NEXT NORMAL LEGAL

The Legal Situation in Germany after Covid-19

TaylorWessing

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23.11.2020

Dear readers,

The expressions “after the fall of the Berlin Wall ...”, “post-9/11 ...”, “before the financial crisis ...” are all associated with monumental historical events. After their occurrence, the world became a different place than before. Without doubt, “before Corona ...” will soon be included in this list.

The so-called “next normal”, following the pandemic, will differ considerably from the previous status quo: Even without social distancing and masks, the way people live together is changing and many companies and economies are facing strong pressure to act against the background of a global Corona economic crisis. In the legal sphere, the so-called “**Next Normal Legal**” which is emerging in Germany, will also be shaped by many of these changes.

Companies will have to learn to adapt to drastic changes in economic and legal conditions or sooner or later disappear from the market. More robust, innovative or adaptable business models will prevail. The Austrian economist Joseph Schumpeter (1883-1950) called this process the ongoing “creative destruction”. In times of crisis, both the destructive and the creative extremes become particularly visible:

Civil aviation had to completely shut down its operations within a few weeks, with grave consequences for many employees and companies. A short time later, however, many communications technology companies celebrated stock market records, because meetings were now taking place almost exclusively in virtual conference rooms. Just think of the automobile manufacturer that switched production to ventilators at the height of the pandemic. Meanwhile, fashion designers literally “made a virtue out of necessity” and started making facemasks instead of evening dresses and tailor-made suits, for which demand collapsed overnight because there were no evening events any more.

At Taylor Wessing, we have been particularly concerned in recent months with the question of which Corona-related economic and legal challenges companies have to face in the “**Next Normal Legal**” scenario. We wanted to know how players from different industries would react to the new situation, how they would adapt and possibly even emerge from the crisis stronger than before. We have therefore conducted thorough research and numerous expert interviews with our Taylor Wessing partners from all areas of law with a diverse industry and regional focus. We asked them to shed light on the "**Next Normal Legal**" situation in Germany from their perspective and to identify opportunities and risks for their clients.

We have summarised the results of this research for you in this White Paper. As expected, we anticipate numerous major developments – both positive and negative – in almost all industries, from retail to automotive to healthcare. We also identify cross-sectoral issues, such as an increased risk of litigation and the partly different challenges for entrepreneurs and investors.

We hope that you find our White Paper interesting reading and we particularly look forward to exchanging ideas with you on the issues raised. Feel free to send us your feedback as well as questions and comments by email to TWGNextNormalLegal@taylorwessing.com. Remember to follow our social media channels on Twitter, LinkedIn and Xing where we will soon be announcing more industry-specific webinars and events on the topic of "Next Normal Legal" in Germany.

Stay healthy and positive through the crisis!

Best regards

Dr. Oliver Klöck
Partner, Member of Managing Board
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Dr. Daniel Dziewiecki
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Please send any queries or comments to:
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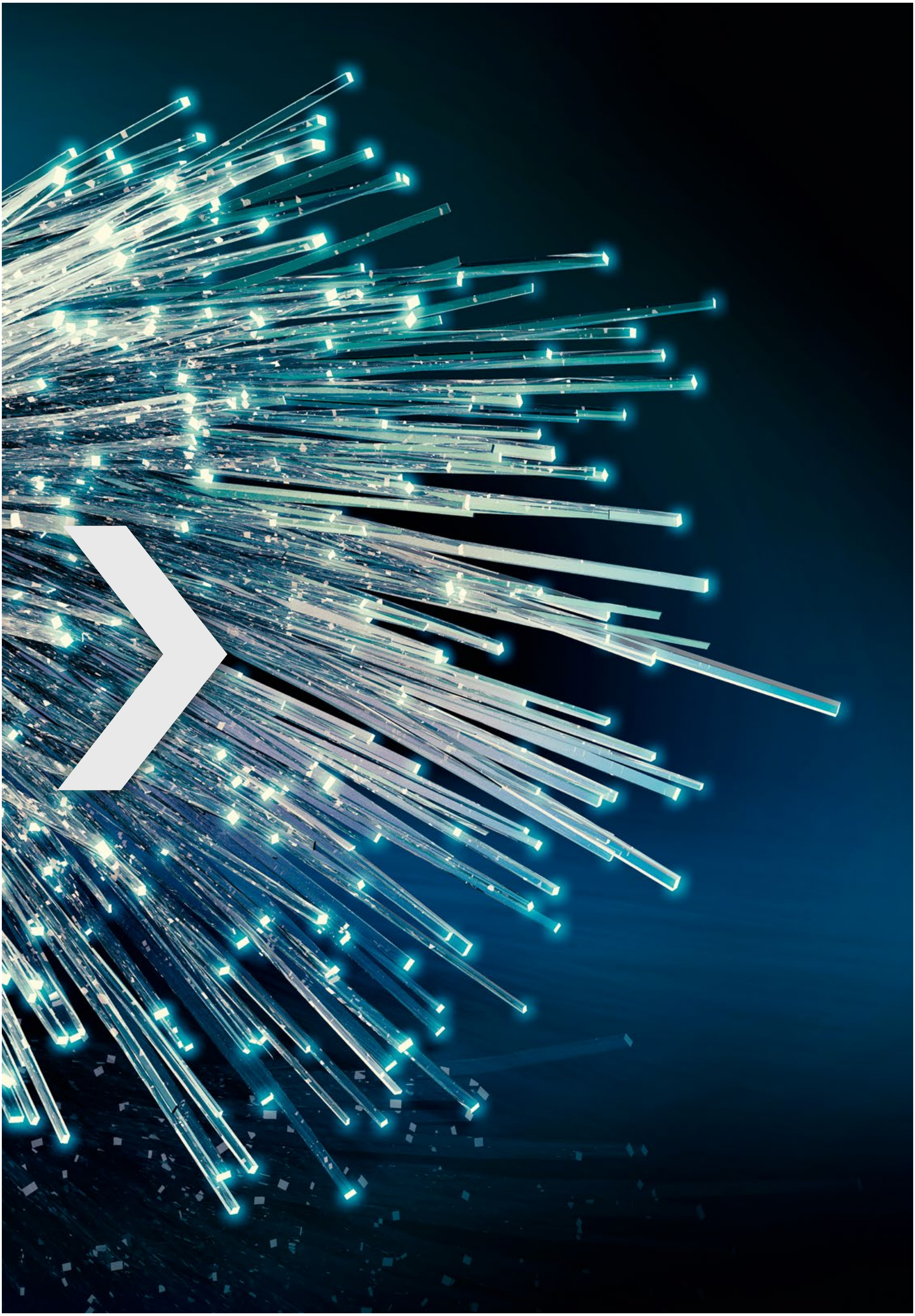

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The Corona pandemic accelerates digitalisation:

implications for IT, e-commerce, transport, logistics and insurance

We spoke to our experts

Dr. Axel Freiherr von dem Bussche
Technology, Media & Communications

Dr. Carsten Schulz
Technology, Media & Communications

- **Dr. Gunbritt Kammerer-Galahn**
  Insurance
- **Dr. Lars-Gerrit Lüßmann**
  Corporate/M&A
- **Dr. Janina Pochhammer**
  Projects, Energy & Infrastructure
- **Alexander R. Roth**
  US Office, Corporate/M&A
- **Dr. Tobias Schelinski**
  Transport & Logistics

The Corona pandemic has a cross-sectoral impact as an accelerator or catalyst for **digitalisation**. The state's **willingness to digitalise** will continue to increase after the Corona crisis and will probably result in more new legislation. The legislator has already made it possible for stock corporations to hold **virtual general meetings**.

The topic of **data protection** (GDPR) "took a break" in the first two months of the Corona crisis and was not within the focus of authorities and companies. This is now changing again: As a result of increasing digitalisation in all areas of life and work, data protection issues are once again gaining importance.

