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 Q2/3 2021. We have also included a few transactions which we have recently advised on.

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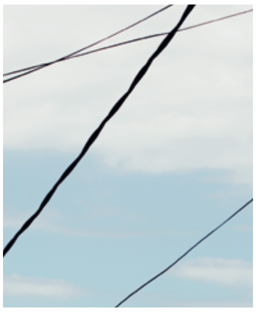
The rise of ESG matters in M&A

The importance of sustainable criteria for good corporate governance has been increasing rapidly over the past few years, with specific effects on the German M&A market. One legislative initiative follows the other leading to an ever closer net of requirements to fulfil. Part of the legislative environment are provisions under EU laws, like the Taxonomy Regulation, the Non-Financial Reporting Directive or the Sustainable Finance Disclosure Regulation. The German legislator has also added to the trend by adopting the Supply Chain Diligence Act (Lieferkettensorgfaltspflichtengesetz) in June 2021. Under the new law, from 2023 onwards companies with 3000+ employees (from 2024 onwards: 1000+ employees; after that, the area of application will be evaluated) are obliged to fulfil certain duties of care aimed at preventing violations of human rights and environmental regulations committed by direct (sub-)suppliers. This will impose additional diligence requirements on most of the larger companies. Another governance-related development is the Act On Increasing The Percentage Of Women In Leadership Positions, inter alia obligating listed companies with 2000+ employees and a management board of more than three members to appoint at least one woman and one man to the board as from August 2022. Additional legislation will most certainly follow, especially in view of an EU initiative on sustainable corporate governance that has been announced for the second half of 2021.

The legislator's activity reflects the general development of enhanced awareness within the German population for social and sustainable issues that has been fed by movements like Fridays for Future and tragic natural disasters like the floods that have devastated major areas in the west and south of Germany. As a consequence of these



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circumstances, investors are also focusing on ESG matters and even launching dedicated ESG campaigns. The ESG status of an entity affects its potential market reputation and also influences the costs that can result from complying with the new legal obligations. Many companies have already started to review their ESG strategy, established ESG departments and integrated ESG expertise into their boards and their remuneration schemes. Institutional investors evaluate these efforts by conducting ESG due diligence reviews and adjust their investment strategies accordingly.

ESG matters have become a serious market factor when it comes to M&A transactions in Germany. Due to the ESG-related legislation already adopted as well as new rules and regulations yet to come and in light of the general social and investment trend, ESG will influence national and international M&A transactions even further.

Stumbling Blocks for Tech Giants

Ursula von der Leyen's State of the EU ("SOTEU") speech on 15 September showed that the bloc is emerging from the shadows of the pandemic stronger and with bold moves on its mind. One of them is building a digital fortress Europe, which would support the European economic recovery. Some might call this "protectionist", but the European Commission ("EC") chose to name it "tech sovereignty". The EC's approach is based on the draft Digital Markets Act ("DMA"), innovating with a new industrial policy plan, all while the speech refrained from mentioning any competition developments.

The idea is not exactly new: in December 2020, the EC unveiled the draft DMA, setting out 18 bans and duties for businesses deemed to be gatekeeper platforms. They would for example be banned from combining data collected by their different services, and would have to allow business users to access data they generate in their use of the gatekeeper's platform. Currently, according to the EU's law-making procedure, national representatives in the Council of the EU and members of the European Parliament are separately scrutinizing the draft DMA to produce their own drafts that they will then negotiate with each other and the EC to arrive at a final version of the document.

One of the SOTEU's "aha" moments was von der Leyen's announcement regarding the launch of the European Chips Act, in reply to the global shortage of microchips. More details on the European Chips Act are kept under wraps for the moment, but judging by the fact sheet the EC published on the day of the SOTEU, it will build on the steps the EU has taken to contain the gatekeeper power of big tech, amongst others. The EC's announcement follows the US's initiative, which last year proposed the Chips for America Act which would see billions of dollars poured into the sector. Other countries are also investing in the technology.


