HENGELER MUELLER

NEWSLETTER | January 2023

M&A SNAPSHOT | SUSTAINABILITY CHALLENGES | COMPETITION OUTLOOK | NEW PARTNERS AND COUNSEL

Content

Hengeler Mueller Partnerschaft von Rechtsanwälten mbB

Rolf Kopel
Director Communications
T +49 69 17095 200
rolf.kopel@hengeler.com

www.hengeler.com

Editorial

Dear friends,

When our predecessors, Georg Frowein and Rainer Krause, wrote to you last year, our thoughts were still focused on the COVID-19 pandemic, its impact on our clients' business, and that of our firm. Since then, the appalling Russian war of aggression against Ukraine has fundamentally changed, not just the lives of so many people, but also the global economy. In 2023, energy shortages, inflation and still-disrupted supply chains will once again present us with enormous challenges.

In this newsletter, we would like to shine a light on several of these topics. First, we take a high-level look at the M&A market. Another key focus of this year's edition is the subject of sustainability: we discuss general meetings' 'say on climate', climate litigation and the new supply chain legislation. Our supervisory board survey also examines ESG topics comprehensively.

We are pleased that, even in these turbulent times, we are able to continue to grow with the appointment of outstanding new partners and counsel. This year, we have named three new partners and five new counsel. They will help you to meet the challenges that face all of us.

Thomas Müller
Co-Managing Partner

Bernd Wirbel
Co-Managing Partner

We wish you all the best for 2023.

Yours sincerely,

Thomas Müller

Bernd Wirbel

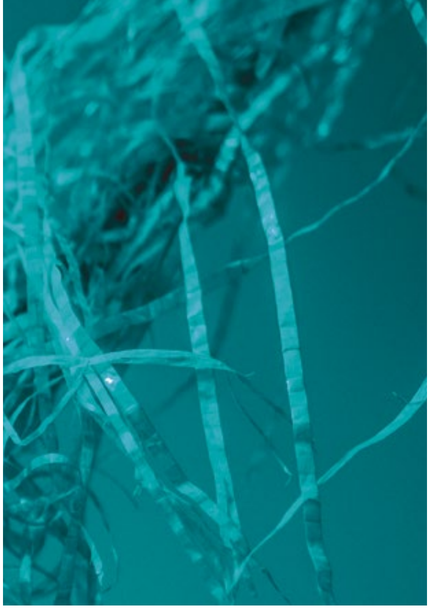
M&A SNAPSHOT

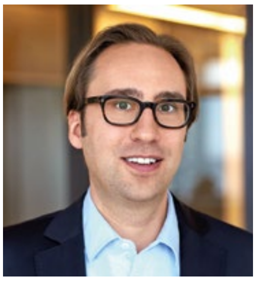
Increasing complexity ahead

The Russian attack on Ukraine has had an enormous geopolitical impact and an equally significant effect on the M&A market. Alongside ongoing disruptions in the global supply chain, rising inflation and increasing interest rates, the conflict is causing huge uncertainty among market players. Nevertheless, the European and German M&A markets have proven to be quite resilient so far. The long-term M&A outlook also remains promising.

Last year saw more than 11,600 M&A transactions with European targets valued at more than EUR 1,100 bn and approx. 1,300 German target deals with a disclosed value of EUR 114 bn.* Although this represents a significant decline of almost 44 per cent by value in German target deals compared to the previous record-breaking year, it is surprisingly solid given the current environment. Some key deal drivers, including digital transformation and ESG considerations, will continue to stimulate deal activity.

Overall, we see a large investor appetite for sustainable business models and those that enable sustainability. In addition to traditional investment in renewable energy companies, green tech is very popular – whether agricultural technology, recycling or sustainable mobility. In the wake of the current crisis, numerous companies are looking for energy independence and bringing the necessary expertise in-house for the sustainable transformation of their own business model through acquisitions.





Andreas Hoger
Partner, Frankfurt
andreas.hoger@hengeler.com

Martin Ulbrich
Partner, Düsseldorf
martin.ulbrich@hengeler.com

As investors look for traditionally crisis-proof business models with predictable profits, the healthcare and defence sectors should benefit from the current environment, as will the infrastructure, education, construction and food sectors, among others. We anticipate that an increased focus by many companies on their core business will lead to spin-offs of non-core divisions, creating additional opportunities for M&A transactions.

Distressed M&A is also on the rise. We have already seen some major restructurings this year and expect such transactions to increase further in the near future.

The crisis makes transactions more complex and more demanding. Market participants not only have to cope with a challenging financing environment, but they also need to factor in sanctions, stricter investment controls and antitrust scrutiny, as well as disrupted supply chains and volatile prices. We also have the impression that buyers' increased caution leads to higher transaction complexity, as negotiations with a small number of interested parties become more intensive in order to find creative contractual solutions. This leads to stronger demand for high-end legal advice.

Overall, we may not be able to match the record volumes of the recent past in 2023. But we expect deal activity in Germany and Europe to remain robust and that transactions with a positive ESG profile will continue to increase.

Best Friends in the lead

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

The Best Friends group of six international law firms, headquartered in the major business centres of Europe, has once more achieved a #1 position in the Mergermarket league table. Comprising BonelliErede in Italy, Bredin Prat in France, De Brauw Blackstone Westbroek in the Netherlands, Hengeler Mueller in Germany, Slaughter and May in the UK and Uría Menéndez in Spain and Portugal, the group provides clients with a 'best in class' service internationally through its fully integrated teams.

2022 European legal adviser league table ranked by value

Rank	House	Value (USD M)	Number of Deals
1	Best Friends Group	288,909	377
2	Freshfields Bruckhaus Deringer LLP	175,546	152
3	Clifford Chance LLP	143,973	144
4	Linklaters	128,877	191
5	Sullivan & Cromwell LLP	128,041	40
6	Simpson Thacher & Bartlett LLP	116,924	38
7	Latham & Watkins LLP	113,457	212
8	White & Case LLP	105,113	262
9	Allen & Overy LLP	104,969	187
10	Davis Polk & Wardwell LLP	77,266	22

This customised Mergermarket league table was provided by Acuris Studios based on European target deals in 2022

Mergermarket
An Acuris company

* Source: Mergermarket

NEWS

Recent work highlights

www.hengeler.com/news

Dec 2022 | Metro

Metro AG, a leading international food wholesale company, has signed a EUR 1bn syndicated revolving facility jointly arranged by DZ Bank and ING Bank. The facility has a term of five years with two extension options for an additional year each and includes an increase option for a further EUR 200m. The new financing is linked to the company's ESG-rating, provided by sustainability rating platform Sustainalytics. Hengeler Mueller advised Metro on the financing.

