

# MuMAC

Munich M&A Conference

## MuMAC Highlights

### 2014 CROSS-BORDER M&A CONFERENCE

M&A, Private Equity and Family Office Direct Investment



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# MuMAC 2014

Dear Clients and Friends,

On 24 September 2014, McDermott Will & Emery proudly hosted the 4th Munich M&A Conference (MuMAC). This year's agenda focused on M&A, private equity and family office direct investment.

We would like to extend special thanks to our co-sponsors, Alvarez & Marsal and Ernst & Young, and our conference partners Bankhaus Lampe, Lincoln International, Mummert & Company Corporate Finance, mayerhöfer & co Corporate Finance and CAPEO Corporate Finance. Through their substantial support and participation, MuMAC 2014 was the most successful to date.

A total of 250 participants from operating companies, financial investors, family offices and service providers made MuMAC 2014 a unique, insightful event that proved both productive and rewarding and provided excellent networking opportunities. We would also like to thank all our clients who joined us, either on the discussion panels or in the audience, and shared their experiences with us. Thank you very much for participating.

The conference kicked off with Chief Economist Dr Alexander Krüger of Bankhaus Lampe taking the audience on a rousing, although not consistently optimistic, tour of the current global macroeconomic situation.

Dr Krüger was followed by a panel of three investment bankers and two representatives from private equity. William F. Detwiler of Three Ocean Partners LLC, Dr Michael Drill of Lincoln International AG, Melville D. Mummert of Mummert & Company Corporate Finance GmbH, Wolfgang Pietzsch of ARDIAN Germany GmbH and Oskar Schilcher of Equistone LLP shared their views and experiences of the current M&A market.

They yielded the floor to the debt financing panel, chaired by Britta Becker of Ernst & Young and featuring Björn Hofmann of IKB Deutsche Industriebank AG, Natalia Nowak of ESO Capital Group, Burkhard von Wangenheim of AFINUM Management and Andrea Weinand of BayernLB. The panel discussed the current debt financing market.

Family office direct investment as the second focus topic of this year's conference was introduced by a group of representatives from well-known direct investing family offices. Philipp Haindl of Serafin Group, Dr Kai Kunze of Peter Möhrle Holding, John P. Rompon of McNally Capital, Dr Hanjörg Schnabel of Equita Management and Hinrich Stahl of Maryland outlined the current family office landscape in German speaking countries.

The afternoon consisted of a choice of concurrent sessions. The first pair of sessions offered a choice between health/life sciences and private equity, or industrials and private equity. Christian Bartling of Gerresheimer AG, Dr Arthur Brothag of APAX Partners, Dr Jan Hille of Siemens, Dr

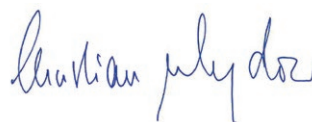
Niels Krüger of Synevo, Marko Maschek of PINOVA Capital and Jan-Daniel Neumann of Brockhaus Private Equity discussed health/life sciences and private equity. A panel consisting of Dr Mathias Gärtner of Honeywell, Dirk Liedtke of Mummert & Company, Joakim Lundvall of Nordic Capital, Dr Oliver Maier of Speyside Equity and Ulrich Passow of MTU discussed recent trends in their markets during the industrials and private equity session.

In the second set of parallel sessions, Dr Johannes von Bismarck of Stella Capital Advisors, Dr Nelson Holzner of BillPay, Stefan Lacher of Alvarez & Marsal, David Lisewski of GIC, Holm Münstermann of Axel Springer and Fabian Wasmus of EQT Partners debated the role of private equity in the technology, media and telecommunications (TMT) sector, while Florian Huber of Ernst & Young, Stephan Kühne of Intersnack Group, Guido May of Silverfleet Capital, Felix Regehr of CAPEO GmbH and Florian Schnau of PARAGON Partners examined the role of private equity in the food and retail sector.

In the final pair of panel discussions, Dr Stephan Geserich from the Federal Fiscal Court and Christian Röhrich from the Munich Tax Office discussed the latest tax legal developments in management participation programmes with Felix Rose of MPTransaction, and Dr Carsten Böhm and Dr Kian Tauser of McDermott Will & Emery. The other session in this pair focused on innovation in the M&A process. Dr Bertolt-Dietrich Gärtner of TÜV-Süd, Fabian Hoppe of Alvarez & Marsal, Dr Emilio Matthaei of Leverton and Jan Mayerhöfer of mayerhöfer & co shared their views on recent innovations and developments affecting M&A transactions.

MuMAC will return in 2015. Please note the date: **Tuesday 22 September 2015** at 09.00 am in the Hotel Bayerischer Hof.