Technology, media and communication are experiencing "hyper growth" as a result of rapid digitalisation, as is the entire **e-commerce** sector. In the future, even more data will be collected and processed in these areas, resulting in an increased need for legal advice on **data protection and cyber security**.

Online services (videoconferencing, streaming, social media, gaming/gambling, etc.) and **hosting providers** have massively expanded their server capacities due to increased demand. A significant decline in these capacities is not expected even after the Corona crisis. Consequently, numerous new **data centres** are likely to be created.

The **transport and logistics sector**, which has always been a digital pioneer, is also breaking new digital ground. For example, **cargo and shipping documents**, which have been travelling around the globe with freight for centuries, will be **completely digitalised** in the future using block chain technology. Established market players are unlikely to develop such technologies themselves, but will acquire them externally through company acquisitions.

Digitalisation will also progress faster in the **insurance industry**. Since many brokerage offices and agencies were closed from March to June 2020, the pressure on smaller and financially weaker insurance brokers to consolidate will increase significantly. At the same time, **online sales** are becoming increasingly important for the industry, as the pandemic-related dent in sales has

If you are interested in more details, please read:

Corona pandemic: Law on virtual general meetings and many other adopted alleviations

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TECH &LAW TV

AI and privacy – marriage of convenience or loving partnership?

Artificial intelligence (AI) is based on the principle of machine learning. The basis for this is the analysis of a large amount of data. AI thus poses great challenges for data protection. The principles of transparency, purpose limitation and data minimisation are in some aspects even contradictory to the strategy of AI. A marriage of convenience or a loving partnership?

Behrang Raji, from the Hamburg Commissioner for Data Protection and Freedom of Information, and Mona Wrobel, a lawyer at Taylor Wessing in the Technology, Media & Telecoms practice group, discussed this issue. Moderated by Dr. Axel Freiherr von dem Bussche.

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to be remedied elsewhere. In this context, strong consumer demand on **comparison platforms** during the crisis has also been seen. At the same time, so-called **insurtechs** are enjoying great popularity amongst investors. The technology-based online insurance providers with innovative business models have found their way out of the niche and are now competing with established market players.

Further insight into digitalisation topics can be found here: **Online-Magazine PlugIn, we think the law of the future**

PlugIn

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3 The Coronavirus expedites the retail transformation from in-store to online sales:

implications for trade, transport, logistics and the real estate sector

We spoke to our experts

Dr. Adrian Birnbach
Commercial Real Estate

Dr. Anja Fenge
Commercial Real Estate

Prof. Dr. Norbert Kämper
Environmental, Planning & Regulatory

Stephan Manuel Nagel
Competition, EU & Trade

Dr. Martin Rothermel
Commercial Agreements & Distribution

- **Dr. Axel Freiherr von dem Bussche**
  Technology, Media & Communications
- **Marc André Gimmy**
  Employment, Pensions & Mobility
- **Dr. Janina Pochhammer**
  Projects, Energy & Infrastructure
- **Dr. Tobias Schelinski**
  Transport & Logistics
- **Dr. Dirk Wieddekind**
  Trademarks, Advertising & Design

With the exception of food retailing, which benefited from the crisis, the **retail sector** was hit very hard by the Corona pandemic due to store closures and space restrictions. The massive consequences are still being felt. The Coronavirus forced even the most die-hard in-store shoppers to seek out their purchases online. A large proportion of this customer segment therefore became acquainted with online shopping and gained additional confidence in digital shopping options. It remains uncertain whether and how many of these customers will find their way back to the bricks-and-mortar retail sector.

As a result, **demand for retail real estate** will probably **fall** sharply within the next five years, and with it the **rental income** that real estate investors can achieve. Within the remaining retail spaces, numerous new **off-line usage concepts for retail space**, e.g. worlds of experience and showrooms, will be developed, as well as other **new digital e-commerce business models**. Shop-in-shop and franchising concepts will become more attractive, as the responsibility for the crisis-proof distribution of goods will be outsourced to business partners. Overall, the **character of town and city centres** will change significantly.

> "
> The character of town and city centres will change significantly.
>
> **Dr. Adrian Birnbach**

During the Corona crisis, the **demand for hotel accommodation from holidaymakers and business travellers** also collapsed to a large extent. Even after the crisis, demand is expected to remain below the pre-crisis level. In the future, there will be numerous restructurings, mergers and sales of travel providers as well as **hotels and hotel chains**. Real estate funds will withdraw from the hotel business and, as a result, the purchase prices for **hotel properties** will fall.

We are also observing declining demand for **office space**. Many companies will require smaller spaces, as working remotely / from home has largely proved its worth during the crisis and numerous suitable digital tools are available.

In contrast, the demand for large-scale **commercial real estate for e-commerce distribution and logistics** will increase. Many **large-scale projects in logistics plant construction**, especially large (fully) automated warehouses built to customer specifications ("build to suit"), are currently being planned and constructed.

From these logistics centres, there is a growing need for **distribution logistics**, i.e. courier, express and postal services to deliver online purchases to B2B/B2C buyers.

After a brief slump at the beginning of the pandemic, consumer demand for **e-commerce** services increased sharply due to the closure of retail branches. This benefited the **online sales** of a number of otherwise hard-hit chain stores, but it did not compensate for their losses suffered in the actual stores. The beneficiaries of the store closures were companies that deal exclusively online, the socalled **Internet pure players**.

After the pandemic, retailers will rely on an orchestrated interaction of online and in-store sales channels. Legal issues regarding online sales, for example, the **requirements for e-commerce, data protection, geo-blocking, the platform-to-business regulation, permissible restrictions of online sales, general questions of sales law** (commercial agents, dealers, franchise, etc.) as well as special topics on the seamless connection of online and offline sales will become more important for traders. For in-store transactions, **cashless or contactless payment**, for example via smartphone, will play a more important role.

If you are interested in more details, please read:

Online sales, platforms and stationary trade – Next Normal: Connecting online and offline sales in and after the crisis

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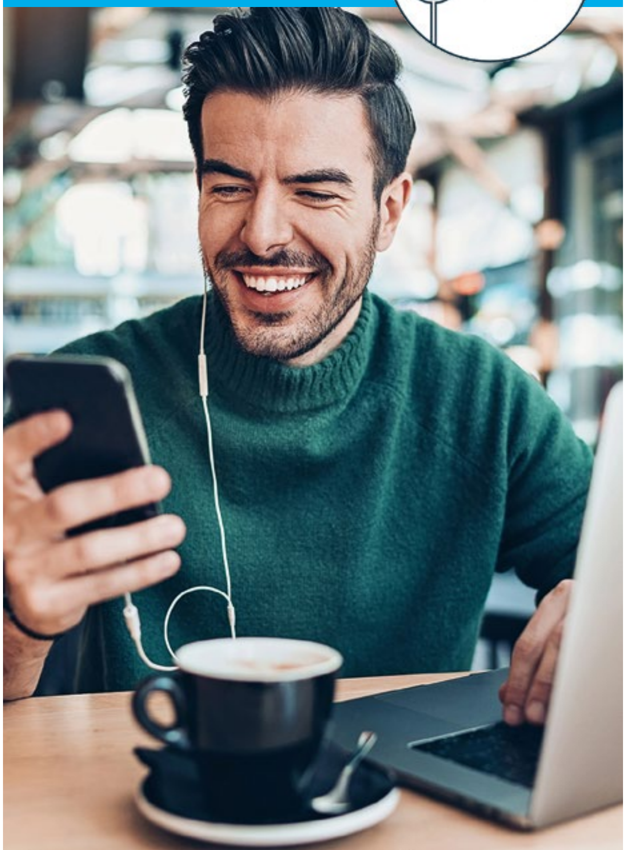
Many **manufacturers** are moving to **B2B/ B2C online direct sales** to retailers or end consumers, so that newly emerging competitive relationships and sales organisations are raising **antitrust issues at all levels of distribution**. Furthermore, data-driven business models are in the special focus of the antitrust authorities. In the future, the question of the extent to which companies can gain **market power through data** will be of central importance. The same applies to antitrust law issues concerning the **use of price algorithms**.