Dec 2022 | Google

The German Federal Cartel Office (Bundeskartellamt) has concluded its 'Google News Showcase' proceedings against Alphabet, Inc ('Google') without issuing a decision. Google News Showcase is a programme for journalistic content which can be used by publishers to build a closer relationship with their audience. The Bundeskartellamt proceedings were based on new provisions of the German Competition Act (Section 19a GWB) for large digital companies. Hengeler Mueller advised Google in the proceedings.

Dec 2022 | Fortum

The EU Commission has approved a stabilisation package for the German energy company Uniper SE under state aid law. In addition to a EUR 18bn credit facility from KfW and a cash capital increase of EUR 8bn, subscribed exclusively by the Federal Republic of Germany as well as an increase of the authorised capital of up to EUR 25bn, the measures include the acquisition of all Uniper shares currently held by Fortum by the Federal Republic of Germany for approx. EUR 500m in total. In addition, the redemption of Fortum's shareholder loan to Uniper of EUR 4bn and the release of Fortum from the EUR 4bn guarantee facility that was granted are part of the stabilisation package. Hengeler Mueller advised Fortum on the transaction.

Nov 2022 | Adler group bondholders

Hengeler Mueller advises the largest group of holders of bonds issued by Adler Group S.A. and Adler Real Estate AG comprehensively on the financial stabilisation of the real estate group. The stabilisation measures include the provision of new secured debt financing of up to EUR 937.5m as well as the amendment of senior unsecured bonds issued by Adler Group with an aggregate nominal amount of EUR 3.2bn.

Nov 2022 | BDT Capital Partners

Funds affiliated with BDT Capital Partners have entered into an agreement on the acquisition of a significant minority stake in Exyte, a global leader in the design, engineering, and delivery of facilities for high-tech industries. Hengeler Mueller advised BDT Capital Partners on the transaction.

Nov 2022 | KKR

A consortium of funds led by Global Infrastructure Partners and KKR entered into a strategic co-control partnership with Vodafone GmbH for Vodafone's stake in Vantage Towers AG and a voluntary public takeover offer to the minority shareholders of Vantage Towers AG. Hengeler Mueller advised KKR on the transaction.

Oct 2022 | RWE

RWE AG, one of the world's leading renewable energy companies, signed a purchase agreement with Con Edison, Inc. to acquire all shares in Con Edison Clean Energy Businesses, Inc., a leading operator and developer of renewable energy plants in the United States. Hengeler Mueller advised RWE as lead counsel on the outbound transaction.

Sept 2022 | Viessmann

Climate and energy solutions provider Viessmann plans to invest EUR 1 billion in the expansion of its heat pump and green climate solutions business over the next three years. To secure the necessary financing framework, Viessmann has signed a syndicated loan with a sustainability component. Hengeler Mueller advised Viessmann on the transaction.

Jul 2022 | Ørsted

Ørsted purchased the business of the Ostwind group, a German developer, owner and operator of onshore wind and solar photovoltaic projects in Germany and France. The acquisition of Ostwind marks Ørsted's entry into the German and French onshore renewable energies markets and substantially expands its onshore footprint in Europe. Hengeler Mueller advised Ørsted on the transaction.

EXPERTISE

Crisis management and strategy go hand in hand on supervisory boards

Sustainability has long been an important topic affecting business activities. But all three ESG criteria – environment, social and governance – are now becoming more central to companies' strategic planning than ever before. For some time, this has not just been about straightforward compliance with different legal regimes, such as sustainability reporting requirements or adapting to EU taxonomy. Positioning an organisation to be sustainable can also provide it with greater resilience to external shocks and developments – from dependence on supply chains to the impact of climate change. Our current environment shows precisely how important such resilience is, and how much sustainable economic success is ultimately linked to it. As a result, corporate boards are also focusing on sustainability – not just executive boards, but also supervisory boards.

The findings of our 2022 supervisory board survey, conducted jointly with Arbeitskreis deutscher Aufsichtsrat e.V. (German Supervisory Board Working Group), prove exactly that. After managing the effects of the COVID-19 pandemic and other crises, the supervisory boards of German companies are once again harnessing more of their energy in strategic areas. Inevitably, the impact of events in Ukraine is being felt: 81 per cent of respondents believe that Russia's war of aggression is having a tangible effect on the work of supervisory boards. But positioning their companies for the future is perceived to be just as relevant. At 86 per cent, an overwhelming majority of supervisory board members regard adapting their companies to the digital age as a central issue. But ESG and transforming companies to becoming more sustainable is also increasingly seen as imperative: 80 per cent of supervisory board members surveyed now consider it relevant, up from 64 per cent last year. Dealing with the effects of the pandemic has become

Daniela Favoccia
Partner, Frankfurt
daniela.favoccia@hengeler.com

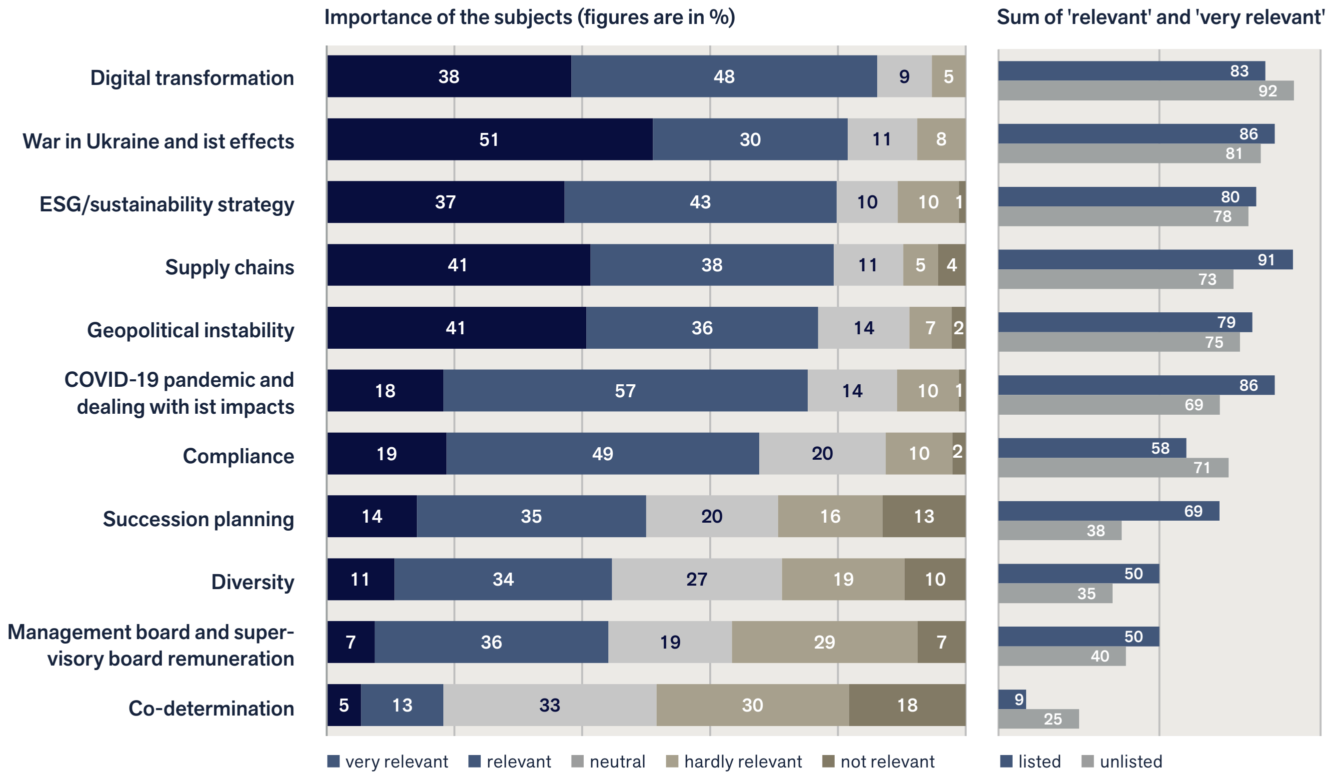
Daniel Illhardt
Partner, Munich
daniel.illhardt@hengeler.com