We look forward to seeing you many times before then. If we can be of any assistance on any matter worldwide, please do not hesitate to call.



Christian von Sydow  
Conference Co-Chair



Dr Nikolaus von Jacobs  
Conference Co-Chair





Summary by  
**Dr Alexander Krüger,**  
Bankhaus Lampe

## Caught in The Debt Crisis: Are We Moving Towards a Uniform Yield?

The confidence felt in the financial markets since European Central Bank (ECB) President Mario Draghi promised to “do whatever it takes” in July 2012 suffered a severe setback in 2014. Within the Eurozone, although gross domestic product (GDP) is growing in Germany, it has barely grown anywhere else, with Italy and France causing particular concern. In the sixth year since the crisis, GDP in the Eurozone is still 2.4 per cent below the cyclical high-point reached in 2008. This highlights the fact that the European economies are unable to emerge from the banking, economic and sovereign debt crises if they only have the protection of the ECB. The situation is further exacerbated by the rate of inflation falling sharply. Combined, these two issues mean the debt sustainability of the Eurozone Member States will continue to face serious challenges.

June 2014 saw the usual response to low nominal growth rates. To stimulate credit demand, the ECB implemented further liquidity measures, and recently put into place a broad-based securities purchase programme intended to ward off deflationary risks. According to President Draghi, there is up to €1 trillion of fresh aid in the pipeline.

The ECB is choosing a risky path with its monetary policies. It is understandable that, having been handed a series of crises by national governments, it is using all the measures available to it to counteract weak growth, deflationary risks and impending sovereign defaults, and to eliminate systemic risks. Despite the ECB’s best efforts, however, its success has been negligible. Against a backdrop of financial depression, the growth in debt has been merely slowed, not halted. Moreover, the ECB has, for several years now, been easing the pressure on governments to push through reforms; it is therefore itself blocking the adjustment process necessary to improve various countries’ competitiveness. President Draghi recently called for growth-friendly fiscal policies but, in view of exploding sovereign debt, this is likely to prove a Herculean task.

The panel expressed concern that future monetary policies are likely to cause more problems than they solve. The reason can be found in increasingly indispensable artificial stimulus by the ECB. Expansionist monetary policymaking can at best provide only a short-term boost in what is a zero interest rate environment.

The panel agreed that this attempt to ignite lending, “whatever it costs”, exacerbates the negative long-term effects.

This is because, although new loans will maintain (and create) sectors and jobs, the ongoing existence of those sectors and jobs then depends on the continuation of the low rate environment, or an environment of even lower rates. For this reason, the Bank for International Settlements warned in mid-2014 of zombie banks being artificially kept alive.

When the liquidity tap is shut off, either because interest rates can no longer fall any further, liquidity injections can no longer be increased or because governments intended to normalise monetary policies, certain sectors become unprofitable. Poorly allocated loans then lead to insolvencies and dismissals, followed by banking crises, culminating in a severe recession. Against this backdrop, it is thus likely to prove a fatal error to believe that the growth crisis can be overcome in the wake of the new ECB normality of zero interest rates and bloated balance sheets.

The panel agreed that lending in the Eurozone will probably not pick up organically because the economic and sales prospects are extremely poor and the private sector will continue to pay off debt. In addition, the banking regulator is taking action to ensure that banks retain their aversion to risk because many still have unhealthy balance sheets. Monetary policies cannot cure the problem of structurally weak growth. There will only be a “cleansing” when the ECB stops treating the symptoms of the crisis with demand-side stimuli and accepts a temporary phase of economic weakness.

Another problem is that the ability of the economy to absorb external shocks is low. If any were to occur, the ECB would probably respond by providing fresh liquidity. In any case, the panel anticipated that the ECB will also buy up government bonds in 2015. At present, it therefore appears as though the current phase of weak GDP growth and more intensive deflation is set to continue, and very low 10Y European Economic and Monetary Union government bond yields will still be with us for some time to come.





## The M&A and Private Equity Market 2014

Dr Michael Drill, CEO Germany and Managing Director of Lincoln International AG; William F. Detwiler, Partner of Three Ocean Partners LLC; Melville D. Mummert, Managing Partner of Mummert & Company Corporate Finance GmbH; Wolfgang Pietzsch, Managing Director of ARDIAN Germany GmbH; and Oskar Schilcher, Partner of Equistone LLP discussed the M&A and private equity market in 2014 with panel heads Dr Nikolaus von Jacobs and Mark Davis of McDermott Will & Emery.

