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MuMAC Special 2021

The M&A Phoenix – Rising from Pandemic Ashes?

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MuMAC 2021: The M&A Phoenix – Rising from Pandemic Ashes?

1. MuMAC 2021

Border M&A and Private Equity Conference ("MuMAC") from the famed Hotel Bayerischer Hof in Munich. We expect some 700 conference participants to join the live stream. This special issue of M&A Review focuses on the conference and some of the key topics to be discussed.

2. Corona aftermath

The global crisis caused by the SARS-CoV 2 (coronavirus or Covid-19) pandemic has had (and continues to have) a material impact worldwide on economies and society, including vaccination, contact restrictions, education and work from home. However, to some surprise of market participants, the M&A market has experienced an astounding upheaval. This year's virtual conference – entitled "The M&A Phoenix – Rising from Pandemic Ashes?" – focuses on the current aftermath of the coronavirus crisis on Private Equity, M&A and other business combination and investment transactions.

3. MuMAC 2021 Features

Supervisory Board Member and Senior Advisor Janina Kugel, on the back of her new book "It's now", will take us on the journey of "Corporate Transformation in the Digital Post-Pandemic Era".

Four panels with distinguished experts will cover the current Private Equity and M&A market, German Mittelstand transactions in the pandemic circumstances, Restructuring and Special Situations Opportunities as well as the all time highs of International Healthcare Transactions.

4. Conclusion

The M&A industry has impressively started to overcome this economic crisis – for sure. Namely, this applies to industries such as Tech, pharma and healthcare. The pandemic continues to have a significant impact on business and economies, domestically as well as globally. For successful future deals the effects will have to continue to be assessed. It still requires a careful analysis of the facts and circumstances considering future deals. The market has started thinking new and has grasped the opportunities that have shown to bring businesses successfully through this era. We all hope that this pandemic will end soon and our business and personal live will continue to stabilise.

With our very best regards

Christian von Sydow *Dr. Nikolaus von Jacobs*

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The European M&A market in times of Covid-19 – drivers, development and outlook

Andre Wassmann, Helbling Business Advisors

The economic impact of the Covid-19 pandemic has hit the global economy hard in some cases. German companies have also had to deal with the consequences of short-time work, falling margins, supply chain problems and, in some cases, insolvencies. These effects did not leave the M&A market unscathed, although the impact is far less drastic than what was suspected at the beginning of the pandemic.

At the end of the first year of the pandemic, European M&A volume stood at EUR 790 billion (-20%) and 14,572 transactions (-17%), the lowest level since 2013. The high level of uncertainty combined with increasingly severe restrictions on public and economic life led to many announced transactions being suspended for the time being. Thus, Q2/20 will go down in history as the weakest quarter since Q3/09 for the European M&A market. In our analysis of the first half of 2020 which we performed last year, the chances for a catch-up in the second half of the year were high, due to the stabilization of the economic sentiment (European Economic Climate Indicator (ESI) with an increase of 21% to 77.2 in Dec'20 compared to Apr'20 with 63.8). With the increasing relaxation of Covid-19 related measures over the summer, transaction volumes also recovered in the last two quarters, in line with the optimism of dealmakers. Europe had become accustomed to closing deals in the "new normal."

2021 is on track to become a record year for M&A globally. In the first half of the year, global M&A volume already reached EUR 2.4 trillion (+131%), the US account for the largest market share, at EUR 1.1 trillion (+249%), Europe is also well above H1/20 with EUR 498 billion (+39%) and has already reached two-thirds of the full-year 2020 value. It is interesting to note that three sectors in particular are contributing significantly to the boom. According to an analysis of global M&A activity by Refinitiv, the target markets technology, financial services and energy have grown the most compared to the same period last year. Global deal volume in the technology sector totaled EUR 750 billion in H1/21, more than triple the 2020 level. The number of deals increased by 52%. The share of financial sector deals in the total volume increased by around one-third year-on-year to 11%. The energy sector accounted for 11% of M&A activity, an increase of 188% year-on-year.

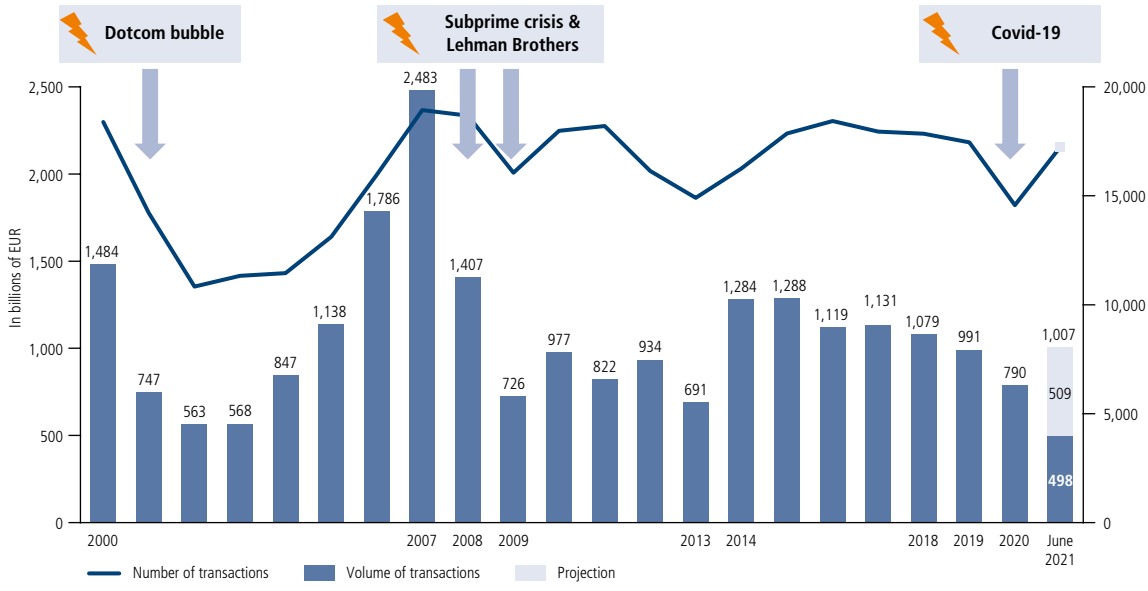
1. Megatrends – Fueling the M&A market

Back in September 2020, we analyzed that M&A appears to make particular sense in certain target markets due to social megatrends. This assessment can be confirmed today, as shown by a comparison of the shares of key sectors in the total volume of transactions, as well as the current market development (Morgan Stanley, Refinitiv). Digitalization, healthcare, sustainability, transportation, finance, and consumption have proven to be particularly promising. The exceptionally good year for M&A, as well as the outperformance of some sectors, can be attributed to several specific drivers.

One is the increased confidence of dealmakers due to the recovery of the global economy, widespread relaxation of "lockdowns" and advancing vaccination campaigns. On the other hand, continuing low interest rates, low borrowing costs and a correspondingly high level of liquidity as well as well-endowed "war chests" of investors are contributing significantly to the current boom. Private equity-backed acquisitions accounted for 18% of M&A activity in H1/21. The total value of PE buyouts executed reached EUR 453 billion, doubling year-on-year, and the number of PE-backed deals rose to 6,500 globally (+76%).

Fig. 1 • European M&A market development

Source: IMAA-Institute; Refinitiv; Helbling Research



In addition to the extremely active PEs, there is an increasing number of special purpose acquisition companies (SPACs), through which 201 transactions with a total value of EUR 329 billion have been executed to date. This corresponds to around 14% of the total deal volume. Due to the large number of potential buyers, competition is fierce, especially for very attractive targets.

The Covid 19 pandemic is also contributing to the current M&A boom. It is the fuel for profound social and economic changes and has ruthlessly exposed individual weaknesses in supply chains and business models. The need for greater focus has increased the pressure on many companies to quickly address these new commercial and operational challenges. Many decision-makers are now faced with a buy-or-build decision, and M&A offers companies and investors a quick and comparatively straightforward solution to this. This trend can also be seen in the continued strong growth in transactions and valuations in the technology sector.

Technology, clean energy, and financial services are increasingly emerging as key target markets for investment. Consequently, deal activity and valuations have risen rapidly. One example is the sector surrounding CO_2-neutral energy production and use. In the first half of the year, purchase prices here rose significantly compared with the same period last year. Buyers paid a median of 3.4x sales (1.5x in the previous year), and the median EBITDA multiple rose to 11.4x compared to 9.4x (Mergermarket).

2. ESG dramatically changes the rules of the M&A game

Neo-ecology is certainly the megatrend with the strongest long-term socio-political influence. It translates into our economic actions via the required ESG conformity and is now more or less synonymous with the term economic sustainability. The criteria by which ESG compliance or contribution to sustainability is measured are currently still under development, but corresponding concepts have already been pre-sketched in regulatory terms and are gradually being reinforced.

Regardless, the pressure to act is great. Regulation to protect the climate is developing at a rapid pace. In July 2020, the EU Taxonomy Regulation came into force, requiring companies to account for the first two goals of "climate protection" and "adaptation to climate change" as early as the 2021 financial year. This reporting obligation is still limited by size thresholds in terms of number of employees and sales volume. However, the EU is planning to tighten these thresholds as early as 2024, with a further significant tightening three years later. Capital providers will also be held to account. Based on the European Disclosure Regulation, banks and investors have been obliged since March 10, 2021 to disclose their integration of ESG criteria when granting loans or making investments.

With the publication of the Intergovernmental Panel on Climate Change's new report on climate change on August 9, 2021, at the latest, it is clear how urgently action must be taken structurally and thus also in the economy. Every single company must react, otherwise it can get expensive. Lack of ESG compliance may then mean a noticeable price increase in financing – whether equity or debt. At worst, it means no ESG compliance, no loan, or no financing round. The same applies to takeovers, and especially by financial investors such as PEs. This does not yet consider the increase in the cost of production or service provision due to the CO_2 pricing introduced in 2021 and its significant increase as of 2025.

M&A can help meet the criteria in three ways:

1) Expanding and standardizing ESG due diligence as a fully-fledged part of the usual due diligence phase in M&A processes

2) The investment in sustainability-enhancing or sustainable assets to build an ESG-compliant portfolio by financial investors

3) The acquisition of ESG compliant companies, process steps or supply chains by strategic investors

Initial awareness has already been raised. Based on an analysis by EY, the renewable energy asset class attracted about 2.7 times more transaction volume in H1/21 than in the same period last year, just under USD 97 billion. However, this asset class has existed in the market for a long time and seems to be perceived as the most obvious way to obtain a positive ESG rating so far.

On the other hand, there is still room for improvement in the acquisition of entire companies or parts of companies to shape one's own value creation in a sustainable manner. According to a study by Acuris and Baker Tilly, 65% of corporates and PE investors surveyed already consider ESG criteria to be very important or important in M&A. So far, however, only slightly more than half have backed out of a deal because the asset in question was not ESG-compliant. There is also a significant difference between PE and corporates. While 60% of PEs focus on ESG in the investment, ESG is only relevant to less than half of the corporates surveyed (44%). In short, strategic acquisitions still have little focus on sustainability. For the time being.

3. Conclusion

After a historically weak Q2/2020 for the European M&A market, 2021 seems to become a record year for deals. In addition to extremely active PEs and an increase in the use of SPACs this year, the Covid-19 pandemic has also contributed to this M&A boom. In certain target markets, the crisis has even fueled the volume. In addition, the megatrend neo-ecology is slowly gaining momentum and has the potential to have a lasting impact on the M&A market.

Andre Waßmann, Member of the Executive Board, Head of M&A, Helbling Business Advisors, has almost twenty years of experience as a M&A and corporate finance expert as well as a strategy consultant for clients in the financial services and capital markets sectors. Before joining Helbling Business Advisors and CFI Group, Andre was Partner at Clairfield International with a focus on the transaction market of startups, corporates and VCs in the fintech sector and other digital business models. He covers further technology-based innovation areas such as mobility and energy. At the investment management house KGAL, he was responsible for the development of innovative business areas, the M&A and venture capital investments and he implemented a digital investment platform. Besides this, he supports acade – mia in the development of blockchain technology. Andre has an excellent network to fintech companies, think tanks and incubators, banks and insurance companies as well as to national and international financial investors, targets, capital markets and buyers.

Mastering uncertainty and volatility – how executives optimise portfolios in challenging market environments

Tobias Huesmann & Arndt Philipp Truempert, PwC Germany

1. Introduction

Companies are experiencing increased volatility, uncertainty, complexity and ambiguity (VUCA) in global markets. This is being driven by a wide variety of factors, including new regulations, changing consumer preferences and the Covid-19 pandemic. These market dynamics are having an enormous impact on corporate portfolios, and corporate decision-makers need to find new methods to successfully navigate these complex situations. Constantly adapting corporate portfolios to new market conditions and ensuring an optimal fit with corporate strategy will be crucial for long-term success.

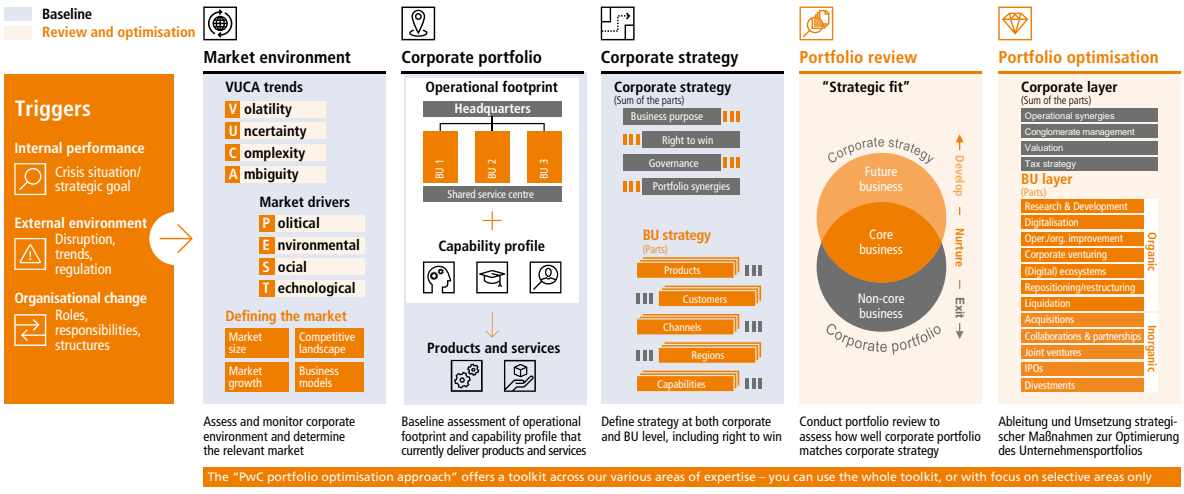
PwC utilises a structured approach to portfolio optimisation to guide executives through volatile markets. This approach comprises five steps; executives can apply all five steps in order, or just some of them, depending on their requirements. Triggered by external or internal needs, the PwC portfolio optimisation approach starts by analysing the relevant market environment, reviewing the company's competitive positioning in that market environment in form of the corporate portfolio, and assessing whether the corporate strategy is suitable to optimally exploit market opportunities and mitigate risks. Based on this baseline, the portfolio review stage reveals the "strategic fit" of the corporate portfolio, i.e., how well it delivers the corporate strategy. Finally, strategic measures are selected – on both corporate and business unit (BU) level – to optimise the corporate portfolio.