At present, numerous **antitrust legislative projects are being planned**, which are primarily aimed at powerful Internet platforms: The **EU Commission** plans to introduce a so-called **New Competition Tool** with extensive powers of intervention, especially in "tilting" markets. Through data, it is intended to counteract structural risks of digital markets due to network effects, high scale effects and market power. In **Germany**, an **amendment to the antitrust law** with significant reforms for the digital age is planned in parallel. Among other things, it contains a provision for the **monitoring of major Internet platforms across markets** by the Federal Cartel Office, regulations concerning the market power of Internet platforms as so-called intermediaries, and reforms with regard to **access to data of strong or dominant companies**. In addition, there are plans to make life easier for medium-sized companies, for example by raising the relevant turnover thresholds for merger control.

If you are interested in more antitrust law topics, we recommend **Competition Cast**, Germany's first antitrust law podcast



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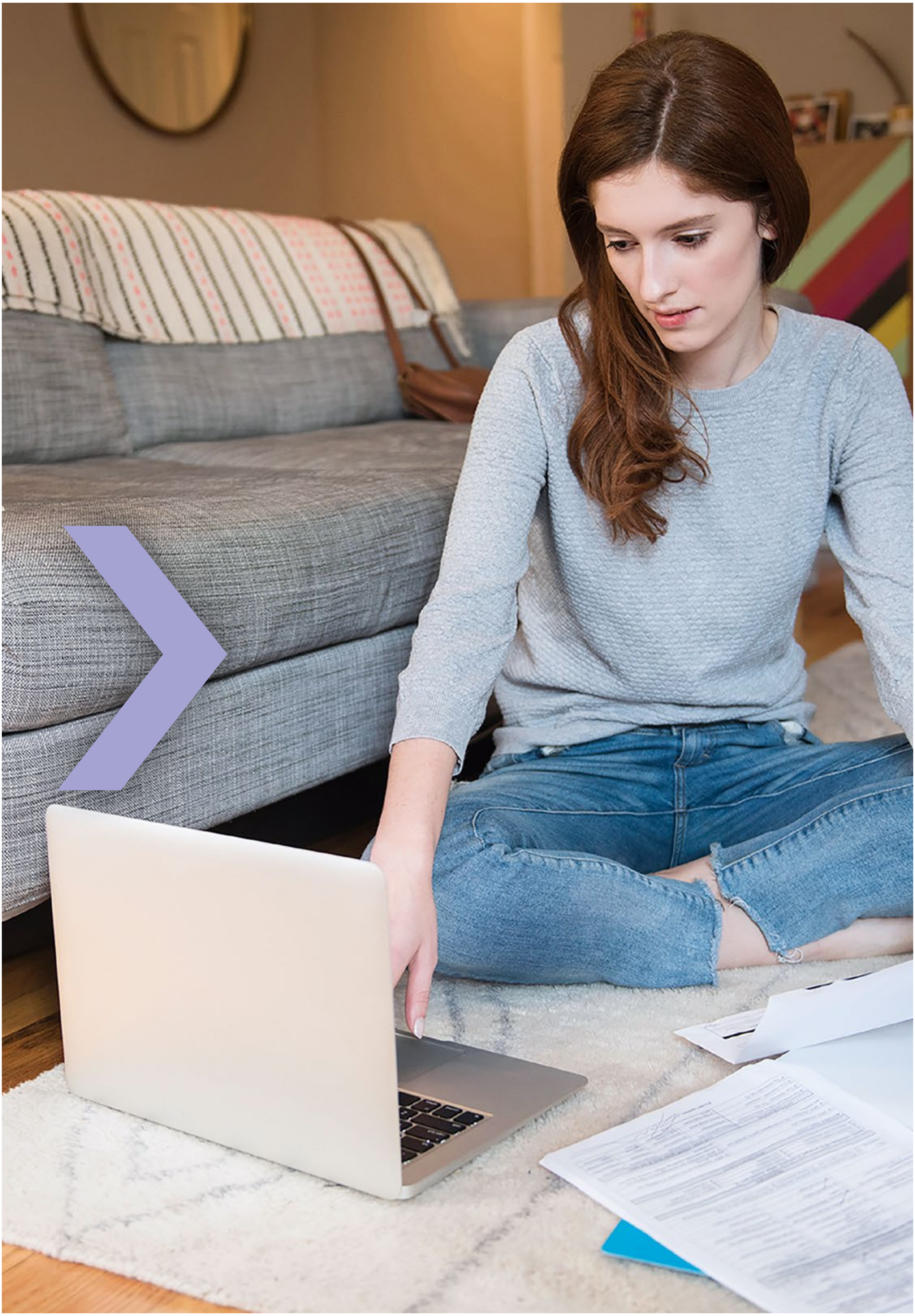

4 | New world of work after Corona:

digitalisation, remote working, occupational health and safety, rights of co-determination, contracts for work and services

We spoke to our experts

Dr. Oliver Bertram
Employment, Pensions & Mobility

Marc André Gimmy
Employment, Pensions & Mobility

Alexander R. Roth
US Office, Corporate/M&A

During the Corona crisis, companies enabled employees to work flexibly from home. This greater acceptance of working remotely, born out of necessity, has proven its worth in many companies during the crisis and will continue to exist after the pandemic. A discussion has started, whether remote work should be subject to statutory regulation or not. In this framework, the Federal Ministry of Labour and Social Affairs filed a draft bill that would guarantee employees a "**right to work from home**." This draft bill, however, was rejected. The German government is divided as to whether and how employees should be granted a statutory right for remote work or work from home.

Numerous work processes have been digitalised which were previously run predominantly "offline". The introduction of new digital tools made these processes more efficient and cost-effective. The **use of digital technologies** at work has increased significantly, e.g. software and hardware for video conferences for communication between office and remote working employees.

Companies will therefore soon be faced with new questions of employment and tax law. For example, they will have to deal with the required contractual supplements to work from home, as well as the examination and avoidance of tax law risks in connection with the unintentional establishment of permanent establishments or incorrect income tax deductions when employees are deployed far away from their previous place

Podcast Episode #7: Total remote – Working in the 21st century

The Corona crisis has turned the world of work upside down: Many people are now working from home if their jobs allow it. Are we just on the way to remote working forever? How are digital companies, often trendsetters of such developments, currently dealing with this? How is working life changing as a result, for employees, but also for their bosses? What's going on out there with regard to working remotely?

The answers to these and many other questions were provided by our guests Anna Zeiter, Global Data Protection Head of Ebay, and Dr. Axel Freiherr von dem Bussche, specialist lawyer for information technology law and head of the Technology, Media & Telecoms Practice Group at Taylor Wessing.

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of employment. In addition, due to the risk of infection by the Coronavirus, many companies will have to implement and enforce additional new **occupational health and safety measures** (vaccination and testing obligations, adjustment of hygiene concepts, distancing rules) within the framework of their employment relationships.

Also affected are **co-determination obligations towards employee representatives** such as negotiations with trade unions and works councils on mobile work. Measures for occupational safety and health protection will represent a central challenge for company management in the foreseeable future.

During the Corona crisis, the **flexible deployment of foreign personnel** and the often related issue of **contracts for work and services** became the focus of media coverage at times. This form of employment is widespread in Germany across all industries and is of considerable importance for numerous branches of industry in our country. In many cases it is not a matter of precarious employment relationships. As a reaction to the problematic hygiene measures in individual companies, a political debate has flared up about a **ban on contracts for work and services**. It was also discussed that such contracts for work and services could also be prohibited for other sectors (e.g. healthcare) or even across sectors. At the same time, this prohibition is being extended to the use of temporary staff, which is completely unfounded. However, such a ban and the associated deflexibilisation of the labour factor would have far-reaching consequences for Germany as a business location Germany.

Forum on the working world of the future

The digitalisation of the workplace and Corporate Social Responsibility (CSR): We examine these developments from an employment law, corporate, academic, socio-cultural and international perspective in formats you would certainly not expect from a law firm.