The panel reviewed the current market and found that, generally, a lot of money is chasing a limited number of opportunities. There are a lot of financial sponsors able to finance nearly any transaction, owing to the monetary policies of the central banks. Funds also have deep pockets as a result of the swing in the market, which has made recent fund raisings successful. The same applies to strategic players, which have profited from the generally positive economic climate and open debt capital markets. This has led to a very active, but not crowded, market place, despite there being more strategic players operating in the market than in recent years, in particular from the United States.

The monetary policies have led to high purchase prices, as money flooding the market finds its way into the capital markets, inflating stock prices that are reflected in high prices in private transactions. Financing banks are keen to take their piece of the pie and are once again prepared to provide leverage loans at considerable debt multiples and on “covenant-lite” terms. Buyers are more careful, however, having learned their lesson in the financial crisis: they remember that price levels can drop quickly, which calls into question an investment that, operationally, is a success.

Given the competitive landscape, where do financial sponsors find the right assets to add value? The German *Mittelstand* remains somewhat conservative as regards private equity, but

the panel noted that enterprises where family owners have put management in place are possibly on the lookout for financial sponsors who would enable management to acquire the company. This sector of the *Mittelstand* might therefore serve as a new entry point for financial sponsors.

In terms of size, there have been quite a few large transactions in the German market recently, but the mid-market remains most active. The panel agreed there has not been a significant move to the public markets. On the acquisition side, there are still the challenges of German corporate law affecting the successful takeover of listed companies. On the sale side, German equity capital markets continue to attract less attention than private markets, although sellers continue to pretend they run dual track processes.

One notable trend pointed out by the panel is that larger funds are chasing smaller deals because of the scarcity of transactions in their areas of principal focus. Their attitude is that it is better to invest in smaller targets deploying relatively more resources than not invest at all. For this reason, more US and UK funds are now seeking opportunities in Germany; they see there is too much competition at home and the German economy has good prospects.

Increasingly, funds claim to be more flexible and less focused on majority stakes but are also prepared to acquire minority positions, although the panel conceded this tends not to happen very often. One exception is a phenomenon appearing in the media sector, which might be called “corporate private equity”: strategic players are teaming up with private equity funds in order to explore business opportunities in the online field. Another form of cooperation raised by the panel is co-investment—or at least co-bid—structures between financial sponsors and strategic players. These tend to be seen in auctions initiated by conglomerates selling parts of their groups.



From left to right: Dr Nikolaus von Jacobs, McDermott Will & Emery; Wolfgang Pietzsch, ARDIAN Germany GmbH; William F. Detwiler, Three Ocean Partners LLC; Dr Michael Drill, Lincoln International AG; Melville D. Mummert, Mummert & Company Corporate Finance GmbH; Oskar Schilcher, Equistone LLP; Mark Davis, McDermott Will & Emery



Summary by  
**Britta Becker,**  
Ernst & Young GmbH WPG

## Debt Financing

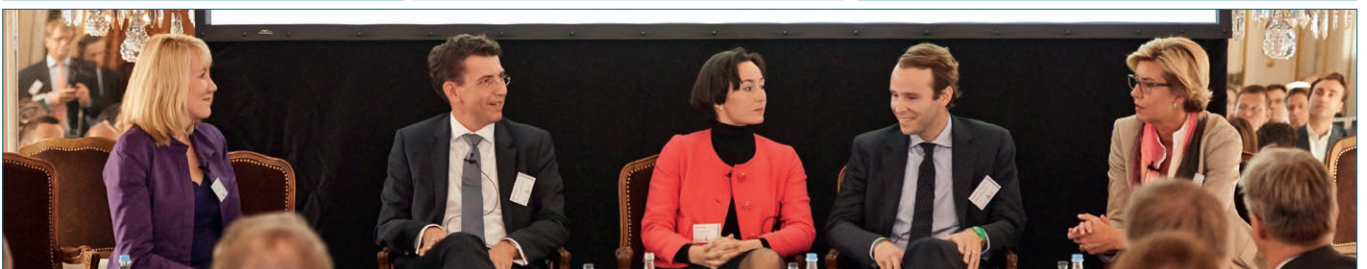
Natalie Nowak (ESO Capital), Andrea Weinand (Bayern LB), Björn Hofmann (IKB) and Burkhard von Wangenheim (AFINUM) discussed with the panel leader, Britta Becker (Ernst & Young, Capital & Debt Advisory), the current trends in the credit and capital markets.

Ms Becker launched the panel discussion with an overview of the recovery of the financial markets since 2012. This recovery is, inter alia, based on high competition for assets, the refocusing of domestic banks on corporate and leverage financing and the renewed investments by international banks in Germany. This competition has led to favourable margins, higher leverage multiples and more generous terms and conditions. Andrea Weinand added that debt funds have also recently entered the market.