less of a priority, however, although it still continues to reverberate in supply chains.

This combination of permanent crisis management, establishing resilience and working on the future of their companies will consume the attention of supervisory boards for some considerable time. This is hardly surprising. After all, dealing with crisis issues has already become part of their day-to-day business – whether it be adjusting to a recessionary economy or handling conventional energy supply shortages. Our study also shows that the issue of sustainability is now more and more apparent in how supervisory boards are organised. In that context, calls for particular expertise in sustainability are now being taken into account, as recommended by the German Corporate Governance Code, for example. A narrow majority (51 per cent) of respondents believe that their companies already meet this requirement. At listed companies, the figure is notably higher, at 62 per cent.

Supervisory boards are tackling sustainability expertise requirements in entirely different ways. More than three quarters of board members surveyed (76 per cent) currently view training and seminars as the best means of education. While 72 per cent look to appoint board members with a professional background in this area, 63 per cent would involve external consultants. By contrast, dealing with ESG topics by establishing committees or appointing individuals to oversee sustainability matters is not currently the norm. Only 12 per cent of survey participants said that they had opted for such a solution on their boards. It is still typical for the full supervisory board to handle ESG matters, according to 58 per cent of respondents. But a dynamic shift has become evident when it comes to assigning responsibility on supervisory boards for the key business challenge of sustainability. Companies such as Allianz, Bayer, Covestro, Deutsche Börse, Deutsche Post, e.ON, Qiagen, MunichRe, Puma, SAP, Zalando, RWE, EON, Hello Fresh and LEG are now setting up ESG committees or functions specifically to address the issue, which shows that it is not just relevant for companies of a certain critical size or for those operating in certain sectors.

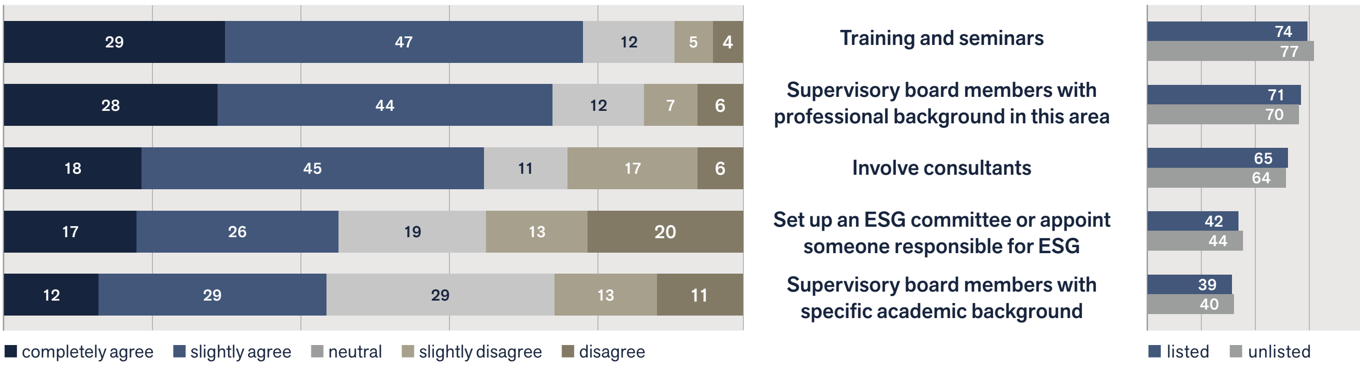
Establishing technical expertise on the supervisory board to monitor and advise management effectively is in the company's best interest – and of paramount importance. We have also seen that institutionalised know-how on sustainability, in whatever form, is another key component in the growing professionalisation of the work done in this area by supervisory boards. This development is critical for the



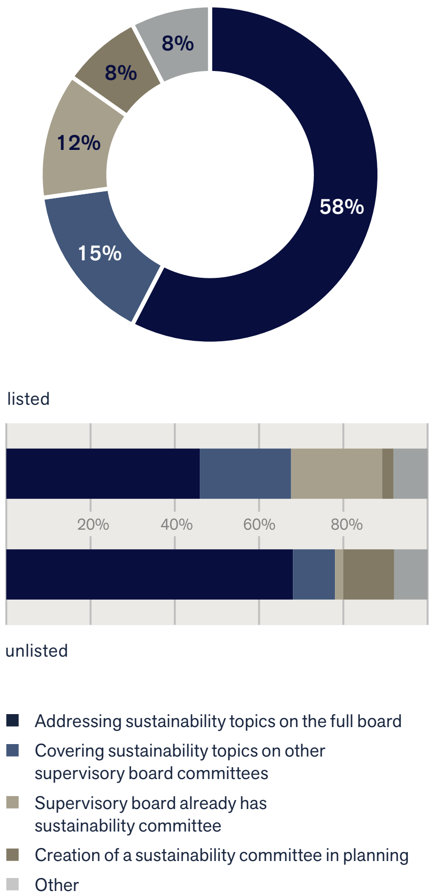
How does your supervisory board intend to address fulfilling the sustainability expertise requirements in the future, or how does your supervisory board meet the requirements already?

Figures are in %

Sum of 'slightly agree' and 'completely agree'



What is your supervisory board's stance on establishing a committee devoted specifically to subjects of sustainability?



future viability of Germany as a centre of international business. Ultimately, in addition to fulfilling its monitoring function, the supervisory board is involved in shaping the company's fundamental decisions when determining the future direction of its business. The ongoing transformation of supervisory boards is also reflected in their make-up. As demonstrated by a significant body of research, the boards of big companies listed on the DAX, MDAX and other indices, have never been more international or more balanced in their gender composition than they are today. That gives cause for hope.