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5 | Healthcare:

life saving during the pandemic, crisis-proof investment after the pandemic

We spoke to our experts

Dr. Manja Epping
Life Sciences & Healthcare

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Dr. Joachim Mandl
Commercial Real Estate

Dr. Carsten Schulz
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Michael Stein
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  Projects, Energy & Infrastructure
- **Thanos Rammos**
  Technology, Media & Communications
- **Michael-Florian Ranft**
  China
- **Alexander R. Roth**
  US Office, Corporate/M&A

During the Corona crisis, numerous scheduled operations in hospitals were postponed in order to free up urgently needed **bed capacities** for Covid-19 emergency patients. In addition, patients avoided the hospitals for fear of possible infection. Visits to hospitals and outpatient practices were banned, possibly in "contradiction to the public health interest". As a result, numerous medical procedures which were lucrative for the hospitals did not take place during the first months of the pandemic. However, the hospitals were not reimbursed for providing this capacity. This resulted in a gap in their balance sheets. In the future, therefore, an **adjustment of hospital reimbursement** is to be expected, which also takes into account reserve capacities required for crisis situations. In addition, the Hospital Future Law *(KHZG)* will provide more than 4 billion Euros in the short term to subsidy digititalisation in hospitals.

> "The demand for a significant reduction in the number of hospitals and hospital beds will no longer dominate the public debate in the future.
>
> **Karolina Lange**

The **remuneration of healthcare workers** has been the subject of discussion since the beginning of the pandemic (e.g. nursing staff in hospitals and nursing homes). These workers were an important pillar of the healthcare system during the main phase and the lockdown. As a result, salaries are expected to rise, which will lead to a noticeable increase in hospital personnel costs.

The situation was exacerbated by the suspension of the **free movement of workers** within the EU. Healthcare facilities were suddenly faced with the challenge that the already high demand for nursing staff could no longer be met by foreign specialists. After the crisis, hospital operators will have to find creative new ways to successfully meet this challenge.

With the crisis, a **crisis-resistant healthcare system** – including hospitals in particular – is gaining greater importance in public perception. Therefore, the demand for a significant reduction in the number of hospitals and hospital beds will no longer dominate the public debate in the future. Where a closure is politically or infrastructurally inappropriate, even economically unstable hospitals will continue to be operated with the help of tax subsidies, even though a cessation of operations seems unavoidable from a business perspective.

i-ManagementPLUS supports hospitals during and after the Corona crisis.

i-ManagementPLUS is an integrated and innovative approach from Redcom Group, Taylor Wessing and Kienbaum. It contributes to the sustainable securing of patient care close to home by economically healthy hospitals. i-ManagementPLUS offers a modular system of restructuring in the combination of business management and consulting - it guarantees legal security, creates a predictable revenue and liquidity management and the appropriate organisational and procedural structures.

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The trend towards consolidation will continue after the Corona crisis. Both service providers in the outpatient and inpatient sector as well as companies from the pharmaceutical and medical device sector will be affected. Even before the crisis, we were able to observe how service providers operating in a highly fragmented market merged to form larger alliances; this process is now being accelerated.

Due to the pandemic, the market dynamics for transactions in the healthcare sector have slowed down in some areas. Purchase prices are coming under slight pressure. It can be assumed that prices will rise back to pre-crisis levels at least in 2021, solely as a result of the investment pressure on the part of financial investors.

If you are interested in more details, please read:

M&A and Private Equity Transactions in the Life Sciences and Healthcare Sector in the Corona crisis – What is the status?

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From the point of view of investors, the **healthcare industry** is one of the "big winners" of the Corona crisis. **Investment opportunities** in the healthcare sector will in future be perceived even more as a "crisis-proof product" and will be in greater demand than ever before by both known and new investors from Germany and abroad. One investment option that will become increasingly popular as a result is **healthcare real estate** where the return on investment is largely secured by payments from social security. The purchase prices for these properties will probably continue to rise in the future, but will in any case remain stable.

In the **life sciences, numerous collaborations between pharmaceutical companies** for research purposes, development and production of **Covid-19 vaccines** have led to successful regulatory filings. In the US and the EU, several vaccines could be provided or will be provided shortly among the population. A single pharmaceutical company is unable to meet the enormous global demand for a vaccine. Collaborations will also accelerate the distribution of a market-ready vaccine.

In order to become more independent of imports, the **production capacities** of the pharmaceutical and medical device industry in Germany will be **expanded**. Several new chemical and pharmaceutical production plants are already being planned.

If a manufacturer cannot ensure a comprehensive supply of the population with the necessary Covid-19 vaccine, it is conceivable against this background that the state will grant **compulsory licences** to other manufacturers against the will of the patent holder on the basis of the German Infection Protection Act. However, due to the promising announcements of various vaccine developers (e.g. Pfizer/Biontech and Moderna), no compulsory licensing is currently expected.

If you are interested in more details, please read:

Compulsory licences and governmental usage orders for patents

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The increased demand for **telemedicine** during the pandemic will continue. Traditional outpatient and inpatient service providers have had to learn through Corona that without telemedicine services, they will be less able to reach some of their patients in the medium to long term.

Podcast #4: The digitalisation of medicine

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In this context, the range of **telemedicine** and **digital health applications ("health apps")** will expand more in the future due to the relaxation of the ban on remote treatment for physicians and the German Drug Advertising Act (HWG), as well as new reimbursement options under the German Digital Supply Act (DVG).

Since the healthcare industry did not have the necessary technological know-how during the crisis - e.g. in the areas of artificial intelligence, digital health, digitalisation - **cooperation with and acquisitions of IT companies** in the healthcare industry will increase.

6 | New mobility after Corona:

the dawn of a new and uncertain age in the automotive and transport sector

We spoke to our experts

Dr. Michael Brüggemann
Competition, EU & Trade

Dr. Klaus Grossmann
Corporate/M&A

Prof. Dr. Norbert Kämper
Environmental, Planning & Regulatory

Michael-Florian Ranft
Automotive

Timo Stellpflug
Aerospace & Defence

- **Qun Huang**
  China
- **Dr. Ralf B. Tietz**
  Corporate/M&A

The so-called **old economy** (e.g. mechanical engineering or the automotive industry) is being hit particularly hard by the crisis.

During the Corona crisis, worldwide **demand for automobiles** – both personal and commercial vehicles – and therefore also the production of **vehicle manufacturers** (OEMs = original equipment manufacturers) fell drastically. This in turn led to a lack of demand among **automotive suppliers**. If the decline in demand continues, this could lead to staff reductions and plant closures at manufacturers and suppliers.

Smaller distressed M&A transactions (mergers & acquisitions) of **insolvent automotive suppliers**, which are bought up by foreign investors from overseas, can currently be observed.

In contrast, some Chinese investors who have already invested domestically will **de-invest** their stakes in ailing companies in order to avoid possible Corona-related total losses due to the threat of insolvency.

The "Corona shock" hit the entire industry particularly hard, since it was already in an extensive **transformation process** before the crisis and is still going through it. The Corona crisis has proved to be a "turbocharger" for international industry issues, such as **new drive technologies (electromobility), connectivity, autonomous driving, data services, digitalisation (e.g. of research and development or sales), and environmental protection**. Within the industry, the priority of these topics continued to increase due to Corona-related factors, but above all at an accelerated rate.

Due to the lower complexity in the construction of electric motors compared to

If you are interested in more details, please read:

Driving your Digital Sales: Your Legal Compass to gear up your Automotive Ecommerce Strategy

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Car Data Protection in the "Extended Vehicle"

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Car Data Protection Management in the Connected Vehicle Landscape

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motors of other types, it is expected that in the future significantly fewer personnel capacity will be required in motor production than before. By expanding or **insourcing the production of individual vehicle components that were previously sourced externally**, manufacturers could keep the personnel capacity busy that was freed up in engine production.

