.

Clearance decisions in Germany are taken solely by the Federal Ministry for Economic Affairs and Energy and any decision to prohibit the investment or impose conditions requires the approval of the Federal Government. The EU Regulation focuses in particular on the potential effects on critical infrastructure and technologies, dual-use items, the supply of critical inputs, access to and the ability to control sensitive information and the freedom and pluralism of the media.

3. Use of W&I Insurance in European M&A Deals Continues to Rise

Initially driven by private equity funds, the product is now increasingly taken up by corporates. Geographically it is widely used in transactions in the UK, Germany, the Netherlands, the Nordics and the CEE, and has been gaining increased traction in France, Spain, Portugal and Italy.

W&I insurance widely used in German M&A transactions helps to bridge the gap between interests of seller (clean exit) and purchaser (adequate risk protection). In auction processes W&I is often initiated by seller ("stapled insurance" or "seller-buyer-flip"). W&I insurance also covers unknown risks from the past as well as unknown



tax risks under a tax indemnity and certain minor known risks up to a certain low cap (affirmative tax coverage). Implications of W&I insurance on M&A process can be:

- Separate workstreams which need to be considered in overall timeline
- Insurable due diligence reports needed for all matters in scope of insurance
- Catalogue of R&W to be agreed and to be reviewed by seller together with target management
- Seller remains liable for intentional misrepresentations
- M&A agreement also otherwise to be aligned with insurance policy

At the same time, scepticism has increased. Having more experience with the settlement of claims has led to the conclusion that W&I insurance is not the ultimate solution. In addition, W&I insurance is typically subject to exclusions for a number of matters of increasing concern (e.g. data protection, environmental, cyber security, compliance) and flexibility on terms is also generally decreasing among the market leading insurers.

"Hengeler Mueller highlighted as regional and specialist firm on India-related assignments for Germany in India"

Business Law Journal 2019

4. Compliance Due Diligence in M&A Transactions Becoming Increasingly Institutionalised

M&A and compliance attach great and ever increasing significance to compliance due diligence (CDD) in the context of corporate transactions. Whether it is corruption, cartel infringements, money laundering, data breaches, product liability, or violations of international sanctions potential risks present a substantial liability for the acquirer. Next to US law enforcement commands an increasingly standardised CDD conducted by acquirers in M&A processes is also driven by expanding regulatory requirements in Germany and in Europe overall.

In spring 2019, Hengeler Mueller conducted a survey together with the Chair for Private Law, Corporate and Financial Law at the University of Frankfurt's House of Finance, asking executives and managers responsible for M&A and compliance at blue-chip companies and investors on their views of CDD. More information is available under www.hengeler.com/en/cdd-survey

Generally speaking the Member States and the EU are interested in coordinating procedures with a sense of proportion, a friendly inclination towards investment and in an expeditious and constructive manner.

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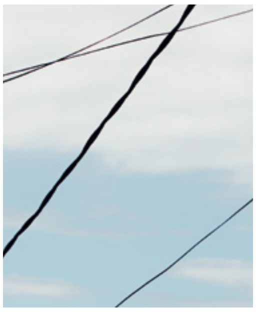
JUVE AWARDS 2019 Germany Law Firm of the Year Regulated Industries

JUVE AWARDS 2019 Germany Law Firm of the Year Energy Law



II. Future and Upcoming Topics in 2020

1. New German Corporate Criminal Law Is Coming

The German Federal Ministry of Justice and Consumer Protection has presented a long awaited draft of an act on combating corporate crime.

The draft contains not only provisions on the sanctioning of legal persons and other entities but also requirements for internal investigations. The draft further provides for the seizure of items that are in the possession of lawyers or other professionals who are subject to a statutory duty of confidentiality.

Key changes will be:

— The amount of sanction can be up to 10% of the group's annual turnover; in addition, profits will be disgorged

— In principle, sanctioning is to be mandatory in cases of criminal offences relating to companies

— Public announcement of the sanctioning is possible ("naming and shaming")

— Adequate compliance management system can preclude sanctioning

— Internal investigation and cooperation can reduce the maximum sanction by 50%

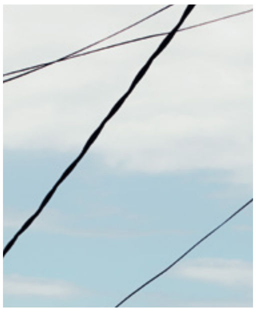
— Attorney-client privilege: search and seizure in law firms to be made easier

Looking forward: Companies potentially subject to the German Criminal Law Act should recognize the distinct possibility that corporate criminal liability will be established in Germany and that any such liability regime will not just penalize misconduct attributable to corporate entities but also attach great significance to having a robust compliance framework. As such, companies are well advised to ensure that they have an effective and well documented compliance mangement system in place.

2. One Year GDPR – Work Needs to Continue

The General Data Protection Regulation (GDPR), the new privacy law for the European Union (EU), went into effect on May 25, 2018. More than one year later the impact of GDPR on business is multifaceted effecting strategic as well as operational decisions within companies. A multitude of complaints hit data protection officer registrations (DPO's) and the enforcement landscape is slowly evolving. Following multi-million Euro GDPR fines in France and the UK, German Data Protection Authorities (DPA) are now following.