September 2021

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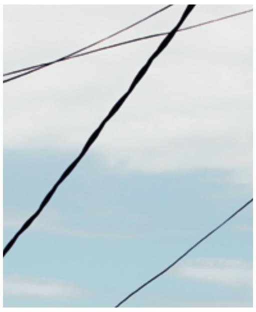
Towards a Digital Fortress Europe?

SOTEU 2021's Digital Highlights Mean More Stumbling Blocks for Tech Giants

Fore more details visit:

www.hengeler-news.com/assets/articles/2021_09_BRX.pdf



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New Transparency Register obligations as of August 1, 2021

With the Transparency and Financial Information Act ("TraFinG"), the legislator rejected the possibility of linking the Transparency Register (which was established in 2017 to combat money laundering and terrorist financing) with other publicly accessible registers, in particular the Commercial Register. Instead, undertakings will be subject to two notification obligations that are unrelated to each other. In addition, strict synchronization of the register entries must be ensured in order to avoid inconsistency reports and fines.

The legislator estimates that around 2.3 million legal entities will have to make a notification to the Transparency Register. All legal entities and registered partnerships will in future have to provide information on their beneficial owners. For many undertakings, this is the first time they will have to register, even though they were already obliged to identify their beneficial owners. Some undertakings face the issue of transparency registers for the first time. These include (1) foreign undertakings acquiring shares in a company with real estate holdings in Germany, and (2) from January 1, 2024, civil law partnerships, provided they are entered in the Partnership Register yet to be established. For a third large group of cases, that of listed companies (3), the notification requirement is still unclear. Originally provided for in the government draft, it was to be removed at the last minute in the legislative process. However, the adopted wording of the law leaves room for interpretation. A clarification by the supervisory authorities or the Federal Office of Administration (BVA) will therefore be indispensable for the practice.

The changes apply from August 1, 2021, and will trigger a need for action on the part of undertakings that should not be underestimated. Undertakings established on or after August 1, 2021 must comply directly with the transparency obligations. For undertakings that were able to invoke a notification fiction under the legal situation applicable until July 31, 2021, the TraFinG provides for relatively generous transitional arrangements – depending on the legal form. This applies both to the transparency obligations (collection, notification, documentation) and to the imposition of fines.

The Transparency Register can be inspected by certain authorities, obligated parties under the Money Laundering Act as well as all members of the public. The TraFinG now clarifies – for data protection reasons – that inspections by authorities may only be carried out for the fulfilment of statutory duties and that inspections by obligated persons may be carried out exclusively for the fulfilment of due diligence obligations. In other respects, it remains the case that the possibility of inspection can be restricted at the request of a beneficial owner.

August 2021

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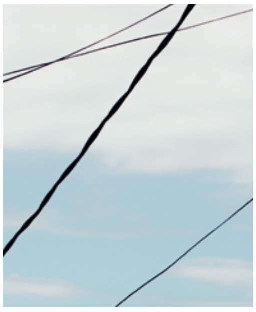
New Transparency Register obligations as of August 1, 2021

Fore more details visit:

www.hengeler.com/fileadmin/news/Newsletter/2021_08_Transparency-Register__Newsletter.pdf



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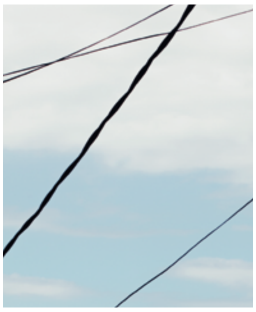
Germany has significantly expanded the scope of mandatory FDI filings

Germany has significantly expanded the scope of sensitive acquisitions for which a foreign direct investment (FDI) filing is mandatory and FDI clearance a statutory closing condition. The amendments fit into a general trend of tightening FDI screenings in the European Union (EU) and worldwide. While there is no screening proceeding at the EU level, the European Commission encourages Member States to implement such national regimes and the EU Foreign Investment Screening Regulation (EU) 2019/452 (EU Screening Regulation) provides a framework for cooperation and harmonization.