A gathering storm on the economic horizon and an imminent recession will do nothing to alter the strategic significance of sustainability. Reining in ambitions or putting projects on hold cannot be the answer. On the contrary, now is precisely the right time to invest more. ESG is not a luxury issue, but a critical factor for the future viability and resilience of companies, and in turn, our national economy.

The complete survey

www.hengeler.com/en/sb-survey

EXPERTISE

Climate litigation as a business risk

The rise in climate-related litigation over recent years (particularly following the 2015 Paris Climate Agreement) has resulted in increased litigation risks for companies. Since 2020, about 500 such cases have been registered globally (a quarter of the total number of climate actions recorded). The majority originate from the US, while Australia, the UK and the EU are increasingly popular jurisdictions.

Antonia Hösch
Partner, Frankfurt
antonia.hoesch@hengeler.com

Megan Schrader
Associate, Frankfurt
megan.schrader@hengeler.com

Pro-regulatory claims for more climate protection

Most claims seeking greater climate protection are directed against states, but they are increasingly being brought against companies in a variety of sectors, including energy, transport, food and agriculture, and finance.

In March 2021, the Federal Constitutional Court required the German legislature to amend the Climate Protection Act. The court considered the climate protection measures in the Act to be insufficient to protect future generations, finding the Act to be unconstitutional in this respect. The court assumed a constitutional duty of the state to protect citizens from climate change risks, thereby making climate protection actionable to a certain extent.

Increasingly, claimants are also seeking to compel companies to meet certain climate targets through private law actions. In May 2021, the District Court of The Hague issued a widely publicised ruling ordering the oil

and gas company Shell to reduce its global emissions by 45 per cent by 2030 compared to 2019. It is noteworthy that the court not only looked at Shell's own emissions, but also assumed a best-efforts obligation on Shell to work towards a reduction of emissions in business relationships with its suppliers and end users. The ruling is under appeal.

Following the Shell ruling, the main claimant in the case, the NGO Milieudefensie, called on 30 other companies, including the airline KLM, the bank ABN Amro and the consumer goods manufacturer Unilever, to submit emission reduction plans.

In Germany, four climate claims were filed in 2021 that attempt to follow up on the argument of the Federal Constitutional Court by making a right to climate protection actionable in relation to companies. The claims, which were filed by the NGO Deutsche Umwelthilfe ('DUH') and Greenpeace, are directed against BMW, Mercedes and Volkswagen, demanding that the German auto manufacturers commit to a tighter carbon emissions budget, and discontinue the worldwide sale of cars with internal combustion engines by 2030. A climate change claim has also been filed against Wintershall Dea to prevent the Norwegian gas and oil producer from developing any new natural gas or oil production after 2026.

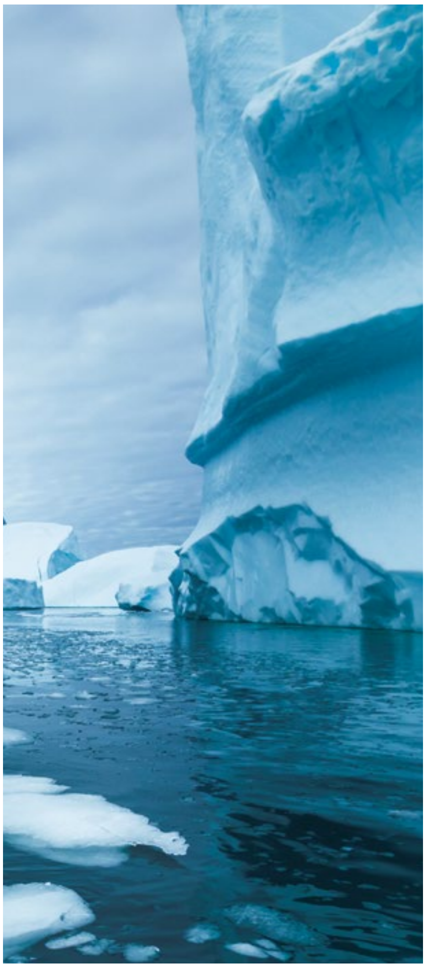
On 13 September 2022, the Stuttgart Regional Court dismissed the action against Mercedes at first instance. The court found insufficient proof that the claimants' personal rights would be impacted. In addition, the court emphasised that the courts are prohibited from taking legislative decisions. DUH filed an appeal.

In the Shell case, the Dutch court relied on a provision of Dutch law, pursuant to which a breach of an unwritten standard of care (in this case, among other things, knowledge about climate change) can result in liability towards third parties. German tort law does not have such a far-reaching general clause. Instead, claimants in a German claim must show: (i) damage to a legal interest protected under the German Civil Code; (ii) a causal link between a company's actions and the alleged damage; and (iii) that the respondents are liable, even while acting in compliance with applicable law. It is unlikely that these hurdles can be easily overcome.

Compensatory claims

The best-known climate-related compensatory claim in Germany is that of Saúl Lliuya's ('SL') against RWE, the German multinational energy company. As a resident of Huaraz, a Peruvian city situated below a glacial lake, SL claims that climate change has caused increasing glacial melt, which has led to a significant rise in the lake's water level. In order to protect Huaraz from flooding, various protective measures have to be implemented. SL is seeking a declaration that RWE will contribute to the cost of these measures. The lawsuit claims that the share of the costs to be paid by RWE must be based on the proportionate share of greenhouse gas emissions caused by RWE worldwide since the beginning of industrialisation, which is claimed to amount to 0.47 per cent.

On appeal, the Hamm Higher Regional Court considered the action to be sound in principle and has since entered the evidentiary stage. It remains to be seen whether German courts will find a causal link between emissions, climate change and the alleged damage, and how they will approach the fact that the emitter complied with applicable law.