This general improvement in financing has triggered higher sales multiples that will result in higher financing needs and

leverage levels, although there is some fear that this dynamic might overheat the market. Björn Hofmann stressed that favourable terms and conditions in leverage financing depend heavily on the industry and the sponsor. Natalia Nowak and Burkhard von Wangenheim introduced a discussion on alternative fundings, such as junior, unitranche or mezzanine financing, which could be added to classic senior financing, for example, as a substitute to equity, with longer terms and more flexible structures. Both Mr Hofmann and Ms Nowak admitted, however, that given the very bullish senior market investment, opportunities or needs for such financing alternatives are currently rare.

All participants concluded that the next 10 to 12 months will reveal whether or not the market will continue to be financed at high levels of leverage, which might lead to a new financial crisis. The fear is that this means the next crisis might be just around the corner.



From left to right: Britta Becker, Ernst & Young GmbH WPG; Björn Hofmann, IKB Deutsche Industriebank AG; Natalia Nowak, ESO Capital Group; Burkhard von Wangenheim, AFINUM Management GmbH; Andrea Weinand, Bayern LB.



## Family Office Direct Investment

From July to September 2014, McDermott Will & Emery conducted a survey on family office direct investment in German speaking countries. The results of this survey were published on 24 September during MuMAC 2014. The survey revealed that

- Direct investment plays a significant role for 60 per cent of the respondents.
- A large number of family offices act without a governance structure.
- Of the responding family offices, 91 per cent plan to invest in the next 24 months.

The biggest challenges reported by family offices are deal sourcing and a lack of time. Of the family offices that responded, 50 per cent invest between 25 and 50 per cent of their funds and real estate. The complete results of the survey can be obtained at [www.mwe.com/2014-cross-border-ma-conference-09-24-2014/](http://www.mwe.com/2014-cross-border-ma-conference-09-24-2014/).

The panellists on the family office panel, Dr Hansjörg Schnabel of Equita Management, Dr Kai Kunze of Peter Möhrle, Hinrich Stahl of Maryland, John P. Rompon of McNally Capital and Philipp Haindl of Serafin gave insights into the material issues they faced when they started family office investments. They detailed their experiences of the interplay between direct investments and investments in other asset classes. The panel also explained why some family offices choose to act as a fund and others as a holding company.

Other topics covered by the panel included

- The way strategies develop over time.
- The degree to which family members exert influence; in many cases substantially so.
- What differentiates family offices from private equity funds: a longer investment horizon and oftentimes less leverage.
- Whether or not family offices pay better prices: perhaps, but not often, certainly not as a rule.

The panellists agreed that, although family offices tend to team up with other families to make direct investments, this phenomenon is not common.



*From top left to bottom right: Dr Hansjörg Schnabel, Equita Management GmbH; John P. Rompon, McNally Capital LLP; Dr Kai Kunze, Peter Möhrle Holding; Hinrich Stahl, Maryland GmbH; Philipp Haindl, Serafin Group; Christian von Sydow, McDermott Will & Emery.*





Summary by  
**Dr Stephan Rau,**  
McDermott Will & Emery

## Health/Life Sciences and Private Equity

In most countries, the share of GDP allocated to expenditure on health care services, pharmaceutical products and medical devices has grown over the last 10 years. In 2009, the year of the worst recession the world had seen for decades, the share of GDP allocated to health expenses grew significantly and absolute amounts spent on health care services and products remained stable or even rose. Publicly announced efforts by governments to reverse this trend have, at best, only slowed it.

In view of increasing life expectancies and public pressure for better health services and products, governments do not seem to be able to cut overall health expenditures and, in most cases even their alleged willingness to do so is questionable. Despite the overall positive perspective of the health industry, there are also some risks for investment in the health sector. Health reimbursement regulation regularly entails significant, sudden cuts that might severely affect certain sectors of the health industry. In addition, complicated licensing procedures, for both market access and reimbursements (the “fourth hurdle”), create market entry barriers that may detract potential investors but that might likewise make investments in local incumbents particularly interesting.