So far, an **FDI filing** was mandatory primarily if the German target is involved in critical infrastructures or manufacturing and developing of certain military and defence goods. This has been broadened to include certain – exhaustively enumerated – activities and products of critical technologies (e.g. AI-based cyberattacks/cyber surveillance, autonomous cars, robotics, semiconductors, IT security products, space/air travel, dual use/nuclear technology, quantum mechanics, additive manufacturing, data networks, smart meter gateways, classified patents, critical inputs, communication of important public agencies, agriculture). In the military and defence sector, the scope has been expanded to cover all military and defence goods on the German Export List, in some cases also related to past activities of the German target.

The German government has also modified the applicable thresholds. The applicable entry thresholds for review of 10, 20 or 25% of voting rights now further differentiate depending on the sector of the German target. Additional acquisitions above the respective threshold fall into the regime's scope only if they meet or exceed certain subsequent thresholds (20% - 25% - 40% - 50% - 75% of voting rights). Voting shares are cumulated in case of agreements on the joint exercise of voting rights or other forms of joint exercise, e.g. if two investors in a German entity are controlled by the same non-EU/EFTA government. "Acquisition" now also includes attaining other forms of control or effective participation in the management of a German company (e.g. additional board seats/majorities or veto rights for strategic decisions that grant the investor influence equivalent to the voting shares triggering the applicability of the FDI screening) as well as circumventions that formally do not meet the applicable thresholds of voting rights.

The German **FDI screening** remains a key issue for cross-border M&A in the German market. The regime continues to apply to any sector and now further sectors and activities of the German target require a filing and clearance. In practice, also related activities not explicitly covered are increasingly being closely scrutinized upon a non-mandatory filing or occasionally also at the government's own initiative. Under the new cooperation mechanism of the EU Screening Regulation additional stakeholders may raise concerns adding some further complexity and uncertainty for parties.



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German legislator speeds up on new tax laws just before the end of the current parliamentary term

With remarkable speed, the German legislator has enacted a large number of new and modified tax law provisions just before the current parliamentary term ended with the federal elections in September 2021. In particular, internationally operating companies doing business in Germany or having IP registered in Germany are affected by numerous and significant developments. But also some more general topics such as the tightening of the German real estate transfer tax provisions or the option for partnerships to be treated tax-wise like corporations, which have been discussed for a long time, have now finally been enacted. In chronological order:

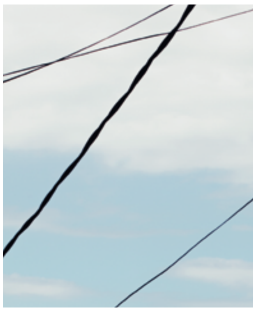
Real Estate Transfer Tax Act: The new law amending the Real Estate Transfer Tax ("RETT") Act entered into force as of July 1, 2021. The main changes (all irrespectively of the tax residency of the shareholder base) are: (1) The relevant threshold for the taxation of share deal transactions has been lowered from 95% to 90%. (2) Watching periods of five years have been extended to ten years. (3) A new corporation rule has been introduced pursuant to which an exchange of the shareholder base of property-owning corporations of at least 90% of the company's capital within a period of ten years triggers RETT even if there is no single shareholder or group of related shareholders who eventually control the real estate owning company. However, this new corporation rule also provides for an exemption for stock exchange transactions in shares of listed companies within the EU/EEA.

Withholding Tax Relief Modernization Act: This act was executed on June 2, 2021 and mainly includes (1) new procedural rules to obtain relief from German withholding tax ("WHT"), (2) a new anti-treaty shopping rule and (3) new transfer pricing rules.

Re relief from WHT: The two-stepped approach to obtain a relief from WHT has generally been maintained; however, under the new law the payer still has to quarterly file "zero" withholding tax returns even if an exemption certificate has been granted.