On 30 October 2019, the Berlin Commissioner for Data Protection and Freedom of Information (Berliner Beauftragte für Datenschutz und Informationsfreiheit – Berlin DPA) issued a EUR 14.5m fine on a German real estate company, Deutsche Wohnen SE, the highest German GDPR fine to date. The infraction related to the over retention of personal data. For the first time, the Berlin DPA applied the new calculation method for GDPR fines issued by the German Datenschutzkonferenz.



3. Blockchain and Crypto-Assets: New Regulatory Perspectives

The legal framework for blockchain applications in the financial market is becoming increasingly reliable. These developments are driven on the one hand by investor protection concerns about virtual currencies and on the other hand by the interest of the financial industry in legal flexibility with regard to digital assets and market infrastructure.

Effective 1 January 2020, Germany will introduce new licensing requirements for service providers engaged in crypto custody business. The legislation is part of a package to implement amendments to the 4th European Anti-Money Laundering (AML) Directive.

Under the new regime, the safekeeping, administration and safeguarding of crypto assets for third parties will qualify as a regulated financial service. Crypto assets are defined as digital representations of an asset which are neither issued nor guaranteed by any central bank or public entity. However, they are accepted as means of exchange or payment or serve investment purposes and can be transferred, stored or traded electronically.

The concept of crypto assets includes a wide array of crypto tokens and is not restricted to virtual currencies, such as payment tokens, within the meaning of the amended AML Directive. As regards securities tokens, i.e. crypto assets that resemble stocks and bonds and represent a claim against an issuer, the distinction between crypto custody business and custody business for traditional securities requires further clarification.

In this context, it should be noted that German civil law currently requires the physical securitisation of privately issued securities which typically takes the form of a global note. The Federal Ministries, however, have recently consulted legislative options to allow the electronic issuance of bonds via blockchain under German law.

4. German Energy Transition and Rising Popularity of Green Bonds

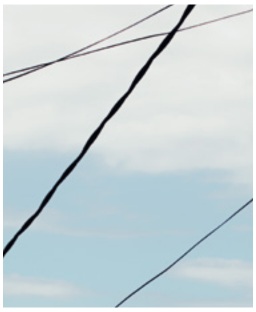
In September 2019, the German government agreed on a EUR 50bn Climate Action Package to reach the 2030 climate targets and reduce emissions in all sectors of the economy. In order to ensure that the financial sector contributes as a lever Germany's Federal Ministry of Finance initiated a strategy aiming to make Germany a leading center for sustainable finance. The interest in Green Bonds from companies, investors and communities to finance sustainable infrastructure, innovations and energy efficiency is on the rise. E.ON, a German utility company, issued in August 2019 one of the largest green bonds with a volume of EUR 1.5bn.

Other examples for this recent trend are the development and issuance of the following products on which Hengeler Mueller advised on

— The development of various structural alternatives for sustainable federal financing instruments (green or sustainable German government bonds). The proceeds will be used exclusively for ecologically oriented projects. The first issue is expected to take place in the second half of 2020.

— Issuance of innogy's first green bond with a volume of EUR 850m. The proceeds will be used to refinance on- and offshore wind projects

— Issuance on the first green bond of DZ Bank with a volume of EUR 250m



III. Recent Transactions

November 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.

October 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.

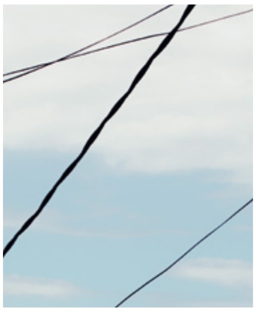
September 2019: Hengeler Mueller, together with Simpson Thacher & Bartlett in London and New York, Davies Ward Phillips & Vineberg in Toronto as well as various other European local counsel, advised funds managed by **The Blackstone Group** on the acquisition of **Dream Global REIT**. The Canadian real 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).

August 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.

August 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 advised Elanco on the acquisition.

July 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.

July 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.



About the firm's India Desk

The India Desk advises Indian companies on their business activities in Germany and throughout Europe and in accompanying German companies to India. Members of the India Desk regularly visit India to meet corporates, law firms, banks and auditors and also to attend conferences based on different topics like IT and foreign investment in India.

Contact

Dr. Daniela Favoccia
Partner

Phone +49 69 17095 382
daniela.favoccia@hengeler.com

Dr. Carsten van de Sande
Partner

Phone +49 69 17095 352
carsten.vandesande@hengeler.com

Dr. Amit Datta
Associate

Phone +49 30 20374 511
amit.datta@hengeler.com

Offices

Germany	BERLIN I Behrenstr. 42, 10117 Berlin
	DÜSSELDORF I Benrather Str. 18-20, 40213 Düsseldorf
	FRANKFURT A.M. I Bockenheimer Landstr. 24, 60323 Frankfurt am Main
	MÜNCHEN I Leopoldstr. 8-10, 80802 München
Belgium	BRUXELLES I Square de Meeûs 40, 1000 Bruxelles
United Kingdom	LONDON I 30 Cannon Street, London EC4M 6XH