2. Market environment

The constantly rising level of VUCA is being driven by a wide variety of factors, including new regulations, changing consumer preferences environmental risks, political tensions, technological innovations, and – as

Fig. 1 • PwC portfolio optimisation approach

Source: Own illustration



recent events have shown – pandemics. This is having a severe impact on fundamental elements of corporate planning, and top executives need to find ways to successfully navigate these VUCA waters. Forecasts are unanimous in predicting that the market environment will continue to become increasingly complex and opaque, and that unexpected, high-impact events will inevitably occur more frequently.[1] Given that market environments will become more dynamic and volatile, the ability to quickly adapt corporate strategies to new market conditions and to make sure that corporate portfolios deliver strategic goals will be crucial for long-term market success.

Increased volatility means that corporate planning parameters will change more drastically and frequently. These planning parameters will thus need to be constantly monitored and analysed, because failure to adapt to external changes could easily lead to corporate strategy being undermined. Alongside routine, institutionalised reviews of the corporate environment, ad-hoc reviews may become necessary after unexpected events or during exceptional situations within the company (e.g. financial distress) to assess whether strategic repositioning is needed.

3. Corporate portfolio

A company's corporate portfolio defines its competitive positioning, across three levels: operational footprint, capability profile, and products and services offered. All three levels are interconnected and entangled at the operational level, but these connections are often complex and opaque. An in-depth understanding of the corporate portfolio and its operational interconnections is essential for assessing the company's exposure to market risks and its vulnerability to volatility.

In VUCA markets, corporate portfolios tend to shift away from efficiency and maximising profits to improving the reliability and robustness of the company's operational backbone. Deliberately adding operational slack, duplicating critical processes or running them in parallel, and enhancing fallback procedures and safety protocols all help to accommodate the challenges of VUCA markets and protect the portfolio from volatility strikes.

4. Corporate strategy

Corporate strategy determines what market positioning the company should aim for, and addresses the corporate purpose, USP and governance structure at the corporate level. At the BU level, strategic goals focus more on operations, relating to the products, the channels, the markets and the capabilities required to satisfy customer needs.

Successful strategies require companies to be very reflective, and strategy will vary with different VUCA factors. The underlying strategic approach has changed: companies now need to be adapters, focusing on speed, flexibility, adaptability and risk reduction. This presents a contrast to the old approach of the preserver – focusing on detail, stability, and maximising profits. Strategies are also focusing on shorter timeframes to better account for dynamic environments.[2]

5. Portfolio review

In dynamic VUCA markets, regular portfolio reviews are becoming an increasingly important means of ensuring that the corporate portfolio is aligned with the corporate strategy as closely as possible. PwC research has shown that corporate approaches to portfolio management are not yet sufficiently mature – only around half of the decision-makers surveyed said that their companies had implemented structured, regular portfolio reviews.[3]

We recommend a standardised approach to portfolio optimisation, based on transparent and objective criteria and carried out on a regular basis. PwC's tried-and-tested portfolio review methodology identifies the strategic fit of each BU against your strategic goals, and uses this to categorise each BU into future business, core business or non-core business.

6. Portfolio optimisation

Following the portfolio review, strategic measures for optimising corporate portfolios are required. Future business areas need further development; core business areas must be nurtured and optimised; and non-core business areas should be divested to free up capital. Suitable strategic measures at the corporate level include portfolio or market valuation measures. At the

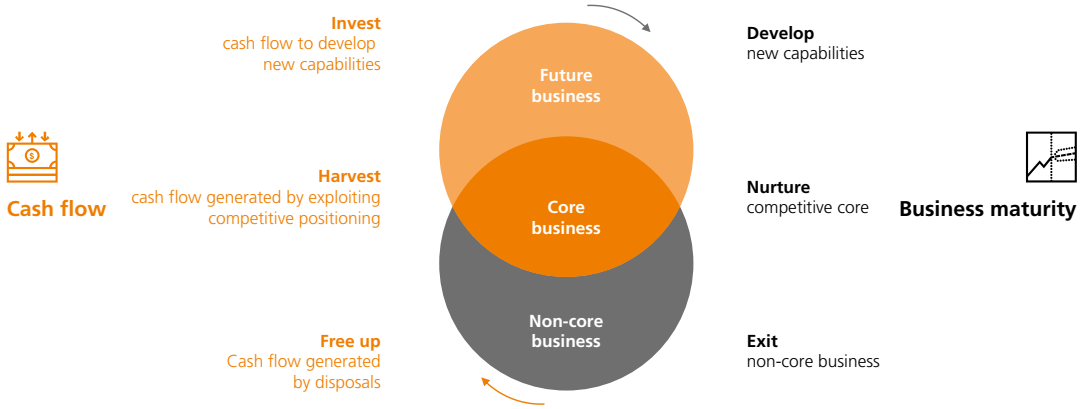
1 Cf. PwC (in collaboration with Kantar and the Technical University of Darmstadt), Optimism on uncertain grounds, 2020.

2 Cf. PwC (in collaboration with Kantar and the Technical University of Darmstadt), Optimism on uncertain grounds, 2020.

3 Cf. PwC (in collaboration with Kantar and the Technical University of Darmstadt), Mastering uncertainty and volatility, 2020.

Fig. 2 • Business maturity vs. cash flow circle

Source: Own illlustration



BU level, organic measures (e.g. R&D, digitalisation, fit-for-growth strategy) and inorganic measures (e.g. acquisitions, divestitures, IPOs) will help to improve the strategic fit of the corporate portfolio. Organic measures utilise the company's internal resources and limit risk exposure, while inorganic measures allow for bold, quick and high-impact strategic moves.

Ideally, executives should make use of both organic and inorganic measures to continuously improve their company's competitive positioning, ensuring that corporate portfolios deliver the best possible returns and provide robustness against future volatility.

Tobias Huesmann is a Director at PwC Germany and leads the portfolio optimization activities. Tobias supports executives along the entire PwC portfolio optimization approach and conducts portfolio analyses to derive and implement holistic portfolio optimization measures, primarily with a focus on complex M&A transactions.

Anrdt Philipp Truempert is a manager at PwC Germany and supports companies in conducting portfolio analyses as well as planning and implementing the corresponding optimization measures. He focuses on large-scale transformation and carve-out projects.

Value creation through carve-outs: Fail to prepare … prepare to fail

Dr. Rainer Bizenberger, Mo Habbas & Manuel Szerencses, AlixPartners

1. Introduction

After another strong quarter of deal-making activity, the M&A outlook for the remainder of 2021 looks buoyant. As countries emerge from lockdown restrictions and vaccine rollouts reinvigorate consumer confidence, the extraordinary "standstill" of twelve months ago appears to have been banished.

This economic re-awakening presents a huge opportunity for business leaders to strategically recalibrate their portfolio to focus more on core offerings, while also carefully considering acquisitions that could accelerate strategic growth.

With such significant rewards up for grabs on both buy- and sell-sides, carve-outs are likely to be a dominant feature of the M&A landscape for some time to come. This makes it all the more important to ensure that nothing is left to chance when executing a carve-out strategy.

2. Be aware

Carve-outs are a significant undertaking from so many perspectives, ranging from defining the ideal carve-out perimeter over designing the optimised legal entity setup, considering cross-border governance and tax implications, to developing a communication concept ensuring that no stakeholder feels excluded from the carve-out process, to name just a few.

However, combining all elements into a single clear plan from the outset – refined as new information becomes available – and having it delivered by an experienced, "battle-tested" project team can give leadership teams the greatest chance of unlocking the highest value in the shortest possible time.

3. Don't underestimate complexity

Any assumptions that carve-outs are anything but highly complex are delusional. The levels of entanglement within large entities from brand, customers, shared services and technology perspectives, to name just a few examples, will present myriad challenges.

Businesses subject to a carve-out have often suffered from a lack of HQ focus, investment or just general love and attention for some years. But that's not to say that they aren't tightly integrated within a portfolio, with the best intentions of forging productive collaboration and realising other business synergies.

There is always a path to separation through such complexity – but this will require rigorous assessment and diligent implementation – with continuous learning and the need to update strategies along the way.

Much depends on the quality of the preparation. A swift and comprehensive planning process, driven by a dedicated core team, including experienced carve-out project managers and affected front- and back-end key functions, will deliver a clear Target Operating Model (TOM) for the carved-out business and a suitable implementation plan. This includes the identification and transfer of affected resources, assets and headcounts to achieve operational effectiveness on Day 1. In addition, Transitional Service Agreements (TSAs) need to be negotiated to guarantee continued support from the parent company (e.g., access to ERP systems and maintenance, use of shared office space, brand licenses) for a pre-defined period of time.

Other critical factors to achieve a successful carve-out include the regular testing of Day 1 readiness, the evaluation of risks and mitigation measures, and the

development of a robust communication program to all stakeholders, in particular to affected employees. This is often underestimated, but crucial in preparing a smooth transition for the separation, to ensure an energetic start for the separated business post-Day 1.

4. Create value

As carve-out assets have typically been neglected or at least de-prioritised, they are particularly attractive to certain private equity firms, including funds focusing on turnaround situations. Such assets frequently offer significant performance improvement opportunities, either as standalone businesses (possibly as a buy-and-build platform) or as integration targets for an existing portfolio company. So, after the route of entanglement has been identified – how will the business be optimised once again?

While carving out a business and moving it to a standalone state will benefit from speed over elegance in terms of reaching Day 1 readiness, this doesn't mean that the analysis and the assessment of the business is negligible – value creation begins from the outset.

From establishing the initial deal perimeter in terms of people, products, systems and customers to building a robust value creation plan, this up-front attention to detail will pay off once the process is under way – and ensure that sellers don't leave value on the table.

From a buyer perspective, the plan to realise value from any asset forms a key part of the investment thesis and is usually split into two distinct phases – **Pre-Deal Due Diligence** and **Post-Deal 100-Day Implementation Plan**.

- **"Pre-Deal DD"**: The challenge for most buyers in the Pre-Deal Due Diligence phase is the inherent limited access to management and data. Having deep business/sector/functional expertise, combined with a proven track record of performance improvement delivery, is vital to develop and validate a set of initiatives through a combination of experience-based hypotheses and data analysis. The due diligence phase is primarily used to stress-test initiatives, reflecting not only a refined set of prioritised activities but also the risks and issues associated with them that must be addressed post-deal.

- **"Post-Deal" 100-Day Implementation Plan**: It's only after the deal completes that greater management and data access is available and the picture becomes clearer. Initial Pre-Deal Due Diligence initiatives can be validated and detailed (unfortunately in some cases, where haste or lack of sufficient preparation has prevailed, initiatives may finally be disproved). In addition, new initiatives can also be developed based on a clearer understanding of the true state of the asset. These will form the Post Deal Value Creation Plan, which should precisely outline and prioritise initiatives. Here the application of the 80/20 rule is vital, focusing attention on the initiatives that deliver most of the value. The initiatives should be actionable, measurable, and pragmatic with a relentless drive and focus on cash and EBITDA generation. To deliver the value, it is fundamental to address the key drivers that have the greatest impact on the business first.

5. Drive implementation through strong governance

Ensuring all the above elements are in place requires meticulous preparation and execution, if the catalyst of a carve-out is truly to deliver the value it first promised.

However, having the right Separation and Value Creation Plans alone is not enough. A strong governance model to drive implementation is equally important. The Challenge Project Management Office (PMO) should not be a checklist PMO. Carve-outs are complex transactions and the Challenge PMO must be led by strong operations professionals who have a deep and proven track record in delivery. It should also be content-rich, solutions-driven and proactively challenging of every workstream involved, rather than a reporting and escalation mechanism, as time will be of the essence and any delays translate to significant additional costs.

6. Don't stop – Reaching Day 1 is only the start

Successfully completing separation and reaching Day 1 on schedule, with a set of TSAs that all parties are confident can be worked through without unexpected delays, will of course be cause for celebration.

However, a value creation plan on paper is just that. Day 1 brings the need for a relentless obsession with implementation, to get a business fighting fit and agile enough to be ready for growth.

The operating model must be established quickly to facilitate that transformation, from process optimisation through to appropriate legal structures and everything in between. For private equity funds, it may feel like a race against time to optimise a business to a point where the strategy that was invested in in the first place can finally be shaped to start delivering returns.

Here, it is people that will come to the fore – the right management on board with the vision, track record and relevant experience to reinvigorate the carved-out entity. With careful planning up front, those leaders should have been identified and secured, and be prepared for implementing a success story that includes employees, customers, suppliers and other key stakeholders.



Dr. Rainer Bizenberger is Managing Director and Co-Lead of the German Turnaround and Restructuring Services at AlixPartners. He helps large companies navigate the complexities of restructuring and transformation. These clients profit from his expertise in turning around, transforming, or refinancing their businesses. Getting things done is his philosophy. Rainer has more than two decades of professional experience. During this time, he has successfully led large-scale, complex restructuring and transformation programs across various industries, both in advisory and management roles (Chief Restructuring Officer / Chief Restructuring Advisor).

Mo Habbas is an AlixPartners UK-based Managing Director and leader in our Private Equity Services practice for EMEA. He focuses on Value Creation Planning and Implementation for private equity portfolio companies and acquisition targets. He has a strong track record in delivering sustainable cash and EBITDA benefits for his clients and specialises in large and complex cross border transformations, integrations and separations, Quickstrike, and cost reduction programs. He has extensive experience in the TMT, Business Services, and Industrials sectors.

Manuel Szerencses is Director at AlixPartners' Munich Office. Manuel guides companies through the complexities of operational and financial restructurings. He has more than 15 years of experience in helping private equity led and mid-sized companies to identify value creation opportunities and turnaround businesses. Manuel focuses on reducing the cost of operations through organization redesign, headcount reduction programs, and operational turnaround projects. In addition, Manuel has significant experience in cross border transformation, separation and integration programs. Prior to joining AlixPartners, Manuel served as head of controlling, M&A and investor relations and led financial and operational restructuring projects of several private equity owned companies.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Outlook for the German M&A market in 2022: The boom in mergers and acquisitions continues!

Dr. Michael R. Drill, Lincoln International AG

Since the beginning of the year, the global mergers and acquisitions (M&A) business has recovered quickly from the deep slump caused by Covid-19 in 2020. In 2021, the number of M&A transactions involving German companies will increase by at least 50% year-over-year. Despite the one-off catch-up effect, many drivers suggest that the German M&A market will maintain its strong momentum in 2022.