During the Corona crisis, manufacturers have also become aware that long supply routes and dependence on a few suppliers can lead to (partial) failures and delays in their supply chain and thus their production. They will therefore consider **restructuring their supply chains** and often give preference to local manufacturers, even if they are not as competitive as their overseas competitors.

This will encourage Chinese and other Asian suppliers to set up additional **plants of their own in Europe** close to the OEMs (see e.g. the production of batteries). As a consequence, these suppliers will have to produce at local wage levels, just like their domestic competitors.

In the People's Republic of China, which was the first country to be severely affected by the Corona crisis, there are, however, already the first signs of a **recovery in demand** for machinery in general and for automobiles in particular. It can therefore be assumed that the automotive industry will also slowly recover in our country and – depending on the general economic situation and the further outlook – demand could even rise above the pre-crisis level. The reason for this could be an increased need for pandemic-proof or infection-proof means of transport for individual traffic. It is doubtful, however, whether this will prevent a possible consolidation.

Due to the Corona-related lack of demand for travel, the **transport market** has almost completely collapsed. From air traffic to gas stations, all **providers of transport services** and their suppliers had to struggle with the challenges of a massive slump in demand. In the future, an increase in private transport can also be expected here.

In **civil aviation** as well as for operators of **regional airports** there will – in all probability – be an anticipation of a market consolidation already predicted before the Corona pandemic, which will result in a reorganisation of the market. Passenger numbers, which are important for both sectors, will probably not recover as quickly as the economy as a whole after the pandemic.

As a result, **passenger aircraft manufacturers** will also look for alternative, more lucrative business models in other market segments and industries.

In the case of regional airports, which are usually supported by local authorities, the long-term shortfall in cover raises issues of state aid law in particular. In addition, some public authorities will want to part with their shares in **regional airports**.

In the **transport and logistics sector**, the vehicles and machinery of some **procurement and production logistics companies** in particular remained underutilized during the Corona crisis. Numerous **restructurings, consolidations and takeovers** are expected in this industry segment as a result of the crisis.

The under-utilization of procurement logisticians and the reduced passenger volume due to Corona will also affect large parts of the **shipbuilding industry** (passenger, transport, marine) in the form of a drop in demand. The plans for the **consolidation** of large shipyards are already drafted and ready for use. However, this had already been considered in the years before the pandemic.

It is not yet possible to predict whether the demand for transport will change in the long term.

7 | Financing and transactions after Corona:

dealing with old and new risks and uncertainties

We spoke to our experts

Dr. Michael Brüggemann
Competition, EU & Trade

Dr. Klaus Grossmann
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Dr. Marco Hartmann-Rüppel
Competition, EU & Trade

Dr. Lars-Gerrit Lüßmann
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- **Marc André Gimmy**
  Employment, Pensions & Mobility
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  Banking & Finance
- **Dr. Gunbritt Kammerer-Galahn**
  Insurance
- **Stephan Manuel Nagel**
  Competition, EU & Trade

In the first months of the pandemic (especially between March and May), companies did not focus on **transactions**. Instead they were preoccupied with securing their continued existence during the Corona crisis. During this period of great uncertainty, numerous transactions were **interrupted and put on hold**, but only a small number were actually cancelled completely.

According to our experts and the perception of other market participants, this situation has normalised to the extent that activity on transactions has now started up again.

Numerous companies will be dependent on **new financing options** during and after the crisis. This applies in particular to those companies whose business models had partly already come under pressure before the crisis because demand for their products and services disappeared during the crisis and they had to change their business model as a result. Some of them resorted to **state aid**, e.g. within the framework of the Economic Stabilization Fund (WSF) provided by the Federal Ministry for Economic Affairs and Energy and the Reconstruction Loan Corporation (KfW, described in military terms by the Federal Minister of Finance Olaf Scholz as an anti-tank weapon) or the coronavirus aid and credit enhancement programmes offered by KFW and the regional development / promotional banks. This development is expected to continue in the further course of the crisis (in particular due to the expiry of the temporary suspension of the obligation to file for insolvency), unless a general economic recovery sets in.

Since many companies in distress do not meet the criteria for state subsidies and fall through the funding net, **additional support programmes** will be launched by the public sector. Currently, for example, further Corona subsidies for SMEs are being discussed at state level (recapitalization measures). After the crisis, an increasing number of reclaims of unlawfully claimed subsidies can be expected.

In 2021, numerous **capital increases** and a rising number of **state participations** by the public sector are expected. This will facilitate the granting of **hybrid capital** (a mixture of equity and debt capital) as well as warding off foreign investors in key industries.

Financial investors, such as **private equity funds**, still have large liquid reserves that they did not want to or could not invest during the crisis. Since the **interest rate** remains low, additional low-cost loans can be taken out on the capital market. Although there is no credit crunch at the moment, financing options are constraint despite a large amount of potential lenders. The market share of debt funds in lending and acquisition financing activities will remain at a high level in 2021 and may, in a tense economic environment even grow.

The major components for assessing the bankability are next to the current financial condition and the cash flow forecast mainly the business model and the underlying sector. Short and medium term consequences resulting from Covid-19 play a significant role for any lender. Despite the low interest environment margins are already increasing compared to previous months and will most likely stabilise at a higher level due to an increased number of non-performing loans. All-equity financings with a recap debt refinancing of part of the equity at a later stage could be a real option for smaller transactions.

It can be assumed that transactions and restructurings will continue to pick up now and after the Corona crisis. In addition to the “classic” restructuring topics such as insolvency law, employment law, financing and state aid law, IP law topics, such as in the valuation and sale of trademarks and patents, are also becoming increasingly relevant.

In contrast to private equity funds, **investment funds** that invest in infrastructure and energy projects (mostly or to a large extent with money from pension funds, pension schemes and insurance companies) are remaining active during the crisis, as they are only allowed and willing to keep a limited amount of capital “in the bank”. Due to the reduced range of lucrative investments, these companies are currently under constant pressure to invest.

In addition, the crisis is acting as a catalyst with regard to the sustainability of existing business models. It is forcing companies and financial investors to adapt their business models or those of their portfolios.

In the course of **reorganisation measures** as a consequence of the effects of the pandemic, corporate groups will part with non-core areas of their business or acquire new fields or know-how. This will lead to **carve-outs** of individual parts of the company, but also to the acquisition of fast-growing companies with innovative business models and products. Especially with regards to financing of carve-outs Debt Funds will play a major role.

For the reasons mentioned above, public takeovers of listed companies under pressure by large **private equity** funds or strategic investors, the so-called **public-to-private** transactions, can also take place.

Even though the **venture capital** market is still active, venture capital investors have become more cautious during the crisis and select their investments even more wisely than before. Investments in technology-based start-ups – e.g. fintechs, insurtechs and digital health – were and are still in high demand during the crisis. At the same time, venture capital investors have high capital

reserves. Many are currently also focussing on the stabilization of Corona-affected companies in their portfolios.

In addition, hedge funds will continue to invest in listed companies and to play an active role as shareholders in order to bring about changes in the company (e.g. new appointments to the supervisory board, initiation of transactions) which may conflict with the requirements of company management (so-called **shareholder activism**). Weaknesses in the business model are being increasingly exposed by the crisis. This opens up opportunities for active shareholders to initiate changes by putting pressure on management and thereby creating value (e.g. through M&A). In the future, stock corporations will therefore increasingly face the challenge of dealing with these situations.

At the same time, the crisis has significantly worsened the situation for **small, financially weak companies**, especially in the traditional industries. They are becoming increasingly unattractive for investors and – in the worst case – may even have to be liquidated.

In this context, the Federal Ministry of Justice and Consumer Protection (BMJV) suspended the obligation to file for insolvency until 30.09.2020 corona-related cases. The act to mitigate the consequences of the Covid-19 pandemic under insolvency law has been extended – with regards to over-indebtedness, but not ability to pay – until 31.12.2020. Therefore it can be assumed that the number of insolvencies will increase significantly from January 2021 onwards. It appears to be important to assess early on alternative structures and to pursue the preferred route resolutely. The communication with the lenders makes up a significant part, especially to initiate and implement potential extrajudicial restructuring measures (pre formal insolvency).

