DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Dr. Sebastian Biedenkopf

& the Law Department of Bosch

THE SPEAKERS

Dr. Sebastian Biedenkopf
General Counsel,
Robert Bosch GmbH

Dr. Ellen Braun
Partner, Allen & Overy LLP

Jeremy Calsyn
Partner, Cleary Gottlieb Steen & Hamilton LLP

Dr. Matthias Karl
Partner, Gleiss Lutz

Dr. Wolfgang Spoerr
Partner, Hengeler Mueller

Ulrich Wolff
Partner, Linklaters LLP

(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our website, www.directorsroundtable.com.)

TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of the achievements of our distinguished Guest of Honor and his colleagues, we are presenting Dr. Sebastian Biedenkopf and the Legal Department of Robert Bosch GmbH with the leading global honor for General Counsel and Law Departments.

The Bosch Group is a leading global supplier of technology and services in four areas: mobility, industry, consumer goods, and energy/buildings. Dr. Biedenkopf's address focuses on key issues facing the General Counsel of an international technology and services corporation, including innovation in the legal landscape, in-house developments, and the legal market for external counsel.

The panelists' additional topics include governance, M&A, financing, competition, rule of law and regulatory issues.

The Directors Roundtable Institute is a charitable, not-for-profit group which organizes educational events for the benefit of the community and never offers goods and services or any charge to attend our programs. Join us on social media for the latest news for Directors on corporate governance and other important VIP issues.

Dr. Sebastian Biedenkopf

General Counsel

BOSCH

Invented for life

Dr. Sebastian Biedenkopf has been the General Counsel of Robert Bosch GmbH, Stuttgart, Germany, since 2013.

From 1991 – 1992, Dr. Biedenkopf has served as a consultant for Treuhandanstalt Berlin, department for the energy industry, an agency established by the government of the German Democratic Republic to reprivatize / privatize East German enterprises prior to the German reunification.

In 1994 – 1998, he worked as legal counsel in Düsseldorf and Washington, D.C., and from 1998 – 2001 worked at Bertelsmann AG, Gütersloh in the Group legal department, cartel and media law, and from 2001 – 2004 at Bertelsmann Inc., New York, as general counsel.

2005 – 2008 Maxingvest AG (formerly Tchibo Holding AG), Hamburg: general counsel and chief compliance officer and from 2008 – 2012, at Conergy AG, Hamburg, he served as head of finance on the executive board and interim Chief Executive Officer.

Since 2012, he has served as Managing Partner of Biedenkopf & Associates Strukturierungsberatung (guidance on structuring) GmbH, Hamburg, Germany.

Dr. Biedenkopf has also served as a member of various statutory supervisory boards in Germany:

- EUROKAI GmbH & Co. KGaA, Hamburg, deputy chairman of the supervisory board, Chairman of the Audit Committee
- EUROGATE Gesch.ftsführungs-GmbH & Co. KGaA, Bremen Bosch Sicherheitssysteme (Security Systems) GmbH, Grasbrunn
- Robert Bosch Automotive Steering GmbH, Schwäbisch Gmünd, Delton AG, Bad Homburg

Robert Bosch GmbH

In 1886, Robert Bosch founded the "Workshop for Precision Mechanics and Electrical Engineering" in Stuttgart. This was the birth of today's globally operating company. Right from the start, it was characterized by innovative strength and social commitment.

From 1897, Bosch started installing better-designed magneto ignition devices into automobiles and became the only supplier of a truly reliable ignition. In 1902, the chief engineer at Bosch unveiled an even better solution — the high-voltage magneto ignition system with spark plug. This product paved the way for Bosch to become a world-leading automotive supplier.

In 1898, he founded the first Bosch company outside Germany in London together with the Englishman Frederic Simms. This was the first step onto the global market. Further sales offices quickly followed in other European countries.

In his will, Robert Bosch left precise instructions on how he wanted the company to be run after his death. The will paved the way for today's corporate constitution, based on the founder's wishes that the company should secure its lasting entrepreneurial freedom, retain links to the Bosch family, and use its dividends to support charitable and social causes.