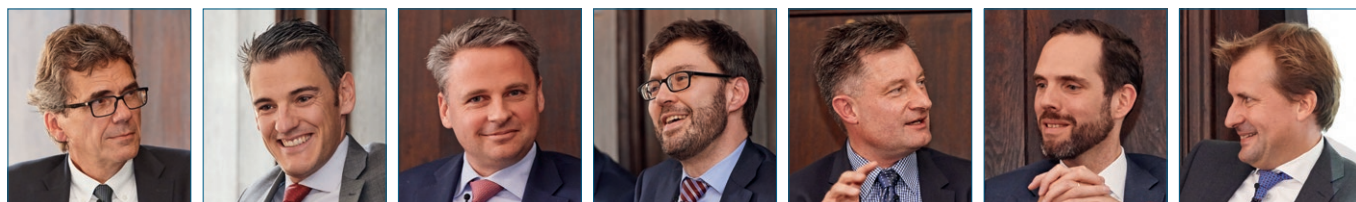
Against that background, a panel consisting of representatives from private equity funds (APAX Partners, Brockhaus Private Equity, PINOVA Capital), Gerresheimer, Siemens and family office-owned Medcover/Synevo Group discussed the particular benefits and challenges of the health and life sciences markets; the role of regulation and reimbursement in Europe, the United States and emerging markets; and the role of private equity in these markets.

The challenges discussed by the panel included, is private equity important for streamlining a company for future success into a clear and efficient structure with clear reporting lines and strategic goals? Or does a family office investor offer a longer-term prospect, for example for doctors who want to sell minority shares in their clinic where they plan to continue to work for another 20 years?

Gerresheimer’s production and sale of US Federal Drug Agency-licensed pharmaceuticals, injections and other medical products has a wider geographical spread than that of most international health service providers. The panel questioned why there are hardly any genuinely global health service providers. One answer suggested was the complexity of different reimbursement systems worldwide which may provide too large a challenge. Yet, regulation of reimbursement of pharmaceutical and medical devices also differ worldwide. Some panellists noted that some doctors are reluctant to work with organisations they consider too large and too international. Others suggested that private equity has yet to develop these industries into global powerhouses.

Niels Krüger of Medcover gave one reason why there are so few global businesses in this sector, with a recent example of having to deal with an unforeseen international challenge: Medcover had developed a widespread East European presence that, for many reasons, deliberately excluded Russia. Recent developments the Ukraine have, however, resulted in them now having operations in Russia, whether they want them or not.

*From left to right: Christian Bartling, Gerresheimer AG; Dr Arthur Brothag, APAX Partners; Dr Jan Hille, Siemens AG; Dr Niels Krüger, Synevo Group; Marko Maschek, PINOVA Capital; Jan-Daniel Neumann, Brockhaus Private Equity GmbH; Dr Stephan Rau, McDermott Will & Emery*





## Industry and Private Equity

Dirk Liedtke, Managing Partner of Mummert & Company Corporate Finance; Joakim Lundvall, Principal of Nordic Capital; Dr Mathias Gärtner, General Counsel for Europe, the Middle East and Africa at Honeywell; Ulrich Passow, General Counsel of MTU Aero Engines; Dr Oliver Maier, Partner of Speyside Equity; and panel head Dr Nikolaus von Jacobs, Partner at McDermott Will & Emery discussed industry and private equity.

The panel explored the drivers for the increased activity of strategic players in the M&A markets. There has recently been a lot of confidence in the market, despite the overall economic climate. This, together with the access of strategic players to the debt capital markets, has led to increased M&A activity. Europe, particularly Germany, sees a lot of this interest, owing to decreasing interest in the emerging markets or a fear of political and economic instability in Eastern Europe. US strategic players are further driven by the US tax rules for non-domestic profits and tax inversion, which encourage them to invest, rather than repatriate returns, and also grant them a possible exemption from US taxation if they undertake M&A transactions.



*From top left to bottom right: Dirk Liedtke, Mummert & Company Corporate Finance GmbH; Joakim Lundvall, Nordic Capital; Dr Mathias Gärtner, Honeywell ECC and S&C; Ulrich Passow, MTU Aero Engines AG; Dr Oliver Maier, Speyside Equity; Dr Nikolaus von Jacobs, McDermott Will & Emery.*

Private equity funds can still find assets to create value in the industrials sector: carve-outs from larger conglomerates, undermanaged businesses and “special situations”, remain a core source of deal originators for funds. The panel agreed that competition has driven funds to increasingly put their energy into bolt-on activities in order to build the businesses they have acquired. The market is now less about quick flips and more about creating new value.

The panel discussed how the current market impacts on the sales process. The post-crisis era prioritised transaction security and speed, while the current market conditions more strongly favour the highest value bid, thus allowing more bidders to enter an auction process and placing less emphasis on pace. This provides more opportunities for strategic buyers who sometimes need more time because of their internal structure. Although there are features of the market that do not meet the auction norm, such as dysfunctional auctions (differing levels of information access and an uneven playing field), discretionary transactions (losing bidders suddenly realise they were not the only ones being granted exclusivity) and broken pickups (bidders reach the line after a process has aborted), the panellists claimed this has always been, and will always be the case, irrespective of overall market conditions.