Conclusion

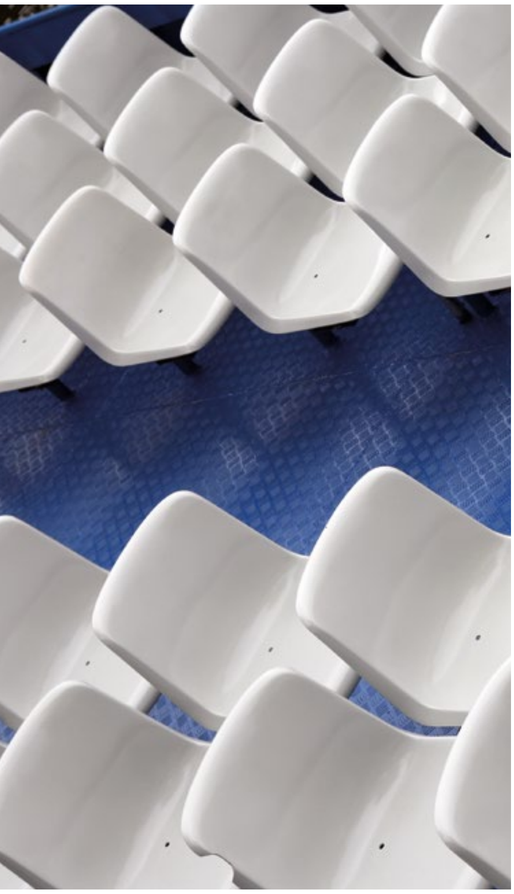
Climate litigation is on the rise (and is widely anticipated to increase further, particularly as a result of extreme weather events), presenting a real risk for companies. Potential climate claims pose significant strategic, financial and reputational risks. A transition plan detailing the company's intended contribution to achieving the Paris climate goals may help to limit these risks.

OUTLOOK

German general meetings' 'say-on-climate'

Lucina Berger
Partner, Frankfurt
lucina.berger@hengeler.com

Increasing regulatory requirements and external stakeholder expectations are raising the pressure on companies to examine their ESG strategies comprehensively at every level, to refine them, and even to formulate one from scratch. In light of this, it is not surprising that demands have been voiced internationally for some time that the general meetings of listed companies should also be involved in the relevant deliberations. But what factors and underlying conditions have to be considered under applicable German law regarding general meeting resolutions, currently referred to using the catchphrase 'say-on-climate'?



To date, no say-on-climate resolutions are known to have been passed in Germany by the general meetings of German listed companies. On the contrary, sustainability issues have traditionally been of minor importance at general meetings. One possible reason for this historic reluctance might be the strict rules imposed by the German Stock Corporation Act: it assigns primary responsibility for deciding on a company's strategic direction – within the limits set down by its articles of association – to the executive board, which is advised and monitored by the supervisory board in taking those decisions. Special scenarios in which the general meeting should handle questions of corporate management are few and very specific, such as the conclusion of certain enterprise agreements or the approval of transformation measures.

Exceptions to this general rule are possible if the executive board decides that it wants to submit certain questions of corporate management to the general meeting for approval. If the executive board makes the request, it is possible, in principle, to have the general meeting adopt a resolution on the company's climate strategy – or even on its sustainability strategy as a whole. Details are still unclear, however, as to the legal and factual consequences of such a resolution by the general meeting. In the particular circumstance where the executive board is pursuing an ambitious sustainability strategy at the expense of the company's profitability, having the general meeting pass a resolution can reduce the risk of personal liability to the executive board members and, indirectly, to the supervisory board members.

Conversely, a low-key climate action plan can, of course, be 'ratified' in this way by the general meeting, and any ambitions to go beyond it could thereby be curbed long

term. Logically, presenting a resolution to the general meeting only as an 'act of consultation' should not result in the executive board later being bound by every detail of that approved strategy. Rather, the executive board must retain the flexibility to adapt the company's goals and strategies to changing situations throughout the year without needing to have an additional resolution passed (if necessary, in coordination with the supervisory board), and to even disregard the originally approved strategy. The question as to whether such flexibility is in fact possible once a resolution has been passed has not yet been clarified in every aspect.

Where the executive board chooses not to put say-on-climate items on the agenda, there is currently no refined system under German stock corporation law that would permit shareholders to have such items put on the agenda. The prevailing view of legal literature is that the general meeting cannot be forced to pass a resolution – for example, by way of a formal request for additions to the agenda. Alternative approaches – possibly in the form of additional requests aimed at amending the company's articles of association (in order to add certain sustainability targets to the company object, for example) or the directors' and officers' remuneration system (with sustainability targets) – are comparatively 'invasive' by nature and will in most cases fail to achieve the intended aim of a jointly approved strategy. Likewise, refusing to approve the board members' acts because the company's climate strategy is not submitted to the general meeting will most likely fail to have the desired effect.

According to current opinion, the only option that shareholders essentially have at present to make ESG issues part of the general debate is by submitting questions for discussion at the general meeting, without being able to force the meeting to resolve on a particular matter.

ESG and all of its aspects will continue to have a decisive influence on German stock corporation law and the corporate governance of German listed companies, leading to perceptible changes sooner or later. It already seems foreseeable, and should in principle be welcomed, that in Germany, resolutions on the ESG strategy – or more specifically the climate strategy – of companies will also appear on the agendas of their general meetings. If it is possible to achieve broad approval for a specific ESG strategy through corresponding resolutions, this can provide relief for the executive board (and indirectly also for the supervisory board) and at the same time send a clear signal to third parties that certain goals are part of the stated corporate strategy.

EXPERTISE

Protecting human rights and the environment along supply chains

Starting this year, the protection of human rights and the environment along German companies' supply chains will become even more important not just in terms of impact on their reputations, but as a legal obligation as well.

Fabian Alexander Quast
Partner, Berlin
fabian.quast@hengeler.com

Carolin Raspé
Counsel, Berlin
carolin.raspe@hengeler.com

The German Supply Chain Due Diligence Act

The *Lieferkettensorgfaltspflichtengesetz* – or LkSG – took effect on 1 January 2023. A last-minute effort by opposition parties to delay the law's entry into force appears to have failed. On 15 December 2022, the alliance of Christian Democrats/Christian Socialists (CDU/CSU) submitted a motion in the Bundestag to postpone the enactment of the LkSG by two years because of the strain the COVID-19 pandemic and the Ukraine war was putting on the Germany economy. The motion is scheduled to be discussed further this month, even though the LkSG has already taken effect. Under the new law, large companies with more than 3,000 employees based in Germany now have to comply with far-reaching due diligence obligations relating to the protection of human rights and certain environmental goods along their global supply chains. The obligations include a comprehensive risk assessment, implementation of a risk management system, publication of a senior management declaration on the company's human rights strategy, taking remediation measures where required, and the operation of a complaint mechanism. From 1 January 2024, the law will also apply to all companies with 1,000 or more employees in Germany.

As the new law includes fairly broad, complex and vaguely worded legal concepts, guidance on its implementation issued by the relevant government agency, the Federal Office of Economic Affairs and Export Control (BAFA), carries significant weight: that guidance has been intensely debated by German companies in recent months. So far, BAFA has published two handouts and a questionnaire. The handouts contain useful information for companies, but are unspecific on certain provisions of the law. To some extent, they adopt an interpretation of the law that is perceived as being unreasonably broad and challenging for affected companies. The questionnaire is designed to be used by companies for generating a complete report to be submitted to BAFA in order to fulfil their reporting obligations, as outlined in the law. Containing numerous closed or multiple-choice questions, the questionnaire is supposed to make the process easier for companies, but it also creates a risk: such a narrow structure cannot always do justice to the required nuances of implementation at a company-wide level. It remains to be seen how BAFA will deal with the (still considerable) legal uncertainty of how companies are supposed to achieve compliance with the law and whether this will be reflected in BAFA's enforcement approach during the initial phase after it enters into force.