The fall of the Iron Curtain also heralded a new era for Bosch. By 1994, it had companies of its own in 13 countries of the former Eastern Bloc. Bosch went on to open manufacturing facilities in the Czech Republic, Poland, Hungary, and the Russian Federation. The share of sales generated outside Germany rose from 51 percent in 1990 to around 72 percent in 2000.

The ESP® electronic stability program launched in 1995 was a technological milestone. It prevents vehicles from skidding. The same year, Bosch unveiled its TravelPilot navigation system with route guidance and voice output. In 1997, the Common Rail high-pressure diesel injection system reduced fuel consumption, as did the DI Motronic gasoline direct injection in 2000, while driver assistance systems such as Adaptive Cruise Control and Night Vision improved safety.

The Internet of Things and Services opens up many new lines of business for Bosch. Besides traditional products, this also includes software, new internet-based business models, and data protection. The company has set itself the aim of combining these four fields in the long term. This covers everything from automated driving to smart homes and autonomous communication between factory machinery.

DR. ELLEN BRAUN: Good morning to everyone. A very warm welcome from me, from all partners at A&O, to this unusual, very interesting and very challenging, in some ways, and very inviting event this morning.

Karen Todd from the Directors Roundtable is our master of ceremonies this morning, and so I hand over to you.

KAREN TODD: Thank you! Good morning, and welcome. My name is Karen Todd, and I'm the Executive Director and Chief Operating Officer of Directors Roundtable. We're very pleased that you're here today.

I want to especially thank the people of Bosch, the outside law firms, the bar groups, the university law schools, local chambers and other organizations who made a point to be here today. We're also appreciative that Allen & Overy hosted the program this morning. They did a wonderful job, so let's acknowledge them. [APPLAUSE]

The Directors Roundtable is a civic group whose mission is to organize the finest programming on a national and global basis for Boards of Directors and their advisors, which, of course, include General Counsel. Over the last 27 years, this has resulted in more than 800 programs on six continents. Our chairman, Jack Friedman, started this series after speaking with corporate directors, who told him that it was rare for a large corporation to be validated for the good they do. He decided to provide a forum for executives and corporate counsel to talk about their companies, the accomplishments in which they take pride, and how they have overcome the obstacles of running a business in today's changing world. We honor General Counsel and their Law Departments – it's a team effort – so they may share their successful actions and strategies with the Directors Roundtable community via today's program, as well as the full-color transcript that we'll produce and make available to about 100,000 people worldwide.

Today, it's our pleasure to honor Dr. Sebastian Biedenkopf, General Counsel, and the Legal Department of Bosch, many of whom are here today. I want to thank you all for coming from Stuttgart. I also want to acknowledge them. [APPLAUSE]

I would now like to introduce our Distinguished Panelists: Dr. Ellen Braun, with Allen & Overy; Jeremy Calsyn, with Cleary Gottlieb Steen & Hamilton; Dr. Matthias Karl, with Gleiss Lutz; Dr. Wolfgang Spoerr, with Hengeler Mueller; and Ulrich Wolff, with Linklaters. I'll now turn it over to Sebastian for his presentation.

DR. SEBASTIAN BIEDENKOPF: Good morning, everybody. I came to meet with old and new friends and I'm very much looking forward to the presentations, the honor, and the discussion afterwards.

Thank you, Ellen, and thank you, Karen, for your all-too-kind introduction. In the name of the Bosch legal team, I would like to thank Allen & Overy for their generosity in organizing this event.

I'm talking to you today as a representative of the Bosch Legal Department, which is being awarded the leading global honor for General Counsel and Law Departments. According to the invitation it is being presented for the Legal Department's achievements. How could we possibly celebrate and have this wonderful reception without talking about the achievements of the Bosch Legal Department? That is my part, and I'm happy to do so. However, I do not only want to talk about the past, but also to look forward to the future and discuss the challenges facing the Legal Department which might come with it. This will be part two of my talk.