The panel highlighted two technical factors that might be noteworthy in the current market. One is the emergence of representation and warranty/indemnity insurances in M&A processes, which can enhance transactions. For example, a seller can simply insure its risk, a stapled insurance could make an asset more attractive, insurance can reassure the bidder with the purpose of making a bid more attractive or warranties can build a bridge where the parties are deadlocked.

Some panellists had experience of some of these examples, and had differing views on whether or not this is a trend that will last.

The other noteworthy technical factor was whether or not the increasing involvement of US bidders would lead to more convergence of the German and US styles of purchase agreement terms. Where the German market standard is fairly seller-friendly (generally granting transaction security from signing), the US style favours conditions being placed on the transaction between signing and closing, e.g., material adverse change, bring-down concepts and confirmatory due diligence, which are matched by break fee concepts. The panel took the view that a seller that finds a US bidder attractive will be prepared to accept that bidder’s home market style. The panel agreed, however, that there was a question mark over whether or not such flexibility would have a lasting effect on typical German deal terms.



Summary by  
**Dr Ralf Weisser,**  
McDermott Will & Emery

## Telecommunication, Media & Technology and Private Equity

The transformation of the media industries from analog to digital is continuing at breath-taking pace. The music industry is almost fully digitalised and shifting again, from downloading to streaming and television and the film industry are catching up quickly. Only book, newspaper and magazine publishers still run a sizeable proportion of their businesses within the parameters of the “old” analog and print world. These industries are now under massive pressure from the champions of the digital world, such as Amazon and Google, who are forcing the sector to think laterally. At the same time, the telecommunications sector has been forced to consolidate in order to achieve the scale and finance necessary to make investments in broadband infrastructure, as demonstrated by this year’s purchase by Vodafone of Kabel Deutschland’s cable TV network.

The participants of the telecommunications, media and technology (TMT) and private equity panel discussed the role of strategic and financial investors in digital transformation and the consolidation of the major TMT players. Dr Johannes von Bismarck, Partner of Stella Capital Advisors; David Lisewski, Vice President of GIC, which is the Government of Singapore Investment Corporation; and Fabian Wasmus, Director of EQT Partners, shared the views held by the private equity players. The TMT markets were represented by Dr Nelson Holzner, CEO and Founder of BillPay GmbH; Holm Münstermann, General Manager of New Media Business

at Axel Springer SE; and Stefan Lacher, Senior Director of Alvarez & Marsal Deutschland GmbH. Dr Ralf Weisser of McDermott Will & Emery led the panel.

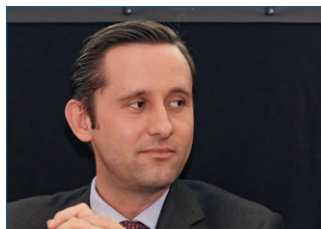
The panellists all agreed that the proper strategy for an effective transition to digital by the different media companies is sensible evolution of their business models, rather than a radical and revolutionary change. The major challenge facing all players consists of upholding the existing revenue streams while investing the necessary funds into new digital businesses.

The panellists also agreed that deriving revenues from subscription fees remains a priority for media companies. Learning more about the customers was seen as an important key to generating advertising revenues and could be achieved by employing “big data” solutions. Data protection regulation must, of course, be kept in mind and carefully observed.

It was generally agreed that Netflix, which opened for business in Germany with great fanfare at the same time as MuMAC 2014, would not cause significant disruption to the established TV broadcasters. The shift of advertising budgets towards the online giants such as Google, Amazon, Apple and Facebook is, however, seen as a real threat to the independent media business model prevalent in Germany.

A lively discussion revolved around the question of the potential benefits for private equity investors in teaming with strategic investors to drive the transformation and consolidation of the TMT sector. The representatives from private equity were comfortable with joining forces with the strategic investors and, in many scenarios, saw the latter’s insights and contributions as indispensable when engaging in a transaction.

This favourable view was shared by the strategic investors, mainly Holm Münstermann, General Manager of New Media Business at Axel Springer SE, with the caveat that they would want to lead any strategic decisions taken by a jointly-owned entity. As a prime example in Germany, it was noted that even a successful digital player like Axel Springer is seriously considering enlisting the financial firepower of private equity investors when contemplating M&A deals in the TMT industries.



*From top left to bottom right: Dr Johannes von Bismarck, Stella Capital Advisors LLP; Dr Nelson Holzner, BillPay GmbH; Stefan Lacher, Alvarez & Marsal Deutschland GmbH; David Lisewski, GIC; Holm Münstermann, Axel Springer SE; Fabian Wasmus, EQT Partners GmbH; Dr Ralf Weisser, McDermott Will & Emery*



## Food, Retail and Private Equity

During our food, retail and private equity panel discussion it became obvious that these sectors continued to be extremely dynamic in 2014.