Re new anti-treaty shopping rule: The new law increased the requirements for receiving a relief under an EU directive or according to applicable double tax treaty provisions. Under the new rule, the recipient of dividends/royalties is only entitled to any relief to the extent (i) the recipient has shareholders who would also be entitled to the same treaty or directive relief assuming they would directly receive the payment or (ii) the source of income has a significant connection with a genuine economic activity of the foreign recipient or (iii) the recipient proves that obtaining a tax advantage is no main purposes for the interposition of the foreign recipient or (iv) the foreign recipient is a publicly traded company listed on a recognized stock exchange.

Re new transfer pricing rules: The new law specifically provides for more significance of the functional and risk analysis ("substance over form"), for the application of internationally standardized regulations ("best method approach"), for the adoption of the DEMPE (development, enhancement, maintenance, protection and exploitation) concept of the OECD and, procedurally, for detailed regulations regarding the advanced pricing agreements.



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Fund Jurisdiction Act: This new law is intended to increase the competitiveness of Germany as a jurisdiction for funds and was executed on June 3, 2021. It introduces, among other things, the following new tax law provisions: (1) Income tax incentives for employee equity investments as of July 1, 2021 specifically to support start-ups in attaining personnel. (2) Trade tax incentives aimed at encouraging renewable energy generation and charging stations for electric vehicles operated by real estate companies. (3) Introduction of a de-minimis threshold with regard to trading activities (e.g. renting of operating equipment) in connection with the trade tax exemption for companies exclusively managing real property in the amount of 5% of income resulting from lease of real estate.

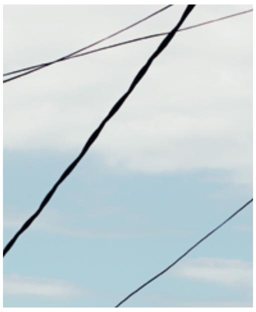
ATAD Implementation Act: This legislation implements the EU Anti-Tax Avoidance Directives ((EU) 2016/1164 and (EU) 2017/952) and substantially amends the exit tax rules for individuals and the German controlled foreign corporation rules (“CFC Rules”). It was executed on June 25, 2021.

<u>Re implementation of the EU Anti-Tax Avoidance Directives</u>: The new law specifically contains provisions addressing hybrid mismatch arrangements. For instance, interest expenses are only tax deductible if the corresponding profits are subject to a tax comparable to German taxation.

<u>Re CFC Rules</u>: The new rules have a wider scope than the previous regime, i.e. not only the holders of shares but also the holders of certain equity instruments could qualify as related parties for CFC purposes and non-tax resident shareholders can also be subject to the new CFC Rules if they hold shares in a foreign corporation in a German permanent establishment. Furthermore, dividend income constitutes passive income if the payments are tax deductible at the level of the payer or if the taxpayer does not own at least 10% of the shares in the payer. Most significantly and heavily criticized, the threshold for low taxation remains at 25%. The new exit taxation regime and the new CFC Rules apply for the first time for the tax year 2022.

Corporate Income Tax Modernization Act: This act was executed on June 25, 2021 and introduces a corporate income tax option, allowing partnerships to be taxed similar to a corporation (“check the box”-system). The main intention is to strengthen the international competitiveness of family businesses in the legal form of a limited liability partnership or general partnership.

Defence against Tax Haven Act: The new law was executed on June 25, 2021 and contains a defence mechanism to make it more difficult for individuals and companies to avoid paying taxes in Germany through business relations with states and territories that are on the EU list of non-cooperative tax jurisdiction (“black list”). The measures include, for example, the denial of tax benefits or deductions. The provisions of the new law apply as of January 1, 2022.



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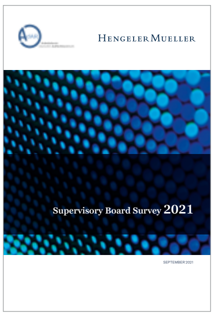
Survey on Non-Executive Board Members