Despite the ongoing uncertainty surrounding the Coronavirus pandemic, transaction activity in Germany in the summer of 2020 is characterised by strong euphoria: In August alone, various large and visible takeovers of listed companies were announced including Deutsche Wohnen, Hella, Zooplus and Schaltbau. Strategic buyers and financial investors are engaged in enormous bidding wars in the M&A processes, and company owners can enjoy high valuation multiples and seller friendly SPAs. The active M&A investment banks in Germany remain very active with numerous mandates.

This development is quite astonishing, considering that in the Coronavirus era, foreign travel, face-to-face management meetings, negotiation rounds and site visits have been very much limited. However, professionals in the M&A market have quickly and strongly embraced new possibilities offered by video communication, insofar that M&A could be initiated and implemented well without traditional face-to-face meetings and business dinners.

The general M&A sentiment is more positive than it has been for years. Inorganic growth is at the top of the strategic agenda for large corporates, because the high share prices of most companies can hardly be justified purely by organic growth. As a result, we expect the high level of deal activity in Germany to continue into 2022, and not only as a result of catch-up effects. While the market has been characterised by a booming economy in recent years, we anticipate other drivers for M&A transactions will take center stage in the future.

Outlook of deal drivers for the German M&A market 2022

- Low interest rates / high share prices
- Globalization of markets and pressure to achieve critical size
- Digitalization / Industry 4.0 as a competitive advantage
- Securing supply chains / reducing dependencies Sale of private equity portfolio companies
- Shareholder activism / corporate divestments
- Investment pressure among private equity investors
- Aggressive acquisition financing

The high valuations on the stock markets are also increasingly being observed in private M&A transactions. Multiples of 20 times EBITDA in the last 12 months are no longer an exception for software, telemedicine, e-commerce and fintech companies, and such valuations are quite achievable for well-positioned industrial companies.

The need for larger corporate entities with global footprints is forcing many mid-sized companies to sell to a larger or financially strong partner. For many companies, the opportunities and challenges associated with the topic of digitization are strategic motivations for M&A. For many German SMEs, for example, the transfer of technology is a proven means of compensating for a lack of digital expertise and avoiding time delays in the introduction of new products and services.

For owners of profitable, healthy companies in particular, the window should be wide open in the coming 18 months for a successful company sale on attractive terms. In addition to the willingness to sell among family businesses, we expect a veritable wave of exits, particularly in private equity, among those portfolio

companies for which a sale was not possible in 2020 nor 2021 as a result of the pandemic.

In order to protect themselves from activist shareholders, large corporations must core parts of their business in order to generate liquidity and better focus or shareholder returns. Corporate carve-outs remain an important driver of M&A activity, for example as a result of the successful spin-offs of Siemens Healthineers and Siemens Energy, the senior managers are finding such transactions appealing. Due to the continuing fluid market environment, we therefore expect a significant increase in corporate divestments. However, these will primarily be underperforming business activities that will impact the return and growth profile of larger quoted companies.

The ongoing zero interest rate policy of central banks is generating an enormous and steady inflow of capital into private equity funds worldwide. The funds collected are constantly reaching new record levels, which means that the investment pressure on financial investors is also growing. The trend is also being fueled by the rise of debt funds. These private credit funds have also raised billions of euros which must now be deployed in the form of aggressive acquisition financing. In Germany, a financial investor already acts as a buyer in roughly every third company sale with a valuation of 50 million euros or more. The trend is for the proportion of private equity deals to increase further in the coming years.

Industry sectors with anticipated strong M&A activity 2022

- Software and IT Services
- Industrial Technology / Fin Tech
- Healthcare / Pharma / Med Tech
- Engineering / Capital Goods
- Automotive ("distressed")
- High Street Retail ("distressed")

We expect almost all sectors to be affected by M&A. We anticipate above-average activity for those sectors that are emerging stronger from the Coronavirus crisis. For example, strategically motivated, highly valued deals will continue to take place in non-cyclical and fast-growing sectors such as healthcare, medical technology, biotechnology, software, IT services, industrial technology or e-commerce. In cyclical industrial sectors and in retail, so-called distressed deals will increasingly be on the agenda. We expect a particular boom in M&A in the automotive supplier sector, which has come under severe pressure.

But despite all the euphoria surrounding highly valued corporate takeovers, strategic buyers and financial investors are increasingly exercising their due diligence in M&A transactions from year to year. In due diligence, they will continue to thoroughly examine the target companies for the existence of any risks and obligations. To hedge against risks, they will try to enforce extensive warranties and indemnities in the purchase agreements. The instrument of warranty and indemnity (W&I) insurance will gain in importance, not only if the seller is a financial investor, but also a private owner or a family business. Securing seller warranties is now part of the standard practice, and the proportion of insured transactions continues to increase.

10 Theses on the German M&A Market 2022

1. Strategic deals gain of importance and defensive deals continue to decrease
2. Attractiveness of companies for sale increases
3. Valuation multiples remain at high level ("asset inflation")
4. Mid cap segment very active;
   large cap deals > Euro 1 billion are the exception
5. All sectors will be affected by M&A
6. Share of cross-border deals will increase from currently approximately 60% to 70%
7. Most important buyer and target nation for German companies to invest remains the U.S.
8. Share of private equity on the buyer side continues to rise (> 33%!)
9. Corporate divestments at DAX and MDAX companies increase
10. Number of deals with German targets will further exceed the high level of 2021

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Shortcut to the stock exchange: opportunities and design options for going public via SPAC

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Special purpose acquisition companies (SPACs) are enjoying rapidly growing popularity as more and more companies choose to go public via SPACs. SPACs have long flourished in the United States, and now they are also going public in Germany and throughout Europe. But how can an initial public offering (IPO) via SPAC be achieved?

A SPAC is a hybrid of IPO, private equity, mergers and acquisitions, and financing. The so-called sponsors set up a SPAC as an investment vehicle, which – without conducting any operating business itself – collects capital from investors during an IPO in order to acquire a promising company later. Since the SPAC is still an empty shell at the time of the IPO, the disclosure obligations in the context of the prospectus disclosure (a decisive time factor in a traditional IPO) usually must be fulfilled within a short period of time. The proceeds raised in the IPO are then deposited into an escrow account while the sponsors search for a company to acquire within 12 to 24 months.

1. The de-SPACing

The process by which the empty shell company becomes a publicly traded company with an operative business is called de-SPACing. Once a target company has been identified for acquisition, the de-SPACing process begins with the signing of a letter of intent that typically includes exclusivity agreements. In parallel with due diligence and preparations for the IPO, a business combination agreement (BCA) is negotiated, along with additional agreements. After the parties sign the BCA, the transaction is marketed to the SPAC shareholders and new investors, often in combination with a pre-signing private investment in private equity financing and market sounding. SPAC investors must agree to the proposed transaction and can still decide whether to drop out or exercise the existing option right in exchange for paying in capital.

From the perspective of the target company, the takeover by a SPAC is initially an M&A transaction, which allows greater predictability of proceeds and terms compared to a traditional IPO, because of the ability to negotiate the BCA. Through a merger with the listed SPAC, at the end of the process the target company is listed on the stock exchange, and both the legacy shareholders and the SPAC investors hold listed shares. The hype around SPACs is fuelled by the fact that the competitive US capital market has enabled active sponsors to collect astonishingly high investor commitments. Courted stock market candidates have been able to take advantage of SPACs' competition for target companies and resulting high valuations.

2. Relevance and attractiveness of SPACs in Europe

Stock market candidates are now regularly examining the possibility of going public via a de-SPAC transaction. At the same time, more European SPACs are targeting European destinations. Nevertheless, conducting SPACs in the US appears attractive for European targets for two main reasons:

- The US capital market offers larger volumes and higher valuations.
- The actual IPO and the entire handling is organized by experienced US investors and their advisors. This makes the process more like an M&A transaction and less like an IPO for the target company. In addition, the sponsors handle the marketing. However, one should not completely ignore the fact that the sponsors regularly receive a 20% share of the capital raised, which can lead to high hidden costs.

3. Concrete design options

Despite all the advantages offered by a de-SPAC transaction, the structural implementation for a German operating company is not trivial, especially if production and management are to remain in Germany after the transaction. The goal is to create a structure that is

compatible with the requirements of the US capital market.

As a first step, the target company establishes a subsidiary (usually Dutch), which later becomes TopCo. Unlike German shares, Dutch shares can be traded directly on a US stock exchange. TopCo in turn establishes a subsidiary, the so-called MergerSub, in the SPAC's jurisdiction. A Cayman SPAC is often used for a transaction with a European connection. The MergerSub is merged with the SPAC based in the Cayman Islands. In return, the shareholders of the Cayman SPAC receive shares in TopCo. TopCo then takes over the stock exchange listing of the SPAC. Thereafter, the shareholders of the target company contribute all shares in the target company to TopCo in exchange for the issuance of new shares in TopCo (thereby transforming TopCo into a Dutch NV). As a result, the target company is listed on a US stock exchange as a subsidiary of the Dutch NV.

From the perspective of the target company and its shareholders, a de-SPAC transaction requires the ability to plan, implement and maintain such a multinational structure in practice. This is only possible with good planning, a great deal of discipline and the right advisors for capital market, legal and tax. All of these factors should be taken into account when considering which route to the capital market is the right one.

Dr. Philipp Grenzebach advises clients on all aspects of corporate law and merger and acquisition (M&A) transactions. Philipp has extensive experience acting for financial and strategic investors, and in private and public takeovers. He has deep knowledge of corporate reorganizations, as well as the governance and capital market compliance of capital-market oriented corporations.

Simon Weiß focuses his practice on capital markets transactions and has a wealth of experience across IPOs, capital increases, equity-linked transactions and investment grade and high-yield bond offerings. He regularly advises issuers, underwriters and other key market players in a wide range of complex domestic and cross-border transactions.

Buying a company out of insolvency – the investor's point of view

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The number of German corporate insolvencies is currently at an all-time low (see Leibniz Institute for Economic Research Halle (IWH), press release 21/2021 dated 5.8.2021). However, the ongoing Corona pandemic is not without consequences. Many companies were only able to cope with the pandemic by relying on government liquidity assistance and additional loans. This additional debt burden must be paid in the future. In cases where a company's business model already appeared questionable before Corona, or in sectors which are affected by major change processes, the challenges are likely to have been exacerbated by an (in some cases significant) increase in the debt burden. Corona-related long-term changes in the markets also should be considered. While potential effects on the retail sector and the commercial rental market, for example, seem rather obvious, it remains to be seen what other effects the current crisis will bring to light over time for many companies and sectors. It therefore seems realistic that the Corona crisis will be reflected in increasing insolvency cases in the medium term.

From the investor's perspective, the acquisition out of insolvency proceedings offers interesting advantages. At the same time, there are special features compared to ordinary M&A transactions which an investor should consider on the way to a successful offer. This article provides an overview of the most relevant aspects of an acquisition out of insolvency proceedings from the investor's perspective.

1. Initial situation

Both the insolvency administrator in insolvency proceedings and the management in debtor-in-possession-/protective shield proceedings must take all measures to ensure the best possible satisfaction of the creditors. In this context, the prospects of satisfaction through a sale of the company must also be examined. As a rule, therefore, an M&A advisor is engaged with a sales process shortly after the application of the relevant proceedings. Irrespective of the activities of an M&A advisor, any interested investor is free to approach the insolvency administrator or the debtor-in-possession independently with an interest in acquiring the business. Serious acquisition offers are to be considered accordingly.

In the interest of the best possible satisfaction of the creditors, a bidding process is regularly conducted to achieve a maximum purchase price, whereby other criteria besides the purchase price, such as transaction security and speed, are decisive as well. In addition, the conduct of a bidding procedure serves as evidence that the company has been utilized in the best possible way in the interest of the creditors.

Compared to ordinary M&A processes, the time factor plays an even more decisive role. The insolvency administrator will aim to conclude the purchase agreement as soon as possible after the opening of the insolvency proceedings. There are usually only about three months between the start of the M&A process and the signing of the purchase agreement. Thus, it is highly advantageous from an investor's point of view to enter the sales process as early as possible and with high speed and determination. Practice shows that potentially promising bids may not be pursued further if the investor simply enters the process too late. Advanced bidders are in danger of being lost if the new – potentially promising – bidder is given the additional time needed without the required transaction security.

Depending on the specific case of the insolvent company, an acquisition of the entire company or only of business units or individual (production) locations may be considered. The acquisition may take the form of the purchase of individual assets (asset deal) or of the entity (share deal) via insolvency plan proceedings. If the insolvent entity owns subsidiaries which are not themselves insolvent, the subsidiaries are generally acquired by way of a share deal.

2. Advantages for the investor

An acquisition out of insolvency can have many advantages for the investor. There is the prospect of acquiring the company at a comparatively lower purchase price than outside insolvency proceedings. Above all, the investor takes over the business free of liabilities from the past and, in consultation with the seller, can make use of restructuring opportunities for the company.

Both in the case of acquisition via an asset deal and in the case of acquisition via an insolvency plan, the liabilities from the past generally remain with the seller, and the company is taken over free of debt (this is only different in terms of a non-insolvent subsidiary, which is acquired by way of an ordinary share deal). This applies, for example, to pension liabilities and other labour law liabilities regarding the period prior to the opening of insolvency proceedings.

For the purchaser, the main opportunity is to restructure the company in connection with the takeover. Since it is possible under insolvency law for the seller (i.e., the insolvency administrator or the debtor-in-possession) to terminate employees with only three months' notice period and to terminate ongoing contractual relationships prematurely at any time, the investor has the opportunity, in agreement with the seller, to reduce jobs and continue the new company as far as possible with a "desired team," and to terminate economically disadvantageous contractual relationships. It may also be possible to negotiate restructuring contributions for the period after the takeover with customers that are dependent on continued supply.

3. Offer and purchase contract negotiations

Timing is a decisive criterion for the insolvency administrator at all stages of the process. It is therefore of considerable importance whether the insolvency administrator gets the impression from the offers submitted that it will be possible to get across the finish line with the respective investor within the time available. To ensure this, it is beneficial to have legal advisors with insolvency experience supporting the bidding phase. Since the binding bid usually must be submitted together with a mark-up of the draft purchase agreement prepared by the seller, the form of this mark-up is also of decisive importance in order to reach the final round of negotiations with the seller. The insolvency administrator will immediately recognize whether advisors with insolvency experience prepared the mark-up. When preparing the mark-up, it is essential to focus specifically on the relevant provisions and to take into account relevant pressure points for the insolvency administrator under insolvency law. Points that should be taken into account in the relevant contractual clauses include transaction security, clearly calculable payments to the insolvency estate, and the allocation of the purchase price to individual secured or unsecured assets. Nevertheless, not everything that would be desirable from the perspective of an insolvency administrator must simply be accepted. It is therefore important to know which points are negotiable and to what extent. If investors and advisors start with the negotiation standards of a regular M&A process, they may considerably impair the acceptability of the offers.