With the Corona-related increase in insolvencies, the number of **merger control proceedings** will also rise. As a result of the Corona crisis, individual transactions were initially postponed and the competition authorities in the first few months of the pandemic had called on companies to submit only urgent notifications if possible. This is likely to have caused an additional backlog of notifications, which is why more time should be allowed for transactions to be cleared in the forthcoming months. Although the examination deadlines for the competition authorities will remain unchanged, the entire procedure should lead to a de facto extension: The informal preliminary talks with the EU Commission, which must be conducted on a mandatory basis, will be extended, and the Federal Cartel Office will also make full use of its review periods in simple cases. Companies are therefore advised to establish (informal) contact with the authorities as early as possible and, if necessary, to submit draft applications first, even if – as is the case at the Federal Cartel Office – this is neither planned nor customary to date. In Germany, however, the problem may be solved in the course of next year as the planned amendment to the law raises the turnover thresholds and thus the obligation to register applies to fewer transactions.

Transactions under Corona conditions are characterised by a significantly higher need for security, especially on the buyer's side. This is reflected in the **drafting of the purchase agreement**, e.g. in the form of **representations and warranties** granted by the seller, **earn out** clauses (purchase price payments depending on the subsequent business success of the object of the transaction) and **vendor loan** clauses (seller grants the purchase price to the buyer as a loan), as well as in **material adverse change** (MAC) clauses or other withdrawal variants. The aim of these clauses is to provide the buyer with the greatest possible flexibility to cushion the risk of unexpected, crisis-related developments in the purchase price.

Overall, the M&A market is noticeably in a **phase of transition** from a seller's to a buyer's market. The buyer is clearly asserting his need for security and is controlling the risks of M&A transactions much more than before. Along with the changes in staggered or delayed purchase price payments described above, we are also observing a move away from **locked box** clauses (clauses that fix the purchase price or purchase price portion payable on the execution date at the time of the conclusion of the contract and do not allow an adjustment up to the later execution date), towards adjustment mechanisms that are based on the execution date. In addition, there has been a sharp increase in the aforementioned **MAC clauses** (possibility of withdrawal in favour of the buyer, especially if agreed business thresholds are not met as a result of the Corona crisis).

Many companies acquired in transactions during and after the Corona crisis will not develop as originally intended by the buyer due to the current adverse economic conditions and volatile markets. Disappointed buyers will therefore carefully review any representations and warranties and earn-out clauses granted by the seller and seek compensation from the seller. This will significantly increase the probability of legal disputes between the parties to the transaction, so-called **post-M&A disputes**.

For the same reasons, the demand for **warranty and indemnity insurance**, which protects buyers and sellers against breaches of warranty in the purchase agreement, will also increase.

In many of the above-mentioned industries, measures such as **short-time work and increased personnel flexibility** were already in use during the crisis due to Corona. This trend will continue. In addition, there will be an increasing number of personnel restructurings, since the supply chains are still partially interrupted and sales are not developing as expected.

As early as October 2019, a new EU regulation on the **verification of foreign direct investments** came into force. Even before the Corona pandemic, there were plans to **expand the scope of the investment review** under the German Foreign Trade and Payments Ordinance (AWV) on the basis of the new EU FDI Regulation. The reporting requirements at the Federal Ministry for Economic Affairs and Energy have already been extended to virus and pandemic-related products. There will be an even stricter examination of foreign investments (from overseas, including China) in key technologies and critical infrastructures, e.g. in the health industry (vaccines, medical devices).

The **tightening of foreign trade law** in Germany and also throughout Europe contributes to an increase in the complexity of cross-border M&A transactions with target companies in Germany. The challenges resulting from the new and stricter regulation can be overcome with a higher degree of transaction planning and even earlier involvement of experts in this field.

In the broader thematic context, there is also a **White Paper from the European Commission** published in June, which makes proposals on how distortions of competition in the internal market resulting from subsidies by non-EU states should be dealt with in future. The EU Commission as well as national authorities should be given powers of intervention against economic activities in general and in the context of mergers and public tenders in particular, if distortions of competition are caused by **aid granted by third countries**.

If you are interested in more details, please read:

New obstacles for foreign investments in the EU?

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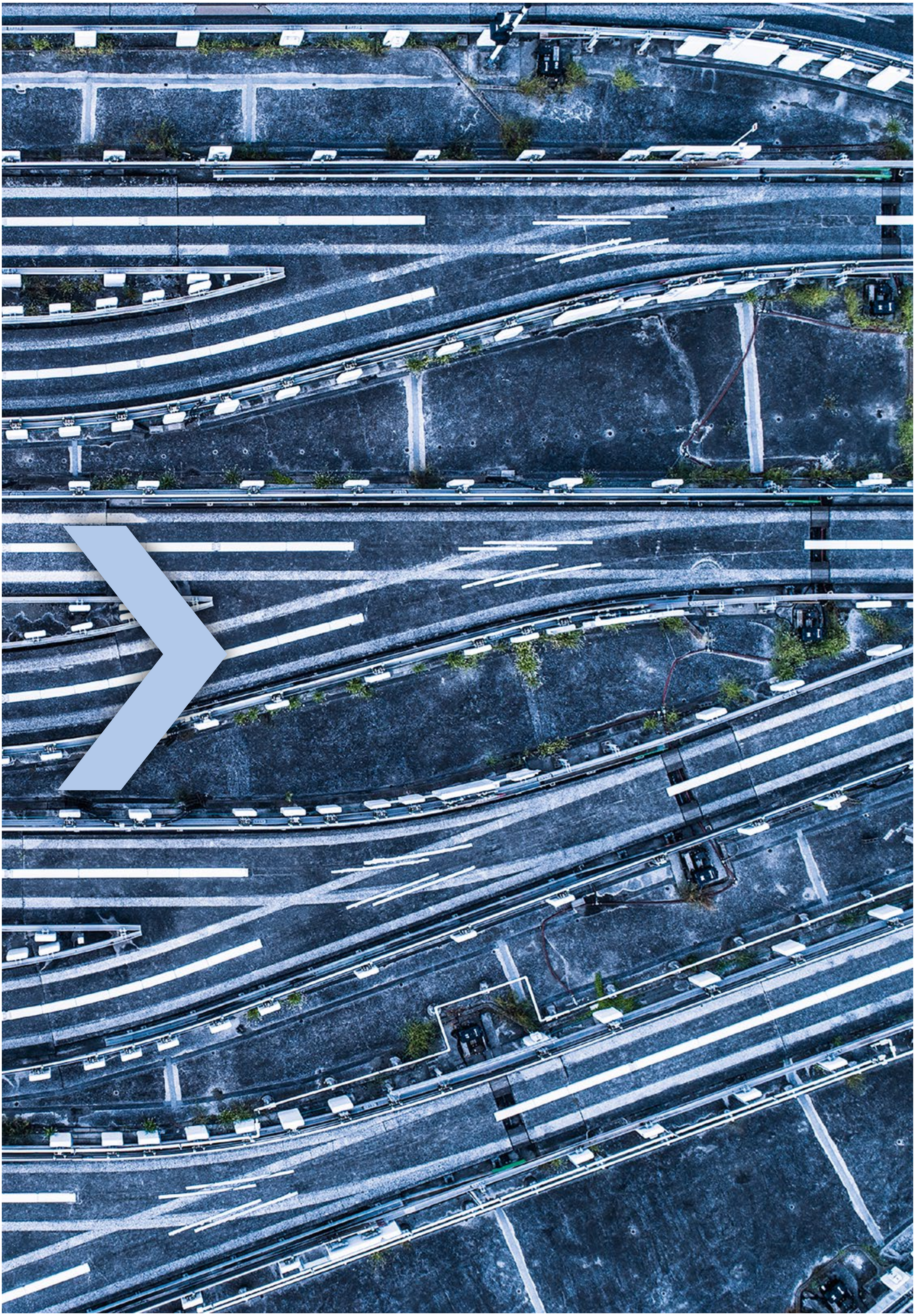