Despite the economic recovery that is now underway, the after-effects of the Covid 19 pandemic continue to have a significant impact on most companies. Their supervisory boards also have a special role to play in dealing with these challenges. But which topics are setting the agenda besides the pandemic and its aftermath? Where do supervisory board members see a need for legislative reform, particularly in light of the federal elections, to improve the framework for their supervisory board activities and what are the greatest challenges awaiting them? Together with the Arbeitskreis deutscher Aufsichtsrat (AdAR) e.V., we examined these and many other questions in this year's Supervisory Board Study. The survey provides an interesting snapshot. The supervisory board interviewees are still very busy coping with the enduring legacy of the pandemic. In principle, they continue to see their organizations as well-equipped. Notwithstanding this, it is clear that the capital markets ensure that listed companies (have to) align their agenda more closely with public discourse. Compliance issues, for example, not only continuously fill the business media, they also rank second on the supervisory board agenda. The highest corporate supervisory body has therefore made compliance with the law a top priority, alongside digitalization, which directly follows in importance. For many companies, these are clearly survival issues. The fact that supervisory boards increasingly regard compliance as a matter of top priority is also shown by the fact that half of the companies have already established a reporting line from the compliance or audit department directly to the supervisory board. In this context, compliance and audit representatives present to the supervisory board or audit committee at least once a year in almost every listed company. The qualification and professionalization of supervisory boards are also important to the survey participants. Representatives of the supervisory board of listed companies give the same importance to training for individual supervisory board members as to own company-specific training. Supervisory board members from unlisted companies clearly prefer individual development opportunities or training from external providers. Notably, supervisory boards, especially of unlisted companies, see the need for the legislator to take action. This is a clear sign that respondents do not rely on self-regulation of the economy alone but wish for stronger legislative direction. The biggest challenge for the activities of the supervisory board is adequacy of resources. Here, respondents would like to see the supervisory board strengthened, including through legal initiatives, with the aim to receive their own budgets and the ability to engage external experts. The study shows the changes taking place in German supervisory boards. Companies as well as investors and legislators should note the signals and follow appropriate trends constructively and energetically.



Fore more details visit:
www.hengeler-news.com/assets/articles/2021_Supervisory_Board_Survey.pdf

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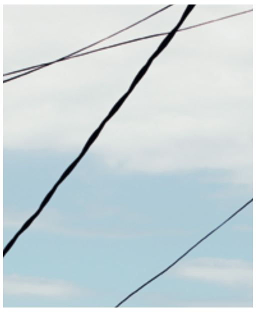

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Recent transactions in Q2/3 2021

— Waterland on sale of a stake in Serrala to Hg

— family shareholders of the German automotive supplier HELLA GmbH & Co. KGaA together with Best Friends law firm Bredin Prat on the sale of their majority shareholding to the French automotive supplier Faurecia

— adidas on the sale of Reebok to Authentic Brands Group (ABG)

— 1&1 on establishment of a 5G mobile network with Rakuten as general contractor

— European Investment Bank on the first guarantee under the umbrella of the European Guarantee Fund in Germany

— MAN on merger-related squeeze-out with TRATON

— Cherry, a global leader in the manufacture of premium mechanical gaming switches and peripherals for gaming, office and industry as well as healthcare and security applications, on its IPO

— German consumer electronics platform CECONOMY on EUR 1 billion ESG-linked syndicated revolving credit facilities

— Bank syndicate on the emission of German energy company RWE’s first EUR 500m green bond

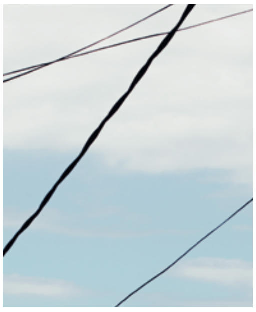
— Danish Danfoss on the sale of White Drive Motors & Steering to Italian Interpump group

— German fashion retailer Peek & Cloppenburg group on the acquisition of the Danish department store chain Magasin du Nord from British department store chain Debenhams

— Chinese technology company Tencent, incumbent shareholder of German electric air mobility pioneer Lilium, on Lilium’s merger of with U.S. SPAC Qell

— bank syndicate on Siemens Healthineers’ EUR 2.3bn capital increase

— Hapag-Lloyd on the acquisition of Dutch container shipping company Nile Dutch Investments B.V.



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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.

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