The binding bids, together with the mark-ups of the draft purchase agreement, are evaluated by the insolvency administrator, supported by the M&A advisor and the lawyers involved, and presented in summary form to the preliminary creditors' committee. Together with the preliminary creditors' committee, the insolvency administrator then decides which bidders should enter into the final round of negotiations (usually two or, at a maximum, three bidders). If time permits, it is customary for the insolvency administrator to obtain unilateral offers of sale before the insolvency proceedings are opened, and to make a final decision on their acceptance together with the creditors' committee after the insolvency proceedings have been opened.

4. Purchase agreement

Structure and Content of the Purchase Agreement

Asset purchase agreements on a sale out of insolvency usually contain the following essential elements:

- Determination of the objects of purchase (excluding cash, receivables and payables)
- Assumption of rights and obligations arising from contracts and differentiation of (past and future) rights and obligations under the contracts between the seller and the buyer
- Additional regulations for sold real properties and shares
- Purchase price payment
- If necessary, purchase price adjustment in relation to inventories
- Transfer of ownership and retention of title rights
- Compensation payments for down payments and subsequent payments after closing

- Transfer of employees and restructuring options (so-called BQG/acquirer model, discussed subsequently herein)
- Execution requirements/conditions
- Seller's right of withdrawal in the event of default or long stop date for closing
- Subsequent cooperation obligations of the purchaser in the event of insolvency proceedings
- Exclusion of warranty, statute of limitations (as far as possible)
- Exclusion of the insolvency administrator's liability

Purchase Price Provisions

For the insolvency administrator, it is necessary to have the greatest possible certainty as to the purchase price flowing into the insolvency estate at the time of signing the purchase agreement, because this has an impact on the amount of the insolvency quota to be distributed to the insolvency creditors. Therefore, the insolvency administrator will try to agree on a fixed purchase price for all assets sold. Since the various assets often serve as security for individual creditors, a purchase price allocation determined in the purchase agreement has significance for the insolvency administrator in the subsequent distribution. In turn, the purchaser has an interest in terms of the purchase price allocation to make use of available valuation options within accounting regulations in order to achieve advantageous depreciation potential and balance sheet effects.

Since it is important for the insolvency administrator to secure the actual payments to the insolvency estate, subsequent adjustments to the purchase price are only conceivable to a limited extent. However, it is customary to record and account for the inventory actually existing at the time of closing and to deduct from the purchase price any assets sold that are not available or not owned by the insolvency administrator.

If non-insolvent subsidiaries are sold, it makes sense from the investor's point of view to demand a net debt/working capital adjustment of the purchase price allocated to the respective shares. If the parties also agree on a fixed purchase price (locked box), the purchaser should ensure by agreeing on so-called no-leakage provisions that no outflows can occur which erode the value of the investment to be acquired without reducing the purchase price. When selling shares in subsidiaries, it should also be noted that the insolvency administrator will try to exclude the enforcement of any intra-group claims of the subsidiary against the insolvency debtor in the purchase agreement in order to avoid subsequent reductions of the insolvency estate.

Special Features of Contractual Relationships to Be Taken Over

As part of the transaction, the purchaser will take over the supplier and customer contracts and other contracts with continuing obligations of the insolvency debtor insofar as these are economically significant for the business operations to be taken over. In this context, the acquisition out of insolvency proceedings offers the opportunity to reorganize (continuing) obligations and certain contracts insofar as these have not yet been completely fulfilled on both sides. As a result of the insolvency administrator's special right to terminate these contracts at any time after opening of the insolvency proceedings, the purchaser can leave behind economically unattractive contracts, which the insolvency administrator then terminates.

It should be kept in mind that the transfer of contracts requires the consent of the contractual partner. If this consent cannot be obtained in individual cases, but the contract cannot be substituted for the purchaser in the short term, often an arrangement can be made with the insolvency administrator, if necessary, so that the latter continues the contract with the contractual partner for a transitional period and passes on the rights and obligations with economic effect internally vis-à-vis the purchaser. However, the insolvency administrator will only agree to such an arrangement if it is economically risk free.

Labour Law Specifics

The transfer of an insolvent company by way of an asset deal generally constitutes a transfer of business within the meaning of Section 613a German Civil Code (BGB). Consequently, all employment relationships existing with the insolvency debtor at the time of the purchase agreement's execution are transferred by law to the purchaser. As a special feature under insolvency law, the purchaser is not liable for employee claims from the period before the opening of the insolvency proceedings, but only for the so-called preferred liabilities of the insolvency estate (*Masseverbindlichkeiten*) arising as of the opening of the insolvency proceedings. Hence, principally all liabilities relating to the period prior to the opening of insolvency proceedings remain with the insolvency administrator. The only exceptions relate to outstanding vacation entitlements and vacation compensation claims due to termination of the employment relationship after the opening of insolvency proceedings, as well as claims from working time accounts. The purchaser is liable for these claims pursuant to Sec. 613a BGB because of their qualification as preferred liabilities of the insolvency estate. However,

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the parties to the transaction are free to make a deviating arrangement in this respect in their internal relationship.

The best way to reduce or restructure the workforce is via a so-called employment and qualification company (*Beschäftigungs- und Qualifizierungsgesellschaft*) (BQG) or the so-called acquirer concept (*Erwerberkonzept*). In the BQG model, for which specialized providers exist, the employees initially transfer to the BQG while terminating their existing employment relationship. Thereafter, new employment relationships are established with the purchaser. Since the implementation of a BQG entails considerable costs, negotiations must be held with the insolvency administrator on how such costs are to be borne. In the acquirer model, the insolvency administrator terminates employment relationships on the basis of an already existing binding restructuring concept of the purchaser. In the course of this process, reconciliation of interests with a list of names is usually agreed with the works council.

Guarantees and Insolvency Administrator's Liability

Insolvency administrators are per se not willing to grant guarantees or indemnities, in light of their objective to secure the paid purchase price for the insolvency estate and because they can only gain very limited insight into the company during their short period of activity. An insolvency administrator often finds a disorderly business operation, which the administration must take over and continue at short notice, i.e., without a longer period of acclimatization. The administrator therefore initially lacks a complete picture of the accounting and operations. In addition, warranty and indemnification (W&I) obligations are preferred liabilities of the insolvency estate, which must be fulfilled in full by the insolvency administrator and otherwise lead to the administrator's personal liability. Guarantees are therefore only negotiable with the insolvency administrator in justified individual cases. This does not include the insolvency administrator's guarantee that the sold assets actually exist and are transferable to the purchaser. As a rule, however, the extent of the liability will be limited to the pro rata purchase price of the missing asset.

The insolvency administrator will also endeavour to limit legal liability to a large extent. In addition to far-reaching exclusions of liability (such as knowledge of the data room, disclosure in annual financial statements or management accounts, claim against an insurance company), the insolvency administrator will regularly want to limit the total liability to a portion of the total purchase price received. In addition, shorter limitation periods are regularly agreed compared to standard M&A transactions.

Against this background, the purchaser may consider purchasing W&I insurance with an insurance provider specialized in this area. While W&I insurance has become increasingly important on the regular M&A market, the offers in the distressed M&A area are still rather limited. Nevertheless, individual insurers offer insurance policies tailored specifically to the transferring restructuring. These are so-called synthetic guarantee insurance policies, meaning that the insured guarantee catalogue is not one negotiated between the parties to the purchase agreement, but a bilaterally agreed guarantee catalogue between the purchaser and the insurer (outside the purchase agreement). Because of the special situation of insolvency, insurers regularly offer a non-negotiable standard catalogue of warranties that is limited compared to a standard M&A transaction. The guarantees are thereby insured objectively, i.e., not knowledge-qualified. However, the insurer will have extensive due diligence performed by the purchaser's lawyers or by its own legal advisors. Due diligence findings will result in liability exclusions. Compared to a standard M&A transaction, the costs of this special distressed W&I policy are also significantly higher.

5. Conclusion

When acquiring a company out of insolvency proceedings, there are typically far-reaching differences for an investor compared to a standard M&A transaction. In addition to purely practical considerations, such as the race against time (safeguarding and continuing workforce and customer relationships), there are insolvency-law-related particularities to observe. In order to prevail over competitors in the bidding process, it is also important to know the relevant aspects for the insolvency administrator besides the purely commercial aspects of the offer. It is therefore advisable to consult a legal advisor experienced in distressed transactions at an early stage in the bidding phase.

Dr. Marc Oberhardt focuses his practice on corporate restructuring and insolvency. He concentrates on restructuring of companies within and outside of insolvency proceedings (debtor-in-possession, insolvency plan proceedings, debt restructuring, advice of directors and shareholders), distressed mergers and acquisitions (M&A (advice of insolvency administrators and investors in connection with acquisitions out of insolvency proceedings)), as well as on all general insolvency-related matters (claw-back proceedings, advice of creditors, etc.).

Dr. Björn Biehl focuses his practice on corporate restructuring and insolvency, national and international M&A and private equity transactions, joint ventures and on all aspects of general corporate law. He advises both domestic and international clients, and has practiced in both Germany and the United Kingdom. Björn has wide experience in transaction management and advised in various projects, inter alia, with respect to the pharmaceutical and technology-based industries.

Clean exit – wishful thinking or buyer's nightmare? Recent market trends and practical recommendations for sellers and buyers

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1. Recent developments

Due to sellers' continuing strong negotiating position in M&A transactions in many sectors, seller-friendly purchase agreements have become more common, particularly in auction processes and also in the German market. This trend is associated with an allocation of risks from the seller to the buyer, which is conceptually referred to as a clean exit for the seller.[2] Consistently implemented, a clean exit can achieve a far-reaching limitation of the seller's liability (zero recourse), up to a comprehensive exclusion and avoidance of subsequent liabilities of the seller, in each case only subject to mandatory legal requirements. In the competitive environment of an auction process, the buyer can generally oppose these efforts only to a very limited extent, if the buyer does not want to burden its final and binding offer with a heavy mark-up of the vendor SPA draft in the auction process. In this case, the buyer can only attempt to address the risks to be assumed pursuant to the seller-friendly purchase agreement outside of the contract, e.g., in the course of due diligence.

Historically, corporate sellers and private equity investors reduced their liability risks by excluding the attribution of fault by vicarious agents (*Erfüllungsgehilfen*) pursuant to section 278 of the German Civil Code (BGB), and regularly limited the imputation of knowledge (*Wissenszurechnung*) to the seller regarding representatives of the target company. Since the end of the 2000s, warranty and indemnity (W&I) insurance also has been increasingly used and further developed.[3] Originally, W&I insurance policies were used to cover the seller's warranties in the purchase agreement. Today, W&I insurance can cover unknown tax risks, and even certain known tax and other risks (contingent risk insurance, or CRI).[4] Accordingly, the seller's liability for breach of its warranties and under the tax indemnity in the purchase agreement can be reduced to zero (i.e., zero liability concept).

More recently, sellers have been attempting to reduce the remaining statutory liability to an absolute minimum and to include liability exclusions in the purchase agreement to the widest extent possible, including for wilful misconduct (*Vorsatz*) and constructive fraud (*Arglist*) by the management of the target company's management. The seller does not assume any liability, as far as possible under mandatory law, beyond the contractual liability regime in the purchase agreement. In order to achieve this objective, certain precedents can be found in practice to date. It remains to be seen which of these, if any, will be able to develop into best practice, and whether and to what extent they will find the courts' blessing in any subsequent M&A post-closing arbitration or litigation.

2. Contractual arrangements in the purchase agreement

In order to achieve a clean exit for the seller, a combination of the following contractual provisions in the purchase agreement and adequate disclosure strategy are required in the due diligence.

1 With thanks for the continued and valuable exchange on the topic inter alia with esteemed former colleagues Matthias Luettges (Aon) and Philipp Heer (HWF Partners) as well as Philipp Gießen (Marsh).
2 Cf. esp. Findeisen, BB 2021, 1607; BB 2015, 2700 with further sources in the legal literature on the matter.
3 On W&I insurance cf. esp. Boche/Luettges, BB 2020, 2764; Ratz/Tachezy, BB 2020, 219; Deubert/Lewe, BB 2020, 235; Hoenig/Klingen, NZG 2016, 1244; Hensel/Namislo, BB 2018, 1475; on the tax treatment of W&I insurances esp. Ratz/Steffens, BB 2018, 2396.
4 Cf. Boche/Luettges, BB 2020, 2764.

2.1 Exclusion of statutory buyer's rights

In order to ensure that the contractual liability regime in the purchase agreement prevails, all statutory rights of the buyer under German civil law are regularly excluded by default unless they are subject to mandatory law. Liability for wilful misconduct by the seller's managing directors cannot be excluded in advance under German civil law (section 276 para. 3 BGB), nor can claims for constructive fraud be excluded in advance (section 444 BGB).[5] Exclusions regarding vicarious agents (*Erfüllungsgehilfen*) of the seller should be addressed separately in the purchase agreement.[6]

2.2 Seller's warranties

Instead of applying the statutory liability regime, it is market practice in German M&A transactions to agree on a particular set of seller's warranties regarding the condition of the target company. In order to limit the risks and avoid disputes, the parties typically agree on certain liability caps, *de minimis* rules and the scope of the relevant damages to be compensated (direct damages, indirect damages, etc.)[7]. In addition, indemnification claims are often agreed for known risks, which are regularly excluded in the purchase agreement from the seller's liability due to the buyer's knowledge.[8]

In M&A deals without W&I insurance, buyers usually try to impose certain duties of inquiry on the seller as part of the definition of the seller's knowledge (so-called due inquiry concept). For the due inquiry, the seller's management assumes a contractual obligation to interview certain members of the management of the target company regarding the sellers' warranties and the disclosures made in this respect. Provided such inquiries to the relevant (agreed upon) managers are diligently carried out, the seller will usually aim to exclude any further obligations and liabilities from any knowledge attribution, organization and further inquiry obligations. The results of the due inquiry can be documented in writing and attached to the purchase agreement, e.g., in the form of so-called due inquiry certificates.[9]

2.3 Risk regarding imputation of knowledge and how it can be addressed

In order to reduce the seller's liability risks under German civil law (i.e., outside the purchase agreement), it is also necessary to exclude or limit as far as possible the attribution or imputation of knowledge (*Wissenszurechnung*) to the seller regarding knowledge generally available at the seller and/or the target. In the event of an intentional breach of duty or constructive fraud on the part of the seller in connection with its disclosure obligations, the contractual exclusions of the seller's liability in the purchase agreement are ineffective, void and consequently do not apply at all. In these cases, the buyer has all statutory rights under German civil law and tort at its disposal, without any contractual limitations. According to applicable case law, the seller is already acting with constructive fraud if he makes statements based on insufficient or inadequate inquiries (*Angaben ins Blaue hinein*), which then prove to be incorrect.[10] In this case, W&I insurance will no longer be available as protection for the seller.[11] For M&A transactions, it is critical to understand whose knowledge is imputed to the seller and whose wilful misconduct and/or constructive fraud is relevant for the seller. The relevant group of persons to whom the attribution of knowledge applies are, first of all, a legal entity's managing directors. However, on the grounds that a contracting party should not suffer any disadvantage because it contracts with a legal entity consisting of a large number of representatives and employees, the relevant knowledge concept, according to the case law of the German Federal Court of Justice (*Bundesgerichtshof*, or BGH), goes beyond the actual knowledge of the relevant managing directors.[12] The German Federal Court of Justice considers it necessary to attribute all information that is "typically recorded in the files" as known by the seller.[13] In addition, the knowledge of so-called "knowledge representatives" (*Wissensvertreter*) is attributed to the seller under German case law. As such, any person qualifies who the seller retains to act on its behalf and as its representative in connection with the respective M&A transaction.[14]

The German Federal Court of Justice has not yet decided whether knowledge of the managing directors or other representatives or employees of the target

5 Mellert, BB 2011, 1667, 1672; Metz, NJW 2010, 813, 815; cf. to Section 123 BGB: German Federal Court (BGH), decision (Beschluss) dated 21.9.2011 – IV ZR 38/09 – „Heros II"= NJW 2012, 296; judgement (Urteil) dated 17.1.2007 – VIII ZR 37/06 = NJW 2007, 1058.