Let me start with the achievements. If you bear in mind that according to the company's archives, the Bosch Legal Department was established more than 80 years ago. The company is still around today, so

we owe most of the Legal Department's achievements to my predecessors. Having only joined Bosch five years ago, I cannot convincingly tell you about the successes before 2014, so let me focus on the last five years. I've never been on the same job for five years before, so you can see from that that I'm growing older.

When I joined the Bosch Group as their new General Counsel in September of 2013, my attention was immediately drawn to the ongoing worldwide cartel investigation into the car parts industry. Bosch, as the world's largest car parts manufacturer, was in troubled water. With an internal team which had just been formed a few months previously, and the help of some of the best external antitrust counsel you can find, we settled the investigation in the U.S. relatively quickly. Roughly four years later, we brought this project to an end earlier this year by settling the claims brought by the EU Competition Authority.

It is rather difficult to call a settlement a success where a company pays millions in fines but, in this case, I think it is fair to use this label. It is a great pleasure for me to have Jeremy Calsyn and Matthias Karl with us here today. Together with the Bosch legal team, they were able to negotiate the deals on the U.S. and the European side which brought the two main investigations to an end. Thanks again, Jeremy and Matthias.

In this context, I would also like to thank John Roberti, who is also here, whose support is crucial in handling the civil side of the matter still today.

Taking over full responsibility in a new environment from day one certainly involved a fair amount of stress for me, but I was fortunate to have a team of experts which, based on mutual trust, carried me through this adventure. I was also very lucky that Ellen Braun recognized the difficult situation I was in. In late 2013, she offered to support me not only as a true friend, but also as a coach. Thank you very much, Ellen!

Right at the beginning of my third year with Bosch, an even greater challenge emerged: the emissions crisis – or "dieselgate," as it was called yesterday. I don't want to talk about this once-in-a-lifetime project – and that refers to everybody who has to deal with it – but would like to take this opportunity to also thank the legal team working on it. When I talk about the team, I address my colleagues not only within the Bosch Legal Department, but I also include our colleagues from Hengeler and Cleary who have been supporting us tirelessly, not only for more than three years now, but also – so far – successfully.

It is a great pleasure for me to have Wolfgang Spoerr, Sven Schneider, and Bernd Wirbel here from Hengeler. Also, Matt Slater from Cleary, who came as a surprise visit today, who unremittingly supported us over the past few years.

As a corporate lawyer, working on the diesel crisis is not something I would call a reward. But nonetheless, I look forward to working with you all – Wolfgang, Sven, Bernd and Matt – and the rest of your teams on this project, where the outcome is of utmost importance to the company. Thank you very much!

I have briefly spoken about two major projects we have had to deal with since I began my tenure at Bosch, and which we are, in part, still working on. This is probably enough for an entire career – believe me. However, I should not forget to mention that while we were doing this heavy lifting, day-to-day work was still going on, and the increase in the workload caused by the two projects I mentioned also put a strain on the rest of the team. The motivation and the team spirit I experienced within the Bosch Legal Department are among the greatest experiences I've had during my entire career. That's enough, for now, with honoring the Legal Department.

I want to emphasize this, also considering the scant resources we had at the time. The year I joined Bosch, 2013, worldwide revenues stood at $46 billion; today, it's $80 billion. Worldwide, Bosch, at the same time, had more than 300,000 employees; today it's 420,000 – not all lawyers. [LAUGHTER]

In 2013, the Legal Department consisted of 108 lawyers and 30 support staff. You might think that this is quite a large team. I can tell you – in comparison to the areas of responsibility, the complexity of the business, and to our competitors – it was not. From day one, I was engaged in discussions about resources with the Bosch board. Most of you know how difficult it is for a corporate function, which is usually seen as a cost center, to ask for additional resources. When the emissions crisis emerged, the stress on the team reached a level where we decided to make a last-ditch attempt. We reinvented the Legal Department. Our first step was to work out the need for legal advice in each of the Bosch business units – and there are almost 1,000 of them, and we really got into details. Based on the total demand, we established the corresponding number of in-house counsel required. We multiplied this number by the usual cost rates and added the resources we felt to be reasonable for matters such as training,

IT systems, etc., and produced a budget amounting to approximately 190% of the budget at that time.