A proposed European Directive on Corporate Sustainability Due Diligence (CSDD)

In addition to requirements under national law, it is likely that human rights due diligence will also become regulated by EU law. In February 2022, the European Commission adopted a proposal for a directive on corporate sustainability due diligence to complement the existing legal framework, which is based predominantly on ESG reporting obligations such as those defined in the Corporate Sustainability Reporting Directive (CSRD). Recently, the Council adopted its position, which the European Parliament is expected to concur with in May 2023, paving the way for negotiations on the final language of the CSDD later this year.

The Commission and the Council are largely in agreement on the scope of the CSDD's application. Companies established under the laws of an EU member state are to be covered by the directive if they have an average of more than 500 employees and a worldwide net turnover of more than EUR 150 million in the previous business year. If they are active in so-called 'high impact sectors', companies with an average of more than 250 employees and an annual worldwide turnover of more than EUR 40 million can also fall within its scope. Non-EU companies incorporated under the laws of a third country will be obliged to comply with the CSDD if they had a net turnover in the Union of more than EUR 150 million in the previous financial year.

As it stands, the draft directive imposes far-reaching corporate due diligence obligations. Companies will be required to identify potential or actual negative impacts on human rights and the environment linked to their business activities, those of their subsidiaries and those of their direct and indirect business partners who are part of the "chain of activities" and they will have to avoid or eliminate them, respectively, as far as possible. The draft directive also provides for an obligation to establish and maintain a complaints procedure, as well as an obligation for companies to evaluate their own activities and actions regularly in addition to those of their subsidiaries.

In the event of violations, enforcement measures, including fines, will apply. In contrast to the LkSG, the proposed directive explicitly provides for civil liability if a company has not fulfilled its obligations.

German companies will have to devote significant resources in the coming years to ensure that they are compliant with the new regulatory framework for protecting human rights and the environment, to avoid regulatory enforcement and litigation risks, and to protect their reputations.

OUTLOOK

EU competition law and policy outlook for 2023

The year 2022 brought about many significant developments in EU competition law and policy, including the adoption of the Digital Markets Act (DMA) and the revision of the Block Exemption Regulation for vertical agreements. We expect that 2023 will also be an action-packed year. Below, we highlight some legislative initiatives and enforcement trends to watch out for.

Markus Röhrig
Partner, Brussels
markus.roehrig@hengeler.com

Christoph Wilken
Partner, Brussels
christoph.wilken@hengeler.com

Joachim Hannes Burger
Associate, Brussels
joachim.burger@hengeler.com

Scrutiny of foreign subsidies on the rise

The EU's new Foreign Subsidies Regulation (FSR) is expected to take effect in mid-2023. It addresses the Commission's concern that subsidies by non-EU member states may distort the EU's internal market, including by providing recipients of foreign subsidies with an unfair advantage to acquire companies or obtain public procurement contracts in the EU.

The FSR will enable the Commission to review a variety of financial contributions following a mandatory notification of certain M&A transactions and public procurement bids, or an ex-officio investigation of transactions that fall below the notification thresholds. Financial contributions which are found to be distortive of the EU's internal market may result in structural or non-structural remedies, such as the divestment of certain assets or providing access to infrastructure; the Commission can also prohibit the subsidised M&A transaction or the award of a public procurement contract to the subsidised bidder.

For companies benefitting from non-EU member states' financial contributions, the FSR will no doubt – in addition to merger control and Foreign Direct Investment control – create another significant regulatory hurdle for deal-making. Companies are well-advised to track foreign subsidies they receive carefully and to have appropriate compliance mechanisms in place.

Stretching the jurisdictional thresholds for merger review

According to its new approach taken in the Illumina/Grail case and new Guidelines, the Commission can take merger control jurisdiction over a transaction following a referral request by an EU member state under Article 22 EU Merger Control Regulation (EUMR), even if this transaction fails to meet the notification thresholds under the EUMR or the EU member states' national merger control laws. After the General Court upheld the Commission's new approach in the Illumina/Grail case, it remains to be seen whether the Court of Justice will follow suit. Building on its previous Article 22

EUMR Guidelines, the Commission has in the meantime published additional FAQs in December 2022, which are intended to provide further guidance under what conditions the Commission considers a transaction to be a suitable Article 22 EUMR candidate and certain procedural issues.

The Commission's shift in applying Article 22 EUMR creates significant hurdles, which need to be taken into account early on in the deal-making process. Undoubtedly at greatest risk of being called in by the Commission under Article 22 EUMR upon an EU member state's referral request are acquisitions by large players of smaller competitors in the healthcare and digital sectors with low or no turnover, but high growth potential.

Companies potentially having a dominant position in the relevant markets should also watch out for the Towercast case: according to Advocate General Kokott's recently published opinion, already completed acquisitions may still be challenged ex-post under abuse of dominance rules if they have not been reviewed (and cleared) ex-ante under merger control laws because the transaction did not require a merger control notification. The European Court of Justice's decision is expected in the course of 2023.

Enforcement of the DMA

On 1 November 2022, the DMA was signed into law and will become applicable on 2 May 2023. DMA enforcement will be one of the top priorities for the Commission in 2023.

As a first step, the Commission will, until around August/September 2023 designate so-called 'gatekeepers', i.e., large providers of so-called 'core platform services' (e.g., online search engines, app stores, or certain messaging services), which meet certain (rebuttable) quantitative thresholds in terms of turnover, market valuation, and monthly active users.

Six months after the designation decision (i.e., around February/March 2024), gatekeepers must fully comply with Dos and Don'ts laid down in the DMA (e.g., a ban on so-called 'self-preferencing' or obligations on interoperability with third-party services and portability of end user data). Gatekeepers must also inform the Commission about intended M&A transactions involving targets active in the digital space or enabling the collection of data, even if such a transaction is not notifiable under the EUMR. The information provided will enable the Commission to reach out and potentially encourage EU member states to request a referral under Article 22 EUMR.

On 5 December 2022, the Commission kicked off a series of workshops to gather insights from stakeholders on the difficulties in implementing the DMA. In addition, on 9 December 2022, the Commission published a Draft DMA Implementing Regulation for public consultation, which addresses procedural issues. It will be adopted later in 2023.