6 More recently, W&I insurance providers became prepared to ignore the exclusion of liability for wilful misconduct on the part of vicarious agents and to compensate the buyer for the damage incurred in these cases as well. This is increasingly being used by sellers to enforce the exclusion in the purchase agreement.

7 Cf. to de Minimis: Hoger/Baumann, NZG 2017, 811, 815, with further sources in the legal literature on the matter.

8 Hoenig/Klingen, NZG 2016, 1244, 1247, with further sources in the legal literature on the matter.

9 Schudlo/Kersten, BB 2021, 1154, 1156, with further sources in the legal literature on the matter.

10 BGH, decision (Urteil) dated 26.9.1997 - V ZR 29/96 = NJW 1998, 302, 303; BGH, decision (Urteil) dated 16.3.2012 - V ZR 18/11= NJW-RR 2012, 1078, 1080.

11 Section 86 para. 1 German Insurance Contract Act (Versicherungsvertragsgesetz, VVG); BGH, decision (Urteil) dated 8. 12. 1989 - V ZR 246/87 = NJW 1990, 975, 976; generally, on the matter MüKoBGB/Schubert, § 166 BGB, ref. 8 et seq.

12 BGH, decision (Urteil) dated 8.12.1989 - V ZR 246/87 = NJW 1990, 975, 976 = NJW-RR 1990, 488; Risse, NZG 2020, 856, 858.

13 BGH, decision (Urteil) dated 2.2.1996 - V ZR 239/94 = NJW 1996, 1339, 1340 et seq.

14 BGH, decision (Urteil) dated 24. 1. 1992 - V ZR 262/90 = NJW 1992, 1099, 1100.

company is attributed to the seller.[15] The German Federal Court of Justice seems to be inclined to accept such attribution under certain conditions. There are different views on this question in the literature and in practice. In some cases, such an imputation is rejected outright[16], while in others, an imputation is assumed under special conditions, but rejected solely based on group law affiliation.[17] It is also often questioned whether a seller should be able to rely on the fact that it was unaware of the knowledge available at the target company.[18]

Regardless, it is established case law in Germany that a seller has a general duty to organize knowledge when selling a company (*Wissensorganisationspflicht*).[19] Accordingly, any risk allocation for a broad clean exit (including an exclusion of wilful misconduct or constructive fraud by the target's management) should be only justifiable, provided the seller comprehensively fulfils its duty to organize knowledge and makes it available to the buyer in the course of the due diligence in order to eliminate any information asymmetry between the seller and the buyer. Without recognition of a seller's duty of this kind, any far-reaching limitation and shifting of liability, as in the context of a broad clean exit, should be difficult, if not impossible, to justify.

On the other hand, the German Federal Court of Justice has ruled that imputed knowledge can be sufficient for constructive fraud. In this context, the German Federal Court has already taken the step from the imputation of knowledge to a fiction of intent (*Wollensfiktion*).[20] Accordingly, under German mandatory law (i.e., section 123 para. 1 BGB), a seller is not able to exclude any liability for constructive fraud by any of its representatives (including the management of the target company if assigned by the seller with the due diligence or the disclosures regarding the warranties in the purchase agreement).

The seller's aim in the purchase agreement must therefore be to exclude the imputation of knowledge as far as possible in order to avoid a breach of duty within the scope of the knowledge organization constituting a constructive fraud misrepresentation due to the comprehensive imputation of knowledge.[21] Generally, the seller can achieve this by waiving its liability for wilful misconduct by its vicarious agents pursuant to section 278 sentence 2 BGB. Furthermore, the direct or analogous application of the attribution standard pursuant to section 166 BGB regarding so-called knowledge representatives must be excluded.

With respect to the scope of excluded persons or knowledge representatives (e.g., managing directors, team leaders of the seller and/or management of the target company), it remains to be seen which market standards will develop in purchase agreements in the future, and also whether and to what extent case law will recognize corresponding limitations or reject them based on mandatory law. It is usually argued in these cases that in M&A processes both parties are often professionally advised, and it is not a matter of mandatory liability for wilful misconduct or constructive fraud under the law, but rather a contractual allocation and determination of the imputation of knowledge, which in some views is not regulated by mandatory German law for these cases.[22] Whether this argumentation can prevail will certainly depend on the circumstances of the individual case.

3. Practical recommendations for M&A transactions

3.1 Sell side

The seller should comprehensively fulfil its duty to organize knowledge, including in due diligence, if it does not want to put its clean exit concept into question. In addition to a typical vendor data room with information on the target and its business, as well as a question-and-answer process and expert sessions in relevant areas, this can be further supported by providing (for example) vendor commercial, financial, tax, ESG and legal fact books. The seller should also offer adequate seller's warranties for the target business in the vendor draft of the purchase agreement that the seller's representatives feel comfortable with based on their knowledge of the target and its business. An insurance broker and insurance providers should be asked to review such seller's warranties, and the seller should obtain non-binding indications of insurance coverage for the buyer (i.e., soft-stapled W&I insurance).[23] Respective liability limitations also must be included in the purchase agreements (in particular,

15 Overview in MüKo BGB/Schubert, § 166 BGB, ref. 64 et seq.
16 Von Woedtke, GmbHR 2017, 505, 508; Hoenig/Klingen, NZG 2013, 1046, 1049.
17 Koppmann, BB 2014, 1673, 1676 with further sources in the legal literature on the matter.
18 Risse, NZG 2020, 856, 860; Jaques in Beck'sches Handbuch Unternehmenskauf im Mittelstand, Ettinger/Jaques, 3. Aufl., 2021, C.I.3., ref. 68; Hartung, NZG 1999, 524, 529; Jaques, BB 2002, 417, 420.
19 BGH decision (Urteil) dated 2.2.1996 - V ZR 239/94 =NJW 1996, 1339, 1341 = BGHZ 132, 30; Risse, NZG 2020, 856, 863; MüKoBGB/ Schubert § 166 ref 47; Schwab, JuS 2017, 481.
20 BGH, decision (Urteil) dated 8.12.1989 - V ZR 246/87 = NJW 1990, 975, 976.
21 On the matter see, inter alia, Koppmann, BB 2014, 1673, 1675; Weißhaupt, WM 2013, 782, 787.
22 Generally, also on this aspect, Findeisen, BB 2021, 1607, 1610.
23 The concept of hard-stapled W&I insurance can be found in some cases in German M&A transactions. However, this type of W&I insurance offering is not (yet) common practice as for instance in some Scandinavian M&A markets.

caps and liability exclusions for claims covered under the W&I insurance, i.e., no recourse to the seller). Last but not least, the due inquiry by the seller regarding the seller's warranties and disclosures should be done with utmost diligence and documented in any event in order to reduce the seller's risk of giving a warranty due to insufficient or inadequate inquiries.[24]

3.2 Buy side

For the buyer, comprehensive due diligence is still the first choice to identify and address risks related to the target. This is the only way for buyers to eliminate or at least substantially reduce information asymmetry between seller and buyer, and to create transparency regarding the risks to be allocated and assumed. In addition, adequate seller's W&I coverage for unknown and known risks, if any, as well as enhancements under the W&I insurance cover sheet (e.g., knowledge scrap) and policy should be negotiated with the seller and the W&I insurance provider. When negotiating liability limitations in the purchase agreement, no general, broad or blanket exclusions should be accepted despite a strong seller position for good assets. Instead, emphasis should be placed on a liability regime that is tailored, appropriate and balanced under the circumstances. With regard to the definition of seller's knowledge regarding the seller's warranties, particular care should be taken to ensure that the group of relevant knowledge representatives includes appropriate key management functions of the seller and the target. When determining the relevant persons for the due inquiry, both management and employees of the seller and of the target company should be carefully selected in order to exclude, as far as possible, the risk of any kind of collusive interaction among the relevant groups. Last but not least, the opportunities and future strategy of the target, but also the material risks of the transaction at hand, should be discussed by the buyer with the management of the target company.

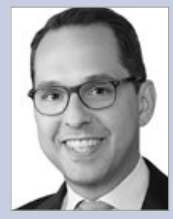
3.3 Synthetic W&I insurance

So-called synthetic W&I insurance policies are also being discussed in Germany and in some cases used.[25] In these instances, the representations and warranties are attached to the insurance policy and not anchored in the purchase agreement. The seller is normally not involved in the contractual relationship between the buyer and the insurer, which is more advantageous from the seller's point of view for several reasons. Nevertheless, there can also be advantages for the buyer. The buyer does not have to negotiate warranties with the seller and can base the agreement with the insurer on a more buyer-friendly warranty scheme. There are still certain uncertainties and ambiguities for synthetic W&I insurance, however. It remains to be seen how this tool will developed and received in the market for other use cases.

4. Conclusion

A totally clean exit without any remaining seller liability is not entirely possible due to certain mandatory liability risks under German civil law. However, a clean exit can be achieved in individual cases under certain conditions. General and blanket provisions are not advisable in the purchase agreement (including for the sell side). Instead, the contractual provisions should be tailored for each individual case and aligned with the seller's disclosure strategy as well as the buyer's due diligence findings. This does not mean that a clean exit must be a nightmare scenario for the buyer with the assumption of risks, including in connection with wilful misconduct or constructive fraud by the management of the target company. Provided the buyer takes into account the practical recommendations described above, the best practice could develop into a clean exit concept that is neither wishful thinking nor a buyer's nightmare.

24 Schudlo/Kersten, BB 2021, 1154, 1156.
25 So far, synthetic W&I insurance has been predominantly used for straightforward targets such as in certain real estate transactions concerning single tenant or single object targets and in some cases in distressed M&A transactions. Generally on the subject: Ratz/Tachezy, BB 2020, 219, 222; Findeisen BB 2021, 1607, 1608.

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A European initiative covering the European M&A market

Exit-readiness – Transparency is key: Management reporting and data management during the exit process

Marcus Hoefer, Chief Executive Officer, Base Camp Management Consulting GmbH

"We spend about one-third of our time in the exit process gathering and processing data."
(Anonymized quote from an M&A advisor)

1. Wouldn't it be more efficient if we could quickly respond to all our buy-side and sell-side advisors' questions with structured data and key performance indicators (KPIs)?

Most of the time, private equity investors' advance planning for an exit process involves considerable procedural detail and time effort. For both investees in the private equity environment and its management, the exit process is one of the most labor-intensive phases of the entire investment period – whether it involves meetings plus several management presentations or inquiries from potential bidders and their buy-side advisors about the company's performance.

The portfolio company always bears the burden of reporting and data sovereignty, and management is always responsible for generating analyses and assessments for the sale process. That's why it's immensely important to prepare both the company and its management for the exit in terms of data management and reporting before the sale discussions ever begin – so they can provide fast and efficient responses to all the buy-side and sell-side advisors' questions.

2. Key challenges during the exit process

Most of the time, a company's performance parameters are in short supply, so in the first step you need to define specific KPIs with management and the investor. Ideally, these KPIs or growth drivers should have already been used to manage the company. As much as the situation allows, they should also reflect the business model and business plan for the coming years.

Traditionally, there's a distinction between financial KPIs (like revenues, costs, and EBITDA) and operational KPIs (like the sales pipeline, procurement and product management, and production). As the significance of sustainable investments in the private equity sphere increases, there's also been growing interest in KPIs for this sector (including carbon footprint, human resource diversity, and compliance incidents).

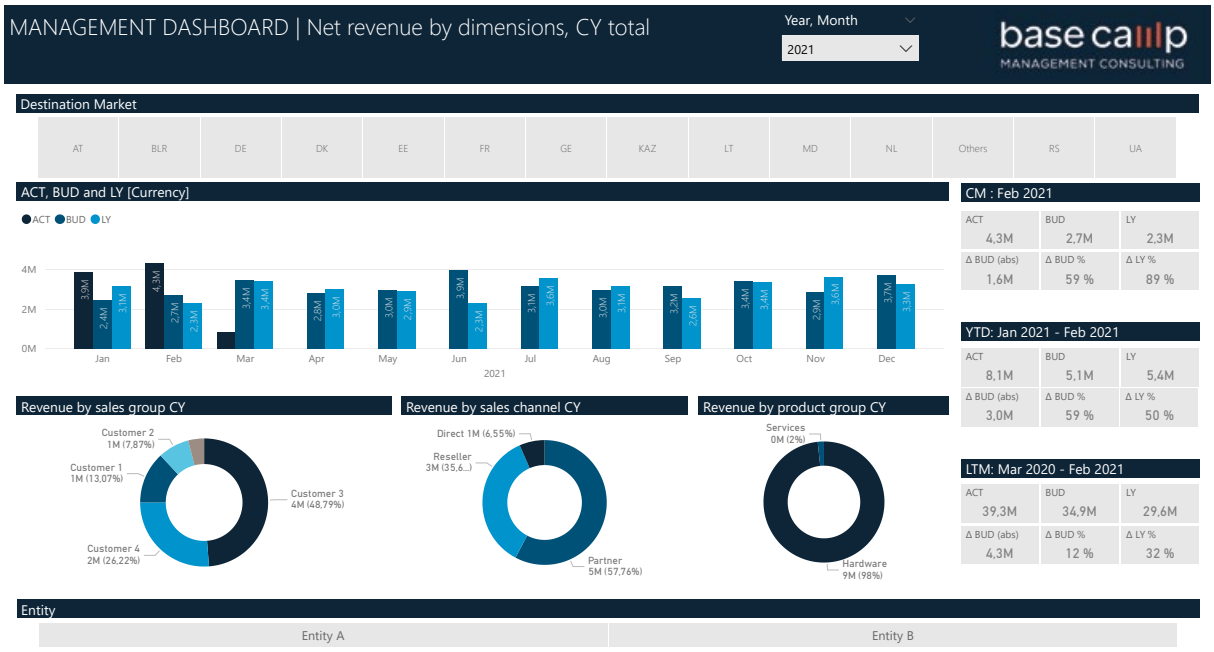
The biggest challenge in the exit process is laying the data foundation for all future analyses. Especially in an M&A context, buy-and-build strategies have often been pursued in which many different ERP systems and data sources need to be combined. And most of the time, this data is inadequate in terms of structure, quality, and substance. Based on our experience at base camp, we recommend setting up a coherent, consolidated data structure that pools both financial and operational data on the entire system and tool landscape. An enterprise data warehouse will offer multiple advantages for the company and the investor.