Of course, it seems completely insane to ask your management board to double the Legal Department's budget. On the other hand, fulfilling the responsibilities you have taken on with only half of the funding that has been established as necessary is also somewhat crazy. This was a dilemma, and I did not want to resolve it at the expense of the Legal Team and my chance to really fulfill my responsibility again. When we presented our new budget to the management board, we also offered an alternative solution of working with less funding if our range of duty was reduced accordingly. Then, however, the management board would have to take back responsibility for the issues that would not be covered by the Legal Department's work any more.

Despite the logic of this proposal, the enthusiasm it received was limited. [LAUGHTER] At the end of the day, our argumentation that the experts – in this case, the members of the Legal Team – should have a better idea of the resources required to perform the tasks assigned to it – must have been convincing enough. We got our budget. Although, admittedly, it was helpful that an external benchmark undertaken at the same time produced figures that were very similar to those of our bottom-up analysis.

Since September 2017, we have been implementing the business plan approved by the management, which is scheduled to take a good two years. We are currently at the halfway mark and well on target. Based on our argumentation to the board, I now have the responsibility for all legal issues well and truly (except, of course, for some clearly delimited exceptions, such as tax law). In order to do justice to this responsibility, I have allocated the tasks previously established in the bottom-up analysis to seven direct reports and packages that are as clearly defined as possible. For their part, these direct reports have the task to subdivide their responsibility and allocate it to their direct reports. When responsibility is delegated, this must go hand-in-hand with affording maximum autonomy. Resources are not an issue at the moment, as we established what was required together. This very clearly defined responsibility, combined with sufficient resources makes it much more difficult to dodge responsibility. This is, however, the cliché of employees working in corporate functions. Fortunately, it's just a cliché. After a little over one year, I have observed that the overwhelming majority of our colleagues are happy to assume responsibility and are extremely motivated by the explicitly defined tasks that have been allocated, and the corresponding autonomy. We can also detect an increase in creativity. Our colleagues are employing the leeway they have been given to implement their own ideas.

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>
> *– Sebastian Biedenkopf*

Alongside the additional resources, we naturally also took on the obligation to provide excellent service in the future. For this reason alone, the needs of our clients had to be absolutely paramount in the reorganization of the Legal Department. In a diversified group such as Bosch, it is only possible to satisfy these needs if the legal advisor – who is now called "counsel to the management" – is also visible and approachable for the client. Whereas up until now, the Legal Department in Germany has been largely focused on the major issues in Stuttgart, now it is going to the client. As a result, we are creating 16 new locations – eight in Germany, and eight in the rest of the world – to cover what we called "white spots."

Internally, we are subdivided into business teams, regional teams and expert teams. The business teams and the regional teams take on the role of the general practitioner or the "family doctor." They are located on the spot in the operative business, and we have spelled out, unambiguously, which one is responsible for each business unit. This means that there is now only one contact for the client. In theory, no one can now say, "That is not my responsibility; you have to call somebody else."

It is then up to the family doctor to decide whether to involve someone from the expert team – a specialist physician, so to speak. This also corresponds to the principle of responsibility. This new concept would not have been possible without my colleagues having a high degree of willingness to accept change. Just imagine eight new locations in Germany. They do have this willingness, and it is worthwhile. The feedback from the operative units – our clients – where this concept has already been rolled out is extremely positive.

In the course of reorganizing the Legal Department, we have often examined the question of the resources that will be required to overcome the challenges to be expected in the future. Our main focus was not on the much-discussed legal tech. The question of the human skill we will require to understand the future and the changes to the ecosystems relevant to us struck us as being more important. Inherent in this are curiosity and innovative thinking, both of which are characteristics that are not necessarily associated with lawyers.

In the last part of my talk, I would like to address two observations that I am concerned with in this connection. One relates to the possible gaps in our legal toolbox; the other, to the increase in asymmetries.