More guidance and comfort for coordination in times of crisis

Climate change, COVID-19, Russia's invasion of the Ukraine and the resulting energy crisis – policymakers and companies alike are facing tremendous challenges. Cooperation between (competing) companies – e.g., agreeing on more sustainable production methods or supply chains – makes a huge contribution to overcoming these challenges in a swifter and more efficient manner. However, legal uncertainties about competition law compliance can sometimes frighten off companies from entering into such crisis cooperation

Just as it did in 2022, we expect the Commission to take an active role in the EU-wide debate on how competition policy can increase legal certainty for companies to engage in collaboration. For example, the Commission's revised Draft Guidelines on Horizontal Agreements (which is expected to be adopted in 2023) will include a dedicated chapter on the legal framework for sustainability agreements. While this certainly provides helpful guidance to companies' self-assessment, some national regulators and competition authorities (e.g., in the Netherland and Austria) took bolder steps in providing even greater comfort to companies.

In addition, the Commission will continue its 'open door' policy, i.e., providing informal guidance ('guidance letters') to interested companies on the legality of their plans. The Commission recently updated its Informal Guidance Notice, part of which also included some (some say: not enough) improvements to the informal guidance process and the (evidentiary) value of guidance letters.

Cracking down on anti-competitive collusion and abuse of dominance

The Commission will continue to be highly alert to and aggressively enforce anti-competitive collusion and abuse of dominance, and – as Executive Vice-President Margrethe Vestager put it in a policy speech in October last year – 'not shy away from novel theories of harm' where considered relevant. One example is the Commission's ongoing investigation into suspected antitrust breaches by Teva in the market for multiple sclerosis medicine. Here, the Commission is, inter alia, concerned that Teva 'gamed' the patent system by artificially prolonging its market exclusivity, resulting in the delayed market entry of other medicines.

SPOTLIGHT

Is there no corporate criminal liability in Germany? Not exactly.

Before the German federal election in 2021, there was much public debate about the former government's draft Corporate Sanctions Act, which aimed to introduce a new framework for prosecuting and sanctioning companies. The bill did not pass the Bundestag and while the current government has also announced that it wants to reform this area of law, it plans to make only targeted adjustments to the existing legal framework. Contrary to what this development might suggest, it is important to understand that the current legal situation in Germany already allows for the imposition of corporate fines for criminal or administrative offences – and in recent years, prosecutors and courts have been using this tool more and more frequently.

Requirements for corporate fines

Under German law, companies cannot be defendants in criminal proceedings, because only individuals can commit offences. That is the basis for the often-used maxim that there is no corporate criminal liability in Germany. However, there is a statute that allows the imposition of an administrative fine against companies (Sec. 30 of the German Act on Administrative Offences (OWiG)). Such a corporate fine can be levied if a person with a 'managerial position' has committed a criminal or administrative offence, as a result of which duties of the company have been violated, or where the company has been enriched or was intended to be enriched. A managerial position includes persons with supervisory and control powers relating to a specific area of the company, such as executives, directors, and certain heads of divisions and departments. Criteria for a managerial position are personnel, budget or departmental responsibility, and the power to represent the company. Corporate fines can also be levied on foreign companies. Although this may pose practical problems, such as international enforcement, it is done on a regular basis.

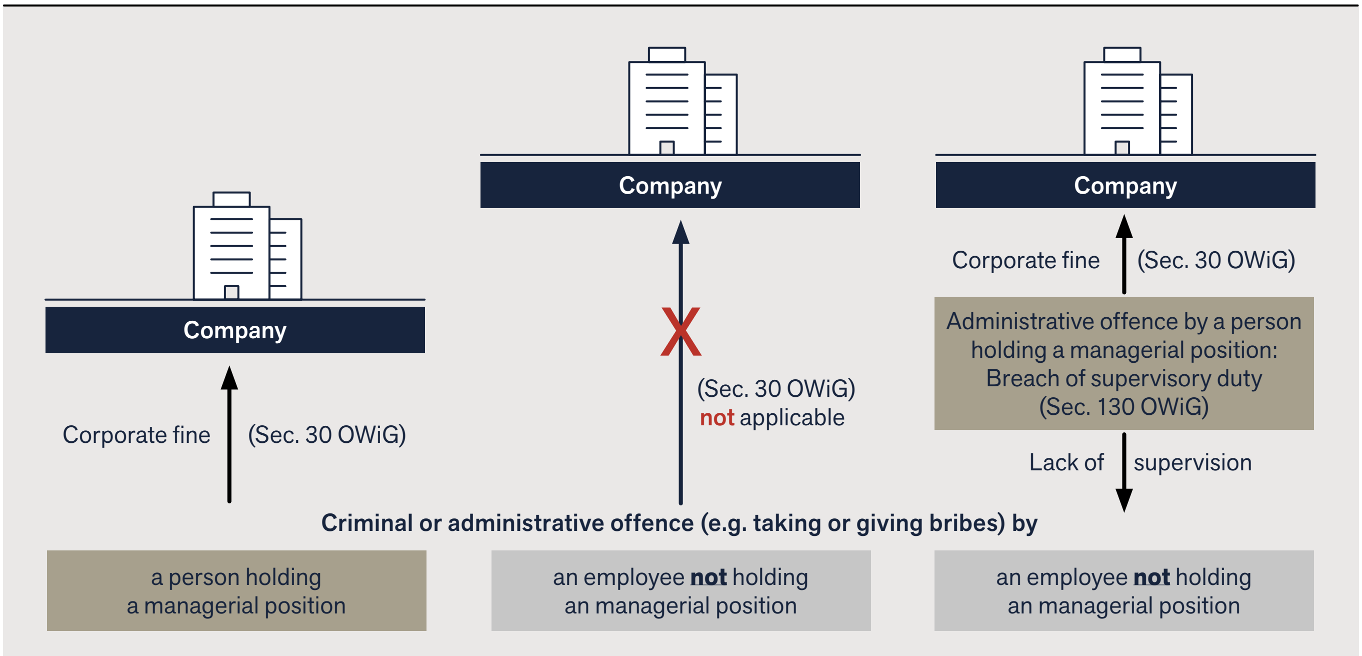
Offences by employees not holding a managerial position do not trigger a corporate fine. However, in such cases, prosecutors often invoke a breach of supervisory duty by someone with a managerial position. Breach of the latter is an administrative offence that is committed if someone omits to take the supervisory measures required to prevent business-related criminal or administrative offences within the company, when the underlying offence would have been prevented, or made much more difficult, if there had been proper supervision. Where a regular employee has committed an offence, prosecutors therefore usually claim that there was a lack of supervision by management, allowing them to impose a fine on the company.