3. An enterprise data warehouse is the fast and efficient solution for modern data management

This approach of tying in all of a company's operating tools and systems results in an intelligent, structured, coherent data source – the "single source of truth". In this way, the portfolio company and the financial investor get transparent company data that gives them information about KPIs and any value strategies before the sale process even begins. In addition, there's the option to establish a durable, standardized, automated, and multi-dimensional reporting structure within the company using modern tools (BI applications like Microsoft Power BI). This allows inquiries from potential bidders and their advisors on topics like sales

Fig. 1 • Example of a management dashboard for turnover figures

Source: Base Camp



verticals over time (including customers, geography, and product groups), segmentation by partner vs. direct sales, and cost breakdowns to be answered more quickly and efficiently and in greater detail.

State-of-the-art data management and sound management reporting using up-to-date business intelligence applications help make the sale process transparent and assist all relevant stakeholders with making decisions that will hold up in the future.

Operationalizing, and thus implementing, this data-driven approach will involve a project time frame of about two months for portfolio companies in the private equity environment. This means that to prepare investees for an exit, investors should launch an initiative within the company well before the exit discussions begin. This will reduce the expense of having M&A advisors gather and prepare data, and the time saved can be used to extract deeper insights from the analyses. Additionally, the exit story could be more specified based on the early insight on the KPI development.

Figure 1 shows an anonymized example from one of our client's past exit process projects. Highly detailed analyses of current and historical sales and revenue figures by segment – for example, customer groups, sales channels, and product groups – trimmed several weeks from the client's sale process.

4. Key take-away: A digital partner before and during the sale process is needed

For both, sell-side and buy-side, it's highly recommended to work with external experts in terms of data management, data warehousing and full-stack management reporting. On the one hand investors can speed up their exit processes and on the other hand, with a reliable data structure all stakeholders will gain more trust in data and its KPIs. At best, investors and its portfolio companies already launch such initiatives during holding period or after acquisition together with external consultancies.

Marcus Höfer is the CEO of base camp. Thanks to his cooperation with a number of private equity funds and their portfolio companies, Marcus Höfer offers long-term management consulting experience and has been extensively involved in various international and national digitalisation projects and transformations. As an early adopter of new technologies and a 'digital native', Marcus Höfer is the optimum contact person in all areas of digitalisation for companies that dare and want to take this important step.
Marcus Höfer graduated from the Technische Universität München with an MSc in information systems focussing on corporate finance.

The reform of Germany's foreign investment control regime: To be continued?

Dr. Germar Enders, McDermott Will & Emery Rechtsanwälte und Steuerberater LLP

In the context of MuMAC 2020, we reported on a trend that in recent years has developed into something like a never-ending story: the continued expansion in scope and further tightening of Germany's foreign investment control regime. The 17th Amendment Ordinance to the Foreign Trade and Payments Ordinance dated 27 April 2021, which entered into force on 1 May 2021, adds another chapter to this story. It was meant to be the last one – at least for the time being. However, further amendments are already in preparation for autumn 2021.

1. Flashback

Following various amendments to Germany's investment control regulations in recent years, profound changes eventually occurred in 2020, when the first amendment act of the German Foreign Trade and Payments Act (AWG) entered into force on 17 July 2020 (the Amendment Act). The purpose of the Amendment Act was to adapt the existing German legal framework to the requirements of the European Foreign Direct Investment (FDI) Screening Regulation (Regulation (EU) 2019/452 of 19 March 2019) and to further tighten the investigation and control regime for foreign investments in German target companies. The changes were accompanied by unexpected shifts induced by the COVID-19 pandemic, which also led to amendments to the Foreign Trade and Payments Ordinance (AWV).

The reforms of 2020 and 2021 left the general structure of German investment control law unchanged: namely, the distinction between the cross-sectoral review (Sec. 55 seq. AWV) and the sector-specific review (Sec. 60 seqq.). The cross-sectoral review regime continues to be directed to non-European Union (EU)/ European Free Trade Association (EFTA) investors and is linked in principle to the acquisition of 25% of the voting rights in a German company. The sector-specific review applies to all non-German investors, irrespective of whether they are from the EU/EFTA or from any other country.

Although the distinction between the two central review areas was maintained, the reforms substantially changed the previous regime. In addition to the inclusion of European security interests in national investment control, the new regulations from 2020 inter alia brought about the following important aggravations:

Threshold for interventions. The threshold for the enactment of restrictive measures was significantly lowered. Under the old version of Sec. 5 (2) Sentence 2 AWG it was necessary for the issuance of orders or the prohibition of a transaction, respectively, that the foreign investment posed "*an actual and sufficiently serious threat*" to public order or security. Under the revised Sec. 5 (2) AWG, it is now sufficient that public order or security is "*likely to be impaired*". Furthermore, the explanatory memorandum to the Amendment Act indicates that under the new rules, a threat to public order or security no longer requires that the acquisition under scrutiny endangers "*fundamental interests of society*". Instead, a relevant impairment of public order and security may in the individual case already be established even if there is "*no specific connection to the fundamental interests of society*". This means a tightening of the previous standard as applied on the basis of European law.

New categories of notifiable transactions. In light of the Covid-19 pandemic, the catalogue of transactions which must be notified to the Federal Ministry for Economic Affairs and Energy (BMWi) was expanded to capture case groups relevant for maintaining a functioning health care system, namely, transactions in the area of certain personal protective equipment, essential pharmaceuticals, medical devices and in-vitro diagnostics.

Expanded application of 10% review threshold. Notifiable transactions in these newly added categories are also subject to the 10% threshold for review which had been introduced only recently for notifiable transactions in the cross-sector area (instead of the

25% threshold applicable to other transactions in the area of cross-sector review).

Standstill orders. Another significant amendment concerns the extension of standstill orders (i.e., pending invalidity of transactions). Prior to the Amendment Act, only those contracts that concerned investments in the area of sector-specific review were (temporarily) invalid until the conclusion of the review process. Since the Amendment Act, all notifiable legal transactions are (temporarily) ineffective from the time they are executed until the conclusion of the review proceedings. This means that transactions that are subject to the cross-sector review which concern, *inter alia*, critical infrastructure, specific software for infrastructure, media companies essential for the formation of public opinion and health care only become valid if the transaction is cleared at the end of the review process (or deemed cleared).

Gun-jumping. The extension of the standstill provisions was accompanied by the introduction of various criminal and regulatory offences, similar to the ban on gun-jumping under cartel law. The respective sanctions are intended to ensure that the purpose of the investment review is not thwarted by completion of the transaction prior to clearance or by any premature exchange of security-relevant information.

2. 17th amendment ordinance to the Foreign Trade and Payments Ordinance

Pursuant to the BMWi, the 17th AWV completes the revision of German investment control law and its full integration into the new EU legal framework, which began in 2020. This assessment suggests that the legislator is not planning any (substantial) further changes to foreign trade law for the time being. In essence, four changes are noteworthy:

Further categories of notifiable transactions. The new AWV introduces a substantial number of additional case groups which are subject to the notification requirement under the provisions of the cross-sectoral review (Sec. 4 (1) no. 4, Sec. 5 (2) AWG and Sec. 55 to 59 AWV) bringing the list from 11 to a new total of 27 case groups.

Transactions concerning investments in respective companies by non-EU investors with regard to which the legislator, in line with the EU Screening Regulation, assumes an increased likelihood for an impairment of public order or security must not only be notified to the BMWi upon signing, but also are subject to the standstill regime. Luckily, the German government did not take the new case groups directly from the EU Screening Directive, but made some effort to define them more clearly and narrowly. Many case groups remain rather vague, however, and should be defined more precisely.

Previously, cross-sectoral review of corporate acquisitions focused on critical infrastructures, including telecoms and the energy sector. The new case groups mainly introduce various areas of emerging technologies deemed likely to affect public order or security, as well as companies that extract critical raw materials and ores, and companies relevant for food security. Examples in the field of emerging technologies include, *inter alia*, the following case groups in Sec. 55 a (1) AWV:

- Certain artificial intelligence applications that can be misused for misinformation or observation purposes (no. 13);
- Unmanned motor vehicles and aircraft with automated or autonomous driving or navigation functions (No. 14), e.g., self-driving cars, drones and air taxis;
- Semiconductors and optoelectronics (no. 16);
- IT security products (or material components of such products) in the field of cyber security (no. 17);
- Goods and essential components of quantum information technology and quantum communication (no. 20).

Target companies falling under case groups 1 to 7 are subject to the low threshold of 10% of the voting rights. With regard to case groups 8 through 27, the applicable threshold triggering the notification requirement is 20%, rather than the 10% threshold that the initial ministerial draft of the 17th AWV had proposed. Target companies in need of a new investor may consider such relaxation to be good news. Venture capital investors typically aim for a stake of more than 10% in start-ups, usually between 10% and 25%. A participation threshold of 10% would have therefore significantly hindered such investments. From the point of view of safeguarding public order and security, the non-application of the low 10% threshold also seems reasonable, since stakes of less than 25% typically do not grant substantial opportunities for influence in a company.

Redefinition of control. The 17th AWV introduces a broader understanding of the term "*acquisition of control*". For the first time since the introduction of the rules on investment control reviews, an event other than the acquisition of voting rights may trigger the applicability of the screening regime. According to the

new rules, it is sufficient for the investor to acquire a share of voting rights below the relevant threshold if such acquisition comes with "*additional seats or majorities in supervisory bodies or in the management*", the "*granting of veto rights in strategic business or personnel decisions*" or the "*granting of rights over information within the meaning of Sec. 15 (4) sentence 1 no. 3 AWG*".

The new concept allows for an extension of the protection regime to a larger number of transactions, but at the same time leads to a loss of legal certainty for the parties to a transaction, as the criterion of "*other significant participation in control*" leaves more room for interpretation than linking the application of the review procedures to certain thresholds of voting rights. In practice, considerations made in the context of merger control clearances where there is also the criterion of "*acquisition of competitively significant influence*" (Sec. 37 (1) no. 4 of the German Act against Restraints of Competition) may help. However, in that regard parties also often consult with the German Federal Cartel Office prior to having legal certainty. In the context of the foreign direct investment regime, this could mean that the number of applications for certificates of non-objection increases, or, where this is not possible, such as in case of a notification requirement pursuant to Sec. 55a (4) sentence 1 AWV, that the authorities are at least consulted more often.

In addition to the previously existing provisions on the attribution of voting rights, e.g., as a result of shareholdings or voting agreements, an attribution between investors can now be derived from additional circumstances. For several state investors from the same country investing in parallel, attribution can be presumed (Sec. 56 (4) sentence 3 AWV); this presumption may be regarded as another tool to review more transactions from China.

Increasing the level of voting rights and atypical control. Since the new AWV entered into effect, an investor that already holds voting rights in a company (and the initial investment of which has been cleared) may become subject to a (further) review in case of any additional acquisitions of voting rights, provided that such acquisitions meet or exceed certain thresholds contained in Sec. 56 (2) AWV (20%, 25%, 40%, 50% and 75%). This means that every additional share purchase may trigger the scope of the review regimes again. The concept of "*other significant participation in control*" also applies here.

Expansion of sector-specific review. The new AWV expands the sector-specific review (Sec. 4 (1) no. 1, Sec. 5 (3) AWG and Sec. 60 to 62 AWV) to all acquisitions of companies which develop, manufacture, modify or have *de facto* control over certain listed military technology and equipment. Since May 2021, all military equipment within the meaning of Part 1 Section A of the Export List is covered. All foreign investments in such companies must be notified if voting rights of 10% or more are acquired. In line with previous provisions, the notification requirement and screening regime applies regardless of whether the investor is from the EU or any non-EU country. In relation to companies that supply manufacturers of military goods, the new AWV substantially increases the number of notifiable transactions – the ministerial draft amendment ordinance estimated a doubling of cases.

3. Assessment and outlook

The 17th amendment of the AWV was meant to bring the reform of the German foreign investment control regime to a (provisional) conclusion. This seems unrealistic. The BMWi will evaluate the effectiveness of the new regulations and the associated efforts and expenses for both enterprises and authorities by mid-2022. Also, further amendments are already in preparation, which shall (presumably) enter into force in September 2021. In the course of adopting AWG and AWV to the new Dual-use-Regulation (Regulation (EU) 2021/821 of 20 May 2021), investment control law will be modified once again: E.g. an exemption from the standstill orders will be introduced for stock exchange transactions/public takeovers via sec. 15 (5) AWG.

The latest amendments continue the story line of expansion of the German investment control regime's scope and generally allow the BMWi to review more transactions. This is due in particular to the introduction of new notification obligations (e.g., in the health sector and in emerging technologies), lower thresholds for screening transactions and an extended definition of the terms control/influence. The latest statistics give a foretaste of what is to come: In 2020, 160 investments into German target companies by foreign investors were reviewed. In comparison, 106 review procedures took place in 2019, 78 in 2018 and 66 in 2017. This means that the number of review procedures is steadily increasing. The latest changes in law will exacerbate this trend. However, it may be considered as good news that the BMWi reports that almost

all 2020 cases where it identified relevant security risks could eventually be remedied through the conclusion of mitigation agreements.

With its focus on companies active in the field of future technologies, the 17th AWV certainly has an impact on venture capital transactions, as more transactions fall under the thresholds lowered from 25% to 10% or 20%. This also affects (mid-cap) private equity investors that seek minority investments in matured but not yet fully developed companies. When setting up and carrying out their due diligence processes, such investors (as well as any other investors) should make sure that the involved parties take into account the applicable regulations on gun-jumping. Non-compliance with such regulations can result in severe sanctions, including criminal liability not only for target companies, but also for sellers and investors.

Investors should be prepared to identify notification requirements early in the transaction process. Sellers – particularly in auction processes – should, when evaluating potential bidders, consider their nationality and potential security concerns they might raise.

Dr. Germar Enders focuses his practice on mergers and acquisitions (M&A), private equity and general corporate law. Germar has extensive experience in advising strategic and financial investors as well as management teams on domestic, cross-border and multi-jurisdictional transactions, and on all aspects of corporate law, including corporate structurings.

Supervisory board service and VAT: will Change in jurisprudence impact PE advisory boards?

Nina Siewert & Marcus Fischer,
McDermott Will & Emery Rechtsanwälte und Steuerberater LLP

1. Initial situation

Under German tax law, service as a member of a supervisory board is regarded as self-employed activity for income tax purposes, and the member of the supervisory board generates income from self-employed/independent activities (section 18 para. 1 no. 4 German Income Tax Act (*Einkommensteuergesetz*)). A supervisory board is a body that is entrusted by the company's articles of association with supervision of the company's management.