8 | The new supply chain:

Corona as a cause and trigger of legal disputes

We spoke to our experts

Dr. Philipp Behrendt
Disputes & Investigations

Dr. Martin Rothermel
Commercial Agreements & Distribution

Dr. Tobias Schelinski
Transport & Logistics

- **Marc André Gimmy**
  Employment, Pensions & Mobility
- **Dr. Gunbritt Kammerer-Galahn**
  Insurance

Due to Corona-related (partial) failures and delays in the supply chain as well as economic and political conflicts (Brexit, protectionism, etc.), numerous manufacturers will put lean management concepts to the test, such as **just-in-time (JIT)** or **kanban**, in relation to their supply chains in purchasing and sales. In the process, securing their own supply as well as that of their customers will gain in importance compared to the costs they generate. Across all industries, the central **make-or-buy** question will be posed by customers of transport and logistics services. If buyers opt for the buy option, i.e. external purchasing, they will be faced with the choice between **single or multiple sourcing**, i.e. whether they want to purchase their preliminary products from one or several manufacturers.

They will also consider many new **alternatives** in their choice of raw materials and preliminary products and their suppliers. They will also consider a well thought-out **regional and economic-political distribution** of their suppliers in order to spread any risks and use digital monitoring and information systems as part of **modern supply chain risk management**. Manufacturers will also increasingly rely on **warehousing** for preventive stockpiling. This can take the form of a **vendor-managed inventory**, for example, in which the supplier assumes responsibility for the inventories of its products at the customer's site. In this context, the use of **consignment** (supplier's warehouse at the customer's) and **commissioning warehouses** (commission agent maintains the warehouse for commission sales) will increase.

If you are interested in more details, please read:

Closer to shorter supply chains? – Supply chain management: the next normal

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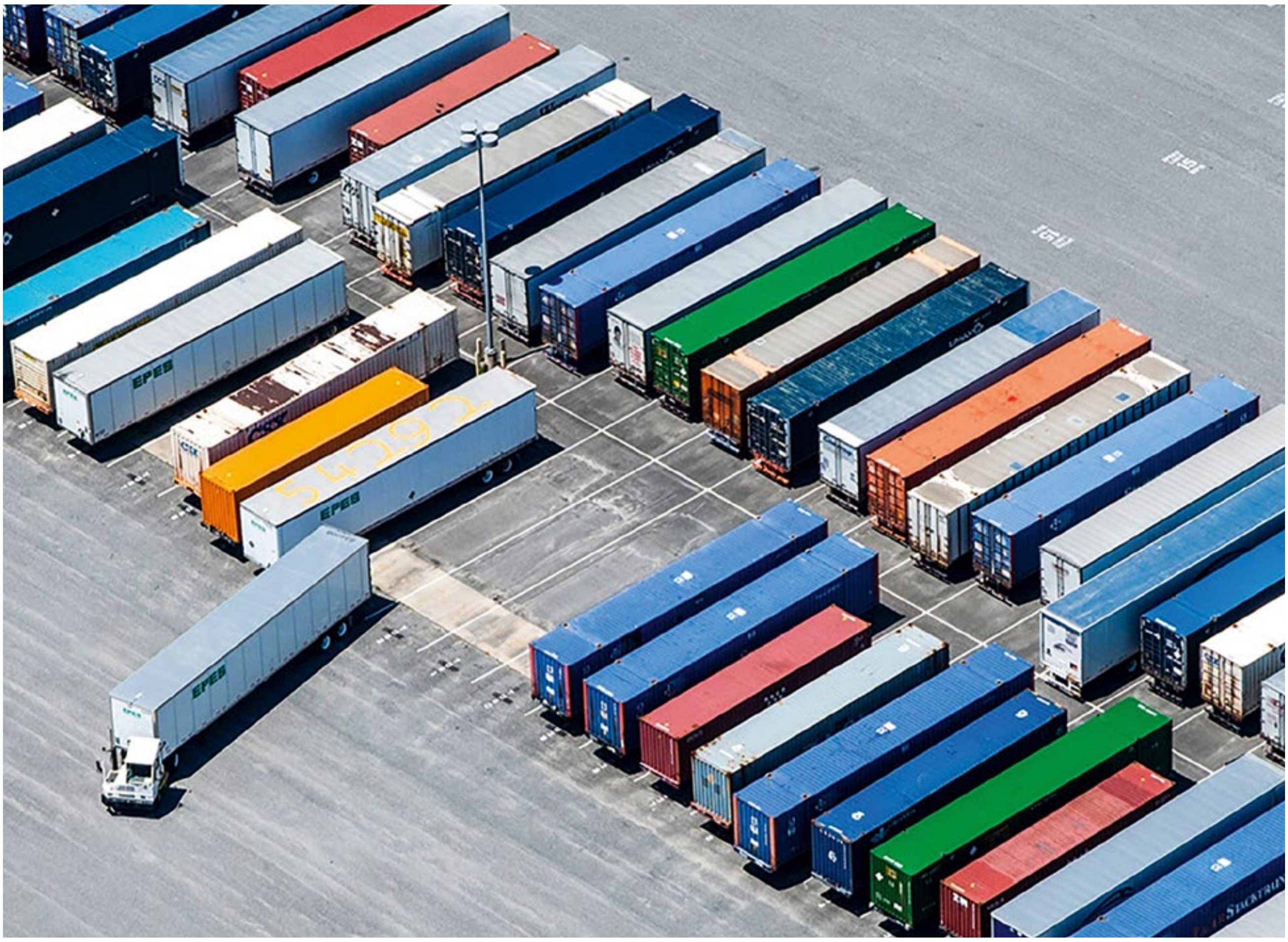
For many of these decisions, **existing contractual relationships with manufacturers, suppliers and transport and logistics companies** must be put to the test. If all else fails, **disputes** about changes in contractual conditions and cancellations of contracts end up **in court**. The Corona crisis has already triggered a number of disputes under both commercial and civil law, e.g. due to late, missing or incomplete delivery of goods or cancellation of events. As the global Corona crisis continues, the **probability of legal disputes**, especially in **crisis-hit industries**, will increase further, since the crisis situation often prevents the parties to the dispute from finding an amicable solution.

At the same time, **arbitration** will continue to gain in importance as the Corona crisis unfolds, as it allows for more flexible litigation and easier enforceability than state courts. This includes, among other things, the possibility of holding **negotiations via video conference**. Especially in the case of international disputes, this option is already being used now and will certainly be used even more frequently in the future. International disputes will continue to increase in the future, e.g. due to delayed, missing or incomplete deliveries of goods, as a result of the pandemic.

Since before March 2020, very few **insurance policies**, such as business closure or general pandemic insurance policies, used special clauses for the case of a Corona pandemic, there will also be legal disputes between insurance companies and policyholders (e.g. from the hotel and restaurant industry) in this area. The question of whether the Covid-19 pandemic or the state protection measures resulting from it constitute an insured event for which the insurance company is liable will be disputed.



In the insurance industry, **life insurance** and **private health insurance** in Germany have so far come through the Corona crisis largely unscathed. The impact of the crisis on **property insurance** depends on the object insured: **motor vehicle and liability insurance** benefited from declining case numbers due to the pandemic restrictions (e.g. remote working, limitations on movement). The average damages for **building and household insurance** also decreased, as damages were discovered more quickly due to the increased presence at home. **Travel cancellation, business closure, credit and residual debt insurances**, on the other hand, were negatively affected by the pandemic. Due to pandemic-related hypersensitivity to risks, the Corona crisis will lead to increased demand for insurance products by risk-averse individuals. Insurance companies will therefore develop new products, e.g. on the basis of a state-supported pandemic pool currently under discussion, with which they can calculate the risks that a pandemic will entail.