Florian Huber of Ernst & Young gave the audience valuable insights into a consolidating market environment where large players are trying to gain even bigger market shares. Despite various obstacles to investing in food and retail companies, private equity funds are still very much interested in acquiring top brand businesses around the globe, and food and retail targets are gaining increased interest from family office investors.

Guido May of Silverfleet Capital explained the ramifications of such investments and Stephan Kühne of Intersnack Group put things in perspective by looking at transactions that his company successfully completed in 2013 and 2014, such as the acquisitions of KP Snacks and Estrella Maarud. The panel openly discussed the potential differences between doing deals with private equity investors and family office/industrial businesses. Whereas private equity investors may look for increased value over a medium period of time, family office/industrial businesses tend to prefer to offer a “final home” to potential targets.

Florian Schnau of PARAGON PARTNERS described the importance of a shared vision held by the buyer and the target. The alignment of the management of the target and the importance of the “customer journey” was discussed at length. Based on this, Felix Regehr of CAPEO and other panel members underlined the importance of a well-designed post-merger integration (PMI) process. The panellists agreed that PMI should start right at the beginning of a typical M&A investment.

Finally, the panel noted that the acquiring entity should learn from and, if necessary, establish best practices at the target company. Stephan Kühne of family-owned Intersnack Group described how this has worked out very well in various M&A transactions Intersnack has undertaken.



*From top left to bottom right: Florian Huber, Ernst & Young GmbH WPG; Stephan Kühne, Intersnack Group GmbH & Co. KG; Guido May, Silverfleet Capital GmbH; Felix Regehr, CAPEO GmbH; Florian Schnau, PARAGON PARTNERS GmbH; Dr Norbert Schulte, McDermott Will & Emery.*





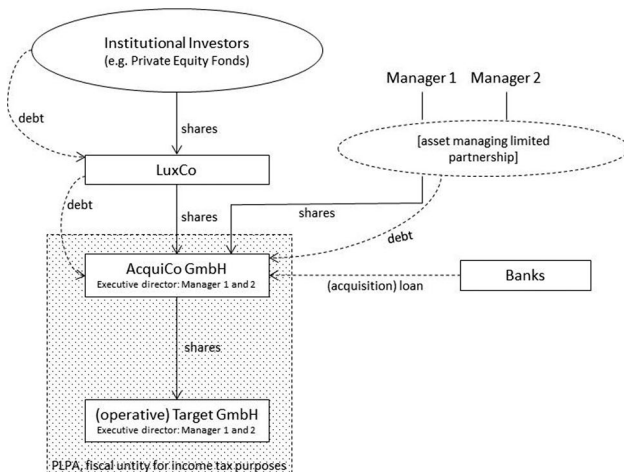
Summary by  
**Dr Carsten Böhm**  
and **Dr Kian Tauser**,  
McDermott Will & Emery

## Management Participation Programmes

It is essential for investors that the senior management of its portfolio entities are sufficiently incentivised to ensure they are driven to increase shareholder value. Management participation programmes (MPPs) are key to achieving these goals.

Recent tax court decisions have led to uncertainty as to whether or not certain standard elements of MPPs mean the return from MPPs is to be taxed as income from employment rather than on the basis of a flat tax on capital income (Abgeltungssteuer) as intended.

The panel discussion was based on the standard MPP structure as shown below and came to the following conclusions.



### Managers May Realise Capital Income From MPPs

The panellists agreed that MPPs acquired at fair market value may qualify as an income source separate from the manager's employment income. On this basis, returns on MPPs may be subject to only a 25 per cent flat income tax, plus a 5.5 per cent solidarity surcharge.

In line with this, in a judgment dated 21 May 2014 (I R 42/12), the German Federal Fiscal Court (the *Bundesfinanzhof*, or *BFH*) recently recognised a manager's return from an MPP as capital income.

### Transfer Restrictions Not Generally Harmful

The BFH held in 2011 that restrictions of the free transferability of shares may hinder a manager to actually have ownership for income tax purposes in such shares (judgment of 30 June 2011, VI R 37/09). Since almost all MPPs place share transfer restrictions on the managers, the BFH decision led to huge uncertainty and numerous legal publications.

The panel clarified that the BFH judgment was largely misunderstood, as the question in the case relating to the judgment was whether or not the manager effectively acquired the shares that were subject to transfer restrictions; in other words, whether or not all the conditions of the acquisition of the shares by the manager were fulfilled. The panel confirmed that shares held by a manager that are subject to transfer restrictions definitely also lead to ownership in the shares for income tax purposes.