Because of their self-employed status, members of the supervisory board have always been regarded as entrepreneurs within the meaning of the German Value Added Tax (VAT) Act (*Umsatzsteuergesetz*) for VAT purposes. Based on decisions of the Federal Fiscal Court (FFC), the federal tax authority has taken the view that qualification as an entrepreneur depends on the income tax qualification, and the activity as a supervisory board member is expressly mentioned as an independent activity in the VAT Applications Decree (*Umsatzsteueranwendungserlass*) (A 2.2 para. 2 p. 7 old version). The supervisory board member is also explicitly named as an entrepreneur in the determination of the location of other services in section 3a para. 4 sentence 2 no. 3 VAT Act.

2. Change in jurisprudence

Judgment of the European Court of Justice of 13 June 2019 – C-420/18.

In a judgment of 13 June 2019 in a case concerning the supervisory board of a Dutch foundation, the European Court of Justice (ECJ) ruled that a supervisory board member who, although hierarchically subordinate to neither the management board nor the supervisory board, does not perform her supervisory board activities in her own name, for her own account and on her own responsibility, but for the account and under the responsibility of the supervisory board, is not to be regarded as self-employed – and thus not an entrepreneur for VAT purposes – if she does not bear the economic risk of her activities. In the opinion of the European Court of Justice, in the case at hand, lack of economic risk was shown by a fixed remuneration and the fact that any potential damage caused by the board member due to negligence had no effect on her remuneration.

Judgment of the Federal Fiscal Court of 27 November 2019 – V R 23/19

With reference to the aforementioned ECJ ruling, the German FFC adjusted its previous view in its ruling of 27 November 2019 and decided that a supervisory board member is not self-employed and thus does not qualify as an entrepreneur if he does not bear any economic risk.

In the case to be decided, the FFC denied the economic risk – comparable to the decision of the ECJ – on the grounds that the supervisory board member received a fixed remuneration of the same amount each year without variable remuneration components and any negligent conduct had no direct influence on the remuneration. The FFC expressly left open the circumstances under which activity as a member of a supervisory board is still to be regarded as conducted in an entrepreneurial capacity.

Reaction of the Federal Tax Authority – Circular Dated 8 July 2021

In response to the aforementioned FFC ruling, the federal tax authority amended the VAT guidelines regarding the treatment of supervisory board members. Now, a supervisory board member is not to be regarded as self-employed (and thus as an entrepreneur) if she does not receive – to some extent – a variable remuneration. In the case of fixed and variable remuneration components, the variable component must amount to at least 10% of the total remuneration for the activity of the supervisory board member to qualify as self-employed. If a person holds several supervisory board mandates, the question of qualification as entrepreneurial activity must be examined separately for each mandate.

According to A 2.2 para. 3a sentence 13 VAT Application Decree (*Umsatzsteueranwendungserlass*), these regulations apply to all members of any other body which does not serve to exercise, but rather to control, the management of a legal entity or association of persons.

3. Effect on advisory boards in private equity structures

Advisory boards in private equity structures can be established at different levels within the structure and are not subject to any predefined legal form. They may be structured like a supervisory board, in analogy to section 52 of the German Limited Liability Companies Act (*GmbH-Gesetz*) and thus have as their main task the supervision of the management of an entity or association of persons. They may also be structured on a contractual basis only, in which case they generally have a more advisory character.

Supervisory Board Analogous to Section 52 GmbH Act

In the case of boards structured analogously to section 52 of the German Limited Liability Companies Act (*GmbH-Gesetz*), which thus primarily have the task of monitoring the management of a company, the change in jurisprudence likely will apply. The federal tax authority at least seems to hold this view (cf. A 2.2 para. 3a sentence 13 VAT Application Decree (*Umsatzsteueranwendungserlass*).

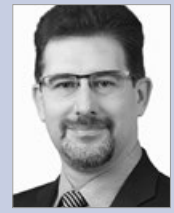
Advisory board

In the case of advisory boards which primarily have the task of advising management, it is questionable whether the change in established jurisprudence applies. The argument against this is that a board having a solely advisory role is not a body of the corporate entity, and therefore follows different rules. The federal tax authority has not yet commented on this construct.

4. Conclusion

It remains to be seen what effects the change in established jurisprudence on the VAT treatment of supervisory board remuneration will have on advisory boards in private equity structures. As far as supervisory boards are concerned, the principles laid down by the federal tax authority must be considered. It is unclear to date whether the federal tax authority will apply the new view only to future cases or to past circumstances as well. The circular from the federal tax authority dated 8 July 2021 does not provide for a transitional period.

In the case of advisory boards, the amendment of the VAT guidelines should not have a direct application, but further developments should be closely monitored. In any case, the change in case law should be taken into account when setting up new advisory boards, so that the parties can support each other if it subsequently emerges that the VAT treatment was incorrect.



Nina Siewert is a German attorney and certified tax advisor and focuses on German and cross-border tax matters. She advises clients on all tax related aspects of domestic and international mergers and acquisitions, group structuring and real estate investments. She has extensive experience in the structuring of funds and debt instruments.

Marcus Fischer is a German attorney and certified tax advisor and focuses his practice on transaction-related tax matters and various aspects of local and international tax law. He advises clients from a range of industries on restructurings and the tax aspects of the purchase and sale of real estate, shares and businesses. Marcus also counsels clients in relation to warranty and indemnity (W&I) insurance and special tax insurance.

Health M&A during Covid-19 and beyond

Dr. Stephan Rau, McDermott Will & Emery Rechtsanwälte und Steuerberater LLP

After the Covid-19 pandemic reached Europe in early 2020, the German healthcare market went into a brief shock paralysis along with the entire country. Several ongoing or planned transactions in the healthcare sector were abruptly cancelled or postponed. After only two or three months, this changed again dramatically, as stakeholders quickly realised that answers to the pandemic could be found in healthcare – and for investors, in the healthcare market. A primary focus was on testing, and clinical labs were suddenly more on the radar screen than possibly ever before. This created a basis for an IPO of Synlab in April 2021 and, finally, the long-awaited sale of Amedes by Antin in July 2021.

Any company developing drugs or vaccines against Covid-19 received investors' focus. This was globally true for Gilead, GSK, Merck&Co, Regeneron and other pharma companies.

In Germany, the Nasdaq IPO of CureVac in August 2020 attracted particular public attention. It succeeded the Nasdaq IPO of its competitor BioNTech in October 2019. Pre-Covid-19, the public had hardly noticed this IPO.

When CureVac prepared its IPO in spring 2020, both it and BioNTech appeared well positioned to be among the first companies to put an mRNA-based vaccine against Covid-19 on the market. While BioNTech achieved this, the CureVac product is not yet on the market, and the latest clinical trial results indicate an effectiveness of only 48%. This has obviously affected the market price of CureVac shares, although, in absolute numbers, not as badly as one might think. Thus, the current share price is approximately where it was upon its first listing a year ago, whereas the BioNTech shares issued around the IPO at about 14 USD increased to 447 USD on August 9, 2021.

Fig. 1 • Gilead Sciences

Source: Google

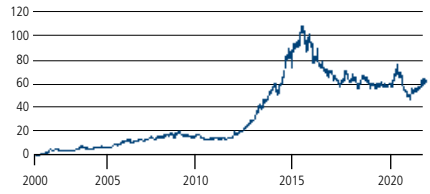


Fig. 2 • Synlab

Source: Google

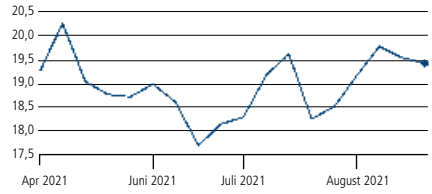


Fig. 3 • BioNTech

Source: Google

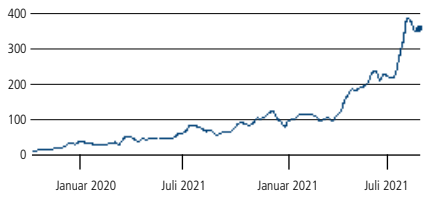


Fig. 4 • CureVac

Source: Google

The different developments of the CureVac and BioNTech stock prices demonstrate how difficult or even impossible it is to predict the future valuation of a new innovative drug and new technology producer.

Therefore, many financial investors focusing on healthcare assets usually do not look at developers of new innovative drugs. Over the last year, more than ever before, many investors focused on health service providers such as specialty labs and other outpatient physician services providers, including orthopaedic, dermatology, renal care, oncology, cardiology and other internal medicine clinics, each to be established in the legal form of a Medizinisches Versorgungszentrum (MVZ). In sectors which had already experienced several transactions pre-Covid-19, secondaries (diagnostic imaging and dental) or even tertiaries (Amedes) took place.

The mental health sector attracted particular attention from investors. This focus had started pre-Covid-19 (most notably, the acquisition of Oberberg by Trilantic). But financial investors' interest grew because of a perceived increased need for mental health services during and after the various lockdowns that the country experienced.

Because of MVZ regulatory requirements, all investors that want to acquire outpatient clinics need a licensed hospital entity as an acquisition vehicle. Therefore, hospitals that many health economists would recommend to close, and which in pre-Covid-19 times would have been difficult to sell, were put on the market at staggering prices. Financial investors have not bought everything that was up for sale at challenging evaluations, however. An investor that intends to establish a high-quality outpatient clinic network needs their hospital to render quality services. The market has taken note, and prices for some vehicle hospitals recently seem to have somewhat declined.

Not surprisingly, the telemedicine and digital health sectors also received a boost during and after the various lockdowns. Both have long been on their way to becoming key markets, in particular as the German

legislature has created the necessary regulatory framework. Legal obstacles to remote medical treatments have been abolished, and German Parliament passed a law in 2019 to provide for coverage of medical apps by public payers. To be reimbursed, medical apps must be prescribed by doctors, but the thresholds for such prescriptions are relatively low.

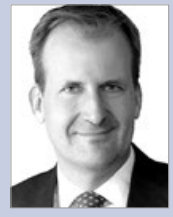
The pandemic has given telemedicine and use of medical apps a further boost. In the expanded telemedicine market, several digital health concepts have emerged. These include software applications that individuals can use in their everyday lives to prevent or treat illnesses. Such applications increasingly provide real medical advice and address, for example, obesity, depression, and neurological disorders and diseases. In the Covid-19 pandemic, these applications have gained considerable practical relevance.

So far, a strong start-up scene still characterises the German digital health industry, but that scene's true potential still has room to further materialise, as parts of the medical profession have traditionally viewed the concept of digital medicine with scepticism. This has also changed under Covid-19. Therefore, the industry has increasingly become an attractive field for investors, who aim to set up integrated health solutions combining traditional healthcare in different sectors with telemedicine and medical apps.

One striking example of the development of an integrated digital health model was the acquisition of Teleclinic, a telemedicine provider established in 2015, by Zur Rose, the shareholder of the largest and best-known online pharmacy, DocMorris, in summer 2020. Both companies declared publicly that they intend to offer a combination of telemedicine services with the issuance of e-prescriptions and the provision of mail-order drug services.

Likewise, artificial intelligence (AI) and machine learning continue to grow and have been largely unaffected by the Covid-19 pandemic. Rapid developments in these fields will significantly benefit many medical areas, including drug development, diagnostics and personalised diagnostics, and personalised medicine, in the coming years. The development and production of medical AI is already one of the largest investment markets. This was exemplified, among other things, by Siemens Healthineers' strategic acquisition of Varian Medical Systems, a Silicon Valley-based developer of hardware and software systems for radiation therapy.

Investments in this area are highly attractive to a wide variety of companies, such as providers of physician and hospital information systems and other information and communication technologies, manufacturers of hardware or software components for the telematics infrastructure, and service providers in the field of IT security. These companies' business operations benefit from the ongoing digitalization of the healthcare market and from stricter regulatory requirements for all market players (for example, in data protection and cyber security). All these healthcare markets are complex and subject to special dynamics. It is therefore essential that investors study the markets carefully and keep their finger on the markets' pulse. For the commercial evaluation of a market participant, and to be able to make a well-founded investment decision, investors need outstanding industry knowledge and regulatory expertise, probably even more than in other regulated industries. This has not changed under Covid-19.



Dr. Stephan Rau M.Sc. (Econ.), L.S.E.; Maître en écon. appl. (Paris-Dauphine), is an attorney and partner at McDermott Will Emery LLP in Munich and leads the Healthcare and Life Sciences M&A and Regulatory practice.

M&A REVIEW EUROPE

Best practice sharing: Does this also apply to M&A?

AGENDA • The M&A Phoenix – Rising from Pandemic Ashes?

Wednesday, September 29, 2021 – MuMAC 2021 – Virtual Conference
12:15 pm to 4:45 pm (CEST)

12:15 pm – 12:30 pm

Welcome and Introduction

Dr. Nikolaus von Jacobs
Conference Co-Chair
Partner and Lawyer, McDermott Will & Emery, Munich
Dr. Nikolaus von Jacobs advises private equity funds and German industrial players on private equity, venture capital, and private and public mergers and acquisitions. Nikolaus leads the firm's German private equity activities.
Before joining McDermott, Nikolaus was a partner of another international law firm and headed its German private equity practice. He has also worked in investment banking and European capital markets for Merrill Lynch, London.

Christian von Sydow
Conference Co-Chair
Partner and Lawyer, McDermott Will & Emery, Munich
Christian von Sydow advises clients on corporate law, M&A, private equity, restructuring, corporate conflict resolution and estate planning. He has represented a large number of international and German clients, including strategic and financial investors, in acquisitions and sales of businesses in Germany and internationally in cross-border matters. Christian represents clients in a wide variety of industries, including automotive supply, consumer electronics, defence, energy, internet, optics, publishing, retail, software, technology and testing technology, travel and tourism.

12:30 pm – 13:15 pm

KEY NOTE SPEECH: Corporate Transformation in the Digital Post-Pandemic Era

Janina Kugel
Senior Advisor, Speaker, Author and Non-Executive Board Member
Janina Kugel is senior advisor, speaker, author and non-executive board member of Konecranes Oyj, Finland, TUI AG, Germany and the German Pension Benefit Guaranty Association.
Prior to this, she has been Chief Human Resources Officer and a member of the Managing Board of Siemens AG.
Janina holds a master's degree in economics from the University of Mainz, Germany, and the University of Verona, Italy, and started her career as a management consultant at Accenture.
Janina is an active supporter of various national and international diversity initiatives. She is also a member of the international Advisory Board of Hertie School of Governance in Berlin, Germany and IESE Business School in Barcelona, Spain. She is serving as board member at the Innovation Council of the Federal Ministry of Digitization.
In April 2021, Janina released her first book "It's Now".