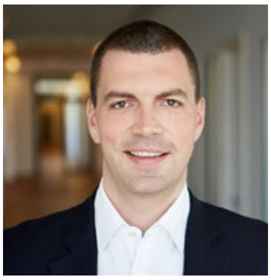
Amount of corporate fines

For an underlying criminal offence, the current maximum corporate fine is 10 million euros for intentional violations and 5 million euros for negligent violations. This is also the case for violations of supervisory duty where the underlying offence is a crime. This rather low amount has been one of the main criticisms of the current framework and the draft Corporate Sanctions Act suggested raising the maximum fine to 10 per cent of the company's annual turnover. However, the maximum fines for administrative offences in certain areas of regulation, for example antitrust, capital markets, data protection and anti-money laundering, already amount to a certain percentage of the company's annual turnover. Notably for larger companies, this leads to the paradoxical consequence that administrative offences can result in higher corporate fines than related criminal offences.

Proceeds from an underlying offence can also be confiscated beyond any statutory maximum fine. The confiscated amount will be included in the total fine. This has resulted in corporate fines reaching hundreds of millions of euros, despite the statutory maximum for these offences being 5 million euros.

The extent to which the maximum permissible amount of a fine is limited in an individual case depends on the gravity of the offence and the economic circumstances of the company. Consideration will also be given to whether the company has taken appropriate compliance measures and to what extent it has cooperated with the authorities.





Constantin Lauterwein
Partner, Berlin
constantin.lauterwein@hengeler.com

Friedrich Florian Steinert
Senior Associate, Düsseldorf
friedrich.steinert@hengeler.com

Competent authority and proceeding

There is no central federal agency competent to prosecute companies.

With regard to underlying criminal offences, more than 100 local public prosecutors' offices at state level are also competent to prosecute companies. However, only a criminal court can impose a corporate fine in such cases.

For underlying administrative offences, the competent regulatory authority can prosecute companies and impose a corporate fine. In tax law, for example, this would be the local tax office. However, the prosecutor's office can always take over the case.

If a corporate fine is based on a breach of supervisory duty which is linked to an underlying criminal offence, the local public prosecutor's office prosecutes and levies the corporate fine. Accordingly, proceedings against companies where fines are levied can be concluded prior to a potential criminal trial against the responsible individuals. On the other hand, fines for breaches of supervisory duty linked to an administrative offence can be imposed by the competent regulatory authority, if the prosecutor's office does not take over the matter.

As a general rule, in contrast to criminal proceedings against individuals, it is at the discretion of the competent authority or court whether or not to prosecute and sanction companies. The draft Corporate Sanctions Act also aimed to introduce mandatory proceedings against companies. But in practice, prosecutor's offices, especially those in bigger cities, have been prosecuting companies under the existing rules for quite some time.

Summary

While the government has not specified what changes it wants to make, in practice, German and foreign companies can already be subject to heavy fines as prosecutors claim that there is a lack of supervision in order to impose them. To protect themselves, in particular against accusations of having violated their supervisory duties, companies must have adequate compliance programs in place, and in the case of investigations against employees, they should develop a corporate defence strategy at an early stage.

AWARDS

Recent recognition

> www.hengeler.com/awards

Law.com International Rising Stars

Hengeler Mueller disputes partner Antonia Hösch is listed among Continental Europe's 25 future female leaders in law.

ITR Rising Stars Awards EMEA

Three Hengeler Mueller partners were among the winners of the ITR Rising Stars Awards EMEA 2022.

Lucina Berger (Corporate Governance)

Gunther Wagner (Tax)

Daniel Zimmer (Energy)

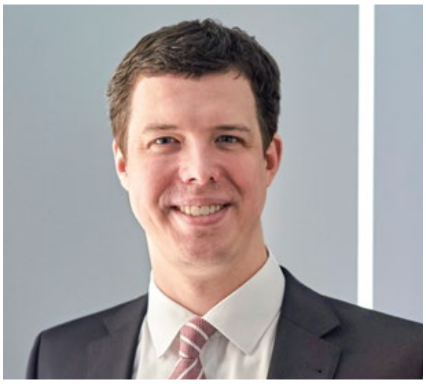
NEWS

New partners and counsel 2023


'We congratulate all new partners and counsel, and look forward to continuing our work together successfully. This provides further evidence of our outstanding young talent in all practice areas which is important both for us and for our clients. We are convinced that our new partners and counsel will make an important contribution to the continued successful development of Hengeler Mueller.'

Thomas Müller and Bernd Wirbel, Co-Managing Partners of Hengeler Mueller






Oda Christiane Goetzke

Partner, Düsseldorf
oda.goetzke@hengeler.com

Oda advises on public and private takeovers, corporate reorganisations and a broad range of corporate matters. Her practice also includes capital markets work.

Sebastian Heinrichs

Counsel, Frankfurt
sebastian.heinrichs@hengeler.com

Sebastian specialises in tax matters. He primarily covers tax aspects of capital market transactions, joint ventures and M&A, reorganisational measures, restructurings and tax court proceedings, as well as tax issues in criminal law.

Maike Hölty

Partner, Berlin
maike.hoelty@hengeler.com

Maike advises corporate clients and financial investors on M&A transactions, equity financings and joint ventures as well as corporate matters. In addition, she regularly works on infrastructure projects.

Marco Mâallem

Counsel, Berlin
marco.maallem@hengeler.com

Marco acts for corporates, private equity and other financial investors on M&A transactions and joint ventures with a sectoral focus on real estate. His practice also includes corporate matters as well as financing structures.

Philipp Otto Neideck

Partner, Düsseldorf
philipp.neideck@hengeler.com

Philipp Otto advises clients on antitrust and merger control cases. He focuses on M&A-related merger control matters, abuse of dominance and cartel investigations, and follow-on damage claims.

Maximilian Ohrloff

Counsel, Düsseldorf
maximilian.ohrloff@hengeler.com

Maximilian advises and represents companies, executives and board members in all areas of white-collar criminal law, administrative offences, corporate governance and compliance.

Tom Shingler

Counsel, Frankfurt
tom.shingler@hengeler.com

Tom has a broad practice covering financing, banking and capital markets. He advises lenders and borrowers across the full range of syndicated and bilateral lending on all types of debt financing.

Julia Weidner

Counsel, Frankfurt
julia.weidner@hengeler.com

Julia advises lenders and borrowers on corporate finance transactions. She focuses on capital markets-based financing through the issuance of bonds and structured investment products.

www.hengeler.com/lawyers

Hengeler Mueller Partnerschaft von Rechtsanwälten mbB

GERMANY

Behrenstraße 42
10117 Berlin
T +49 30 20374 0

Bockenheimer Landstraße 24
60323 Frankfurt
T +49 69 17095 0

Benrather Straße 18-20
40213 Düsseldorf
T +49 211 8304 0

Leopoldstraße 8-10
80802 Munich
T +49 89 383388 0

BELGIUM

Square de Meeûs 40
1000 Brussels
T +32 2 7885 500

UNITED KINGDOM

30 Cannon Street
London EC4M 6XH
T +44 20 7429 0660

www.hengeler.com