### Leaver Clauses Not Generally Harmful

The BFH held in 2013 that income from a buy-back of profit participations rights (PPRs) that a manager could only sell back to the employer at a price depending on whether or not the employment has been terminated, qualifies as income from employment (judgment of 5 November 2013 (VIII R 20/11)).

The facts of the BFH judgment were rather particular because the manager had no option other than to transfer the PPRs to the employer and the PPRs were automatically terminated a certain time after the end of the employment relationship.

The panel agreed that this BFH judgment does not necessarily lead to the conclusion that MPPs could no longer contain any leaver clauses in order to qualify managers' returns from them as capital income.

The panel did, however, note that it is vital to carefully tailor MPP documentation, especially with a view to leaver clauses, for income to qualify as capital income.

### Tax Office Willing To Give Guidance

Whether or not an MPP triggers wage taxes, for which an employer may be held liable, may be clarified in a binding tax ruling (Lohnsteueranrufungsauskunft) obtained from the employer's local tax office. This binding tax ruling procedure does not trigger administrative fees and it should be noted that it does not formally bind the manager's local tax office.

Although it frequently handles wage tax issues related to employee incentives, the Munich tax office is currently working on its first specifically MPP-related binding tax ruling for wage tax purposes.



From left to right: Dr Stephan Geserich, Federal Fiscal Court (Bundesfinanzhof); Christian Röhrich, Munich Tax Office; Felix Rose, MPTTransaction GmbH; Dr Carsten Böhm, McDermott Will & Emery; Dr Kian Tauser, McDermott Will & Emery.



## Innovation in the M&A Process

The M&A process as we know it today has not been radically altered for over 30 years. That may be about to change.

Dr Bertolt-Dietrich Gärtner, Division CFO of TÜV SÜD Industrie Service; Fabian Hoppe, Managing Director at Alvarez & Marsal; Dr Emilio Matthaei, Managing Director of Leverton; and Jan Mayerhöfer, Managing Director of mayerhöfer & co Corporate Finance Beratung discussed with panel leader Andreas Kurtze of McDermott Will & Emery various elements of the M&A process that are seeing significant innovation.

### The Use of Media in the M&A Process

Jan Mayerhöfer explained that, even though certain forms of media have been available for quite some time, only now has thought been given to how they can be used effectively to improve the M&A process. For example, videos of the target company's production process or a management interview can be embedded in the information memorandum to better illustrate the target's appeal for all bidders, not just a few selected ones. This may improve the competitiveness of the auction and, ultimately, the sale price.

Sellers may achieve greater control of the process by providing information memoranda only on online platforms. This enables them to monitor bidder activity and might give them insight into who are the most interested bidders. Sellers should also be mindful of the much higher level of publicly-available information on a target company that potential bidders can, and will, access via search engines. Sellers should therefore factor search engine results into their communication and marketing strategy.

### Technical Due Diligence

Dr Bertolt Gärtner shared the latest trends and developments in the field of technical due diligence. Technical due diligence is seeing a surge in popularity and can provide substantial added value if it is aligned and interwoven with financial

due diligence. For example, in several recent auctions of targets with significant capex requirements, sellers were able to streamline the process by conducting technical vendor due diligence and making the results available to bidders.

### Data Security

Data security is becoming an ever greater concern in M&A transactions as elsewhere. Fabian Hoppe explained the three basic steps that bidders should take during due diligence to assess whether or not the target company has established adequate protection against data leaks or losses:

1. Evaluate the value of the company's data.
2. Identify which data need the most protection.
3. Based on the outcome of the second step, conduct an analysis of the specific measures the target has in place against the loss of such critical data.

### Data Rooms and Data Mining

Technical evolution in the M&A process is probably nowhere as visible as in the use of electronic data rooms and data mining software. Dr Emilio Matthaei gave a very insightful description of the state of the art and explained how software can be used to analyse complex data more efficiently.

For example, software can now convert scanned or pdf copies of documents into machine-readable text to extract certain relevant contract metadata. The extracted data can be used in an automated comparison with existing databases or other benchmarks. While such features are still limited to certain areas, e.g., rental agreements and data, it is only a matter of time before software-aided due diligence becomes the norm, rather than the exception.

Overall, the discussion revealed that innovation has clearly reached the M&A process; finally, as some might be inclined to say.



*From left to right: Dr Bertolt-Dietrich Gärtner, TÜV SÜD Industrie Service GmbH; Fabian Hoppe, Alvarez & Marsal Deutschland GmbH; Dr Emilio Matthaei, Leverton GmbH; Jan Mayerhöfer, mayerhöfer & co Corporate Finance Beratung GmbH; Andreas Kurtze, McDermott Will & Emery.*

Pictures













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