1:15 pm – 1:55 pm

The Status Quo: M&A and Private Equity Market in 2021

Dr. Nikolaus von Jacobs
Partner and Lawyer, McDermott Will & Emery
Moderator

Andreas Bösenberg
Managing Director, NORD Holding
Andreas has been active in the international private equity industry for more than 20 years. He started his career at 3i. Since 2000 he was responsible for leading and setting up private equity investment teams in the small-mid market segment and for over EUR 2bn of invested capital. He assisted portfolio companies during their transformation and growth phase and exited several of them in international IPOs and trade sales. In May 2018, Andreas was appointed managing director of NORD Holding, an asset manager with over EUR 2bn of AUM where he focuses on transformational investments in the German-speaking region.

Dr. Michael Drill

Managing Director, Chairman of the Management Board, CEO Germany, Lincoln International

Michael Drill provides overall strategic and operational leadership for Lincoln International's activities in Germany, Switzerland, Austria and the Benelux region. He principals the procurement and management of clients, leads deal teams and recruits qualified personnel.

In addition to his operational roles within the firm, Michael is passionate about mergers and acquisitions (M&A) in Germany. He has 25 years of experience advising on M&A, public takeovers, fairness opinions and corporate divestitures. His clients are comprised of large corporations as well as mid-sized privately-owned businesses and leading private equity groups. Michael brings global, cross-border expertise to his projects, helping clients navigate the increasing complexity of transactions, and creating a comprehensive deal experience.

Dr. Philipp Heer

Partner, HWF

Philipp leads the Frankfurt office of HWF Partners.

Prior to joining HWF, Philipp spent several years as an attorney with leading international law firms in Germany and the United States and advised German and international clients on all aspects of corporate law, takeover law, and in connection with M&A transactions, in particular with respect to national and cross-border transactions. Additionally, Philipp has been active working on private equity and venture capital transactions over the previous years.

Since moving into the M&A insurance sector, Philipp has advised numerous clients and their advisors on a broad range of transactions, with deal values ranging into the several billions.

Dr. Sven Oleownik

Partner, Head of Germany, GIMV Germany

Dr. Sven Oleownik joined Gimv, a public listed European private equity and venture capital company, in 2015. Before that, Sven headed Deloitte's Corporate Finance Advisory Team as a managing partner for 12 years. His clients at Deloitte included large corporations (e.g., BASF, Deutsche Telekom, Lufthansa, Siemens and Volkswagen), private equity firms (e.g., Apax, Carlyle, Emeram, EQT, Hannover Finanz, Riverside) and medium-sized companies (e.g., Bionade, Jochen Schweizer, Frequentis, MEN and Runnerspoint). He has key expertise in the consumer/retail and technology sectors. Prior to working for Deloitte, Sven was a partner at a leading management consulting firm and at a medium-sized investment company. In the course of his professional career, he has guided more than 100 transactions, among them several IPOs, and served as a member of the board for various compa-nies. Sven represents Gimv on the board of Think-step and Wemas.

Thessa von Hülsen

Head of Corporate Development and Group Communications, MeinAuto Group AG

Thessa studied business administration at Saarland University. After working in strategy consulting and in Private Equity at Silverfleet Capital in Munich, Thessa took over the management of the executive staff of UniCredit Bank AG.

Thessa held a position as Head of HR Strategy at Deutsche Börse AG before joining MeinAuto Group AG in Munich as Head of Corporate Development and Group Communications in 2021.

2:00 pm – 2:40 pm

German Mittelstand – Investments under Covid-19 Circumstances

Dr. Nadine Hartung
Partner, McDermott Will & Emery, Munich • Moderator
Dr. Nadine Hartung advises clients on corporate law, mergers and acquisitions, corporate governance, private equity, corporate litigation and capital markets. Nadine has experience working with public and private companies, private equity as well as with individual investors. She has advised clients based in Europe, the United States and Canada on various cross border M&A deals. Nadine represents clients in a wide variety of industries, including healthcare, energy, publishing and trans-portation. Before joining McDermott, Nadine practiced at leading international law firms in Berlin, Frankfurt and New York City.

Philipp Haindl
Managing Director, Serafin Group
Philipp Haindl completed his studies at the London School of Economics with a master's of economic history. He started his career as an associate at KPMG in the audit department before moving on to corporate finance valuation services. Before founding Serafin, Philipp was active in business analy-sis and acquisitions for five years and was involved in numerous M&A transactions. Philipp is responsible for strategy and finance within the Serafin Group.

Richard Ramsauer
Managing Partner, VTC Industriebeteiligungen
Richard G. Ramsauer has completed a number of transactions in the industrials, infrastructure and electronics space. He manages VTC's interests in FRIWO AG. Richard is also in charge of public relations at VTC. Before joining VTC, he worked for Bain & Company as a project manager in the Munich and Stockholm offices. During his time at Bain, he focused on strategy work and efficiency programs in the industrials and commodities sectors. He also spends some time on his forestry estate in Austria. Richard is an Austrian citizen and holds a business degree from the University of St. Gallen, Switzerland, and an MBA from the University of Chicago, United States.

Cornelius von Oheimb
Managing Director, ORM Bergold Chemie

Andre Waßmann (evtl. über Videozuschaltung)
Member of the Executive Board, Head of M&A, Helbling Business Advisors
Andre has almost twenty years of experience as a strategy, M&A and corporate finance expert and as a strategy consultant for clients in the financial services and capital markets sectors. He has held various management positions at Accenture, Commerzbank and KGAL. Before joining Helbling Business Advisors and CFI Group, Andre was Partner at Clairfield International with a focus on the transaction market of startups, corporates and VCs in the fintech sector and other digital business models. He covers further technology-based innovation areas such as mobility and energy. At the investment management house KGAL, he was responsible for the development of innovative business areas, the M&A and venture capital investments and he implemented a digital investment platform. Besides this, he supports academia in the development of blockchain technology. His experience and network ranges from corporates and midcap companies to private equity, venture capital, and entrepreneurs. Andre graduated from business studies at Oxford University and in Ravensburg. He holds an MBA from Saïd Business School.

2:40 – 3:10 pm

Break

3:10 pm – 3:55 pm

Restructuring and Special Situations Opportunities

Dr. Björn Biehl
Partner, McDermott Will & Emery, Munich

Dr. Björn Biehl focuses his practice on corporate restructuring and insolvency, national and international M&A and private equity transactions, joint ventures and on all aspects of general corporate law. He advises both domestic and international clients, and has practiced in both Germany and the United Kingdom. Björn has wide experience in transaction management and advised in various projects, inter alia, with respect to the pharmaceutical and technology-based industries.

Dr. Rainer Bizenberger
Managing Director, Co-Lead of the German Turnaround and Restructuring Services, AlixPartners

Dr. Rainer Bizenberger helps large companies navigate the complexities of restructuring and transformation. These clients profit from his expertise in turning around, transforming, or refinancing their businesses. Getting things done is his philosophy. Rainer has more than two decades of professional experience. During this time, he has successfully led large-scale, complex restructuring and transformation programs across various industries, both in advisory and management roles (Chief Restructuring Officer / Chief Restructuring Advisor). His wide-ranging experience with banks and cred-it insurers effectively helps in the negotiation of complex financing issues.

Who's Who Legal recognized Rainer as Global Leader in restructuring and insolvency advisory. He is an active member of the Turnaround Management Association (TMA). Previously, Rainer was heading EY's Turnaround and Restructuring practice in EMEIA. He also was a Senior Partner and Berlin office head at Roland Berger. Rainer holds a PhD in innovative corporate finance and a master degree from Catholic University of Eichstätt-Ingolstadt.

Arndt Geiwitz
Certified Public Accountant, Certified Tax Advisor, Managing Partner, SGP Schneider Geiwitz & Partner

Arndt Geiwitz is managing partner of the SGP Schneider Geiwitz group of corporate law firms. He graduated from the University of Passau and holds a degree in economics. As Certified Public Accountant and Certified Tax Advisor he has spent more than 20 years as an auditor and tax consultant in the field of corporate restructuring. His main areas of expertise as an advisor of medium-sized enterprises are risk management, strategy, business succession, and M&A. He supports many out-of-court restructurings and advises companies in major insolvency proceedings as general representative. Since 2000 he has been appointed by courts as insolvency administrator and since 2012 as trustee.

Merlin Piscitelli
Chief Revenue Officer EMEA, Datasite

In his role, Merlin is responsible for setting and managing the sales strategy and its deployment across this diverse and complex region, including coordinating and managing teams and sales representatives across Europe, the Middle East and Africa. He is based in London.

Merlin has been driving the M&A digital transformation in EMEA since joining Datasite in 2006. He has served in several leadership roles within the organization, including Head of Sales, Europe, Middle East and Africa and Director of Sales, helping drive technological innovation and deal velocity across the region.

Prior to joining Datasite, Merlin served as a sales and business development professional for Infotrieve, now part of Copyright Clearance Center, a global licensing technology content solutions business and document delivery provider.

Merlin holds a BS in Business/Marketing from Florida State University.

Conny Wuppermann
Managing Partner, palero capital GmbH

Conny is CFO and responsible for all financing transactions at palero and as Co-Head for the M&A business. She is a specialist in special situations M&A and financing.

For several years, Conny worked for a listed private equity firm as a director in M&A. Prior to that, she worked in investment banking at Drucker & Co. in Frankfurt. Conny studied business administration with a focus on corporate management and finance – at the Leipzig Graduate School of Management, the University of Passau and the University of Otago in New Zealand.

4:00 pm – 4:45 pm

International Healthcare Transactions: All Time Highs

Dr. Stephan Rau
Partner, Head of the Health Law Practice Group in Europe, McDermott Will & Emery, Munich

Dr. Stephan Rau focuses his practice on M&A transactions, mainly in the health and life sciences sector; healthcare regulation, including with regard to academic organisations; and related compliance. He is head of the firm's Health Law Practice Group in Europe. In 2004, Stephan was an adviser on the foundation of the first German corporate medical centre. Since then he has represented numerous investors, healthcare service providers, pharmaceutical and medtech companies, and governmental entities in M&A transactions, outsourcing projects, and licensing and reimbursement proceedings.

Katharina Jünger
CEO & Co-Founder, TeleClinic

Katharina Jünger is CEO and Co-Founder of TeleClinic GmbH. Founded in 2015, TeleClinic is the No1 platform for online doctor visits including digital prescriptions and sick-notes in Germany.
Prior to this, Katharina studied law at the Humboldt University and Humboldt European Law School in Berlin and holds an Honors Degree in Technology Management. She is listed on the 2020 list of "Forbes Europe 30 under 30" and "40 under 40".

Ludwig Klitzsch
Managing Director and Owner, KIRINUS Health

KIRINUS Health is a family-run healthcare group in Bavaria with a focus on psychosomatics. Anna Klitzsch laid the foundation in 1962 with the founding of today's KIRINUS Alpenpark Klinik in Bad Wiessee. Ludwig Klitzsch is her grandson and has continued to run the company in the third family generation since 2007.
After studying economics at the University of St. Gallen and the École des Hautes Études Commerciales de Paris (HEC), he initially held various positions at Fresenius HELIOS, Wittgensteiner Kliniken and MediClin AG.
Since 2019, Ludwig has been leading the Association of Psychosomatic Hospitals and Hospital Departments in Germany e.V. (VPKD) as first chairman.

Sharon Lamb
Partner, McDermott Will & Emery, London

Sharon advises on global transactional mandates, including mergers and acquisitions and joint ventures in health services, pharma and life sciences, digital health and health data technologies.
Sharon also provides strategic, regulatory and commercial support to UK and international clients on UK health and life sciences with a focus on health services, pharmaceuticals, medical devices, digital health and health data. Sharon is widely recognized for her expertise on NHS and public law regulatory and contracting matters, including payment and reimbursement and market access. She works closely with international technology and life sciences companies on regulatory issues relating to pharmaceuticals, medical devices, digital health and health data protection. She has particular experience advising strategic and private equity investors in transactions and investments in health and life sciences.
Sharon is also well-versed in healthcare services governance and regulatory matters, NHS public private partnerships, procurements, joint ventures and shared working arrangements, mergers, acquisitions, health data and competition issues.

Dr. Michael Ruoff
Managing Partner, GREENPEAK Management

Dr. Michael Ruoff is a Managing Partner at GREENPEAK. He has more than 20 years of experience in corporate finance, M&A and private equity. Starting his career as a lawyer, Michael set up a solar plant developer and worked as General Counsel for a distressed investment group and a small-cap private equity fund, before he co-founded a boutique venture capital investor in the healthcare space. Michael joined GREENPEAK Partners in 2020.
Michael holds a doctorate in law and graduated from Munich business school (Ludwig Maximilian Universität) as Diplom-Kaufmann.

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Lincoln International is a leading global investment banking advisory firm that provides mid-market financial advisory services. As one integrated team of more than 625 professionals across 16 countries, the firm has completed more than 234 transactions globally in 2020. In Germany, Lincoln International is the leading mid-market sell-side advisor by number of transactions. Approximately 80% of the firm's German M&A deals are cross-border.

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Select 2020 M&A Transactions

has sold to Sell-Side	AML Invest Treuhandgesellschaft mbH has sold a majority stake in to private investor consortium Sell-Side	ARDIAN has acquired a majority stake in swissbit from founders and management Buy-Side Acquisition Financing	Institutional and private shareholders have sold ASSEPRO GRUPPE to emz Sell-Side	AURELIUS has sold GHOTEL Group to ART INVEST REAL ESTATE Sell-Side	Managing shareholders have sold a majority stake in barth to BMV Sell-Side
BPE has sold DuoTherm to StellaGroup a portfolio company of PAI ICG Sell-Side	Private shareholders have sold a majority stake in CITYCOMP to s&t Sell-Side	MORE AUTOMOTIVE has been sold to LUXOFT a company of DXC.technology Sell-Side	conzzeta has sold SCHMID RHYNER SWISS BRILLIANCE IN COATING to ALTANA Sell-Side	Corndel. has received an investment from thi investments Sell-Side	DB has sold Ameropa to LIBERTA PARTNERS Sell-Side
Elvaston has sold a majority stake of INFONIQA to WARBURG PINCUS Sell-Side	EQUISTONE has sold ESCHENBACH to INSPECS GROUP PLC Sell-Side	Founders and private shareholders of infopark have sold a majority stake to BID EQUITY Sell-Side	IPEL has been sold to LANXESS Sell-Side	MONITOR CLIPPER PARTNERS has sold RLG REVERSE LOGISTICS GROUP to Reconomy a portfolio company of EMK Capital Sell-Side	A group of private shareholders led by QUARTUM KAPITAL BETEILIGUNGEN have sold profi-con to CWS a portfolio company of HANIEL Sell-Side
SABO a wholly-owned subsidiary of JOHN DEERE has been sold to MUTARES Sell-Side	The German turnkey industrial power distribution projects activities of Schneider Electric has been sold to VINCI ENERGIES Sell-Side	The Eckstein Family has sold a minority stake of VA to Edenred Sell-Side	THOMA BRAVO has sold SIGOS to mobileum a portfolio company of Audax Group Sell-Side	VALMET AUTOMOTIVE has sold its engineering services business to MUTARES Sell-Side	WILLI ELBE GROUP has been sold to AEQUITA Sell-Side