Some important entrepreneurial decisions in the crisis had to be made quickly and they were not just influenced by economic

and legal factors. It can be assumed that these did not always meet with the broad approval of all shareholders and that **legal disputes** between shareholders, e.g. due to the suspension of dividend payments as a result of the crisis, will increase after the pandemic.

It can also be suspected across industries and countries that, due to the high economic pressure during the pandemic, companies have deviated in some cases from rules of **compliance** in order to protect the continued existence of their business. After the pandemic it is therefore to be expected that compliance violations will be uncovered and legal disputes with the injured parties will proceed.

In this context, directors' and officers' liability, i.e. the liability of the managing director for the breach of his official duties, will also be the subject of more frequent litigation and insurance claims under directors and officers insurance (D&O) will increase.

Last but not least, an increase in legal disputes between employers and employees over Corona-related salary cuts is to be expected.

9 The public sector and major projects:

moderate impact of Corona

We spoke to our experts

Dr. Michael Brüggemann
Competition, EU & Trade

Prof. Dr. Norbert Kämper
Environmental, Planning & Regulatory

Dr. Janina Pochhammer
Projects, Energy & Infrastructure

Timo Stellpflug
Projects, Energy & Infrastructure

As expected, demand from the public sector as a client has so far hardly been negatively affected by the Corona pandemic. This means that the crisis has not had any significant impact on sectors that are heavily dependent on public demand (e.g. **space travel, defence**). In some areas of the public sector, there has even been a temporary increase in demand for pandemic-related products and services (e.g. protective masks, PPE and digital solutions for pandemic control such as apps and exit cards at airports).

In order to boost the economy, tenders for infrastructure projects from the public sector are currently expected to increase.

However, continuing high pandemic-related shortfalls in tax revenues could lead to a decline in demand from the entire public sector in the long term.

Plant engineering has so far been largely spared by the Corona crisis. Whether chemical, pharmaceutical, energy, logistics or data centres – most projects continued during the crisis. Although there were isolated delays due to Corona, including the supply of components, these were largely made up for and did not have a significant impact on the respective project schedules. A large number of new major projects have already been initiated in industries that benefit in particular from Corona-related increases in demand (e.g. pharmaceuticals, logistics and digitalisation). We have not yet seen an increase in disputes in this area caused by the Covid-19 pandemic.

In contrast, some shipbuilding projects were halted, especially in the cruise ship sector. However, yacht building and especially the construction of mega yachts has not so far been affected by the crisis. The orders of wealthy owners are not declining even in times of crisis.

10 | Preventive measures:

how companies should protect themselves against the risks presented by crises in the future

We spoke to our experts

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Disputes & Investigations

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Technology, Media & Communications

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Employment, Pensions & Mobility

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In recent years, the probability of various crises has increased continuously. In the past, these crises were caused, among other things, by extreme weather conditions, trade conflicts or speculative bubbles in industrial sectors, which then spread to other sectors as a domino effect. We are now faced with a dangerous virus which has spread into a pandemic and massively affected the global economy.

This general global situation represents a continuous risk with unforeseeable influences on many business models and thus a continuous threat to the survival of countless companies. As we have extensively pointed out in the previous sections, the first reactions of numerous market participants have already taken place or are planned in the short term, e.g. in the form of an increasing worldwide trend towards de-globalisation with increased centralisation of trade and supply chains, as well as a generally increased need for security on the part of companies in the form of dual structures and increased monitoring. The question inevitably arises as to what companies can do in concrete terms to be best-prepared for possible future, foreseeable and unforeseeable crises and to build up sustainable crisis resilience.

A first point of reference is a systematic examination of the respective business model. Decision makers should ask themselves the following questions:

- **Contracts:** which liability risks are present in already existing contracts? How can these be optimised for the future (force majeure)?
- **M&A:** how can contracts be made crisis-resistant in corporate transactions?
- **Supply chains:** how do I make my global supply chain crisis-proof?
- **Risk Management:** what is effective supply chain management?
- **Foreign trade law:** what special features need to be considered with regard to crises in international trade?
- **Personnel deployment:** how do I maintain flexibility in personnel deployment in order to optimally support my newly established trade and supply chains and to be able to react quickly to changing external conditions?
- **Digitalisation and monitoring:** can I digitalise crisis-prone processes in my company whilst taking data protection into account? Is digitalisation sufficiently flanked by cyber security measures?
- **Financing:** how do I secure liquidity and stabilize payment flows for my business?

Optimisation of these and other elements, with targeted consideration of the desired maximum economic efficiency on the one hand and increased security on the other, will allow companies to emerge from this crisis stronger and to look to the future with optimism. We would be pleased to systematically examine your legal challenges in the area of crisis-resilience, working with you to develop individual, tailor-made solutions to make your company resistant to future crises.

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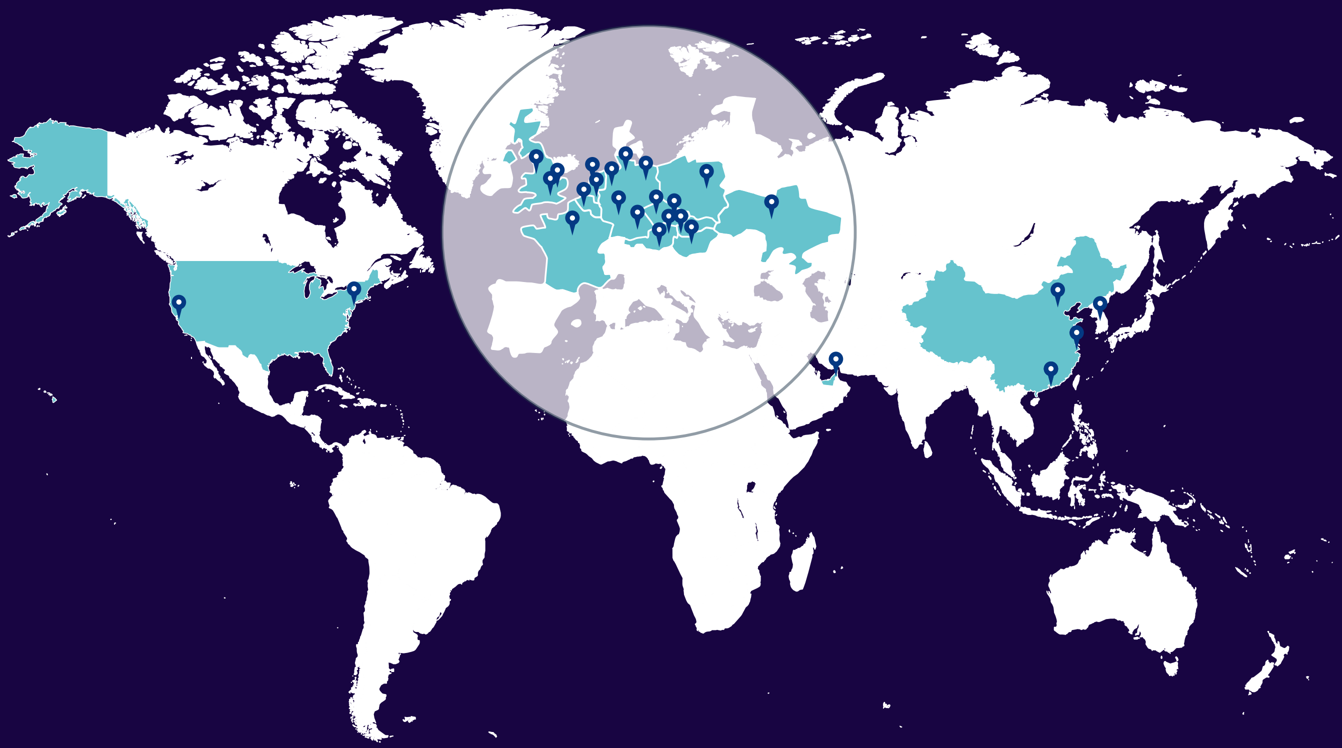

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