First, is the toolbox. Facts are being created through artificial intelligence, which many of a lawyer's classical tools no longer fit. One, for example, is the concept of causality, the question of cause and effect. Software is already in use today where the developers are no longer consistently able to say why the software arrives at a certain result, and what effects this involves. This makes imputing responsibility tremendously more difficult.

The same applies to our tools for assessing the quality of decisions, for example, the business judgment rule. It is not possible to ask software the question, "Why?" Software does not think in the category of "Why did I do something?" For one thing, the precondition for the "why" question is being able to think abstractly in alternatives, therefore, to actually take alternative solutions into consideration. Is it better to turn right, or is it better to turn left? Yet, if software were to be asked the question, "Why?", it would reply, "I don't know, because I'm following mathematical – not human – principles." We're actually developing tools to ask software. I don't know whether they will work, but it's a big challenge for us.

Managers are already making decisions today that are based on recommendations provided by artificial intelligence. The question of how the software arrived at this decision is one which can only be answered by the software engineer, if at all. Often, not even the engineer can do so. If management follows advice and is unable to understand its derivation, and if it transpires that the advice was wrong, who is then responsible – the management, the software, or the software engineer? I'm not only talking about responsibility in terms of legal responsibility. And how does a lawyer judge whether management is at fault? After

all, it is no longer possible to fully reconstruct the decision-making process. Does it, therefore, depend on what the software's hit rate was in the past, or is fault determined solely on the basis of the result?

Similar questions are also being asked in connection with the tool "concept of burden of proof." How do I provide the proof necessary to bring a claim, where even the experts are now unable to understand part of the facts? Or if, after the damage occurred, the software relevant for the facts and circumstances has continued to develop itself autonomously and in a way that cannot be understood.

There are plenty of questions, and please do not expect me to provide any answers to them today!

The good news is that we are all, in the Legal Department – and not just in the Legal Department – thinking about them. And we have, in the Legal Department, already drawn a conclusion: ethical rules that are currently very popular among public authorities and corporations are not the solution. They are important, but, unfortunately, non-binding. Substituting ethical rules for binding statutes would cancel out the requirement of legal certainty that is essential in our system. Unfortunately, there are already far too many examples that the rule of law is, *de facto*, being eroded.

Last, but not least, I would now like to share some thoughts on asymmetry. There is not actually anything new about knowledge asymmetries. They have always existed in companies, too. For instance, a company's CFO can understand corporate interrelationships better than the accountant can, and the chief technology officer grasps how the product operates better than the assembly line worker. This knowledge pyramid that is natural for us is, however, being increasingly turned upside down. It is a phenomenon that has become obvious, ever since the financial crisis, when bankers publicly declared that they now couldn't understand the toxic products they had put on the market. The combination of big data, self-learning software and total connectivity is enabling this asymmetry to grow exponentially. There may still be one single talented software engineer who can understand how the highly developed software in most of today's products works and what effect it has. Management certainly doesn't. Just imagine the following situation: my management asks me whether they can market a potentially dangerous product, although they cannot understand its interactions. What do I say?

Classically, my answer should be, "No," because management should not take a risk that it cannot assess. But "no" is not an answer. And so I think about empiricism. The product could be tested for long enough to establish whether any unknown risks occur. This is why prototypes of driverless cars have already covered several millions of kilometers. But is that enough? Can I rely on empirical data if my product's software constantly continues self-developing throughout the product's lifetime? The answer may be, "Don't just test, but insure, too." That could be a possibility. But then the insurance company would have to ask how they establish and evaluate their risk.

There is something else that is at least as significant as the inversion of the knowledge pyramid in companies, and that is the increasing knowledge asymmetry between

companies and the state. The state makes potentially dangerous products subject to approval obligations, in order to comply with its duty of care to its people. Other products or types of behavior are prohibited by the state altogether. These are both becoming more difficult from the perspective of the state institutions if a human being no longer understands the product or its mode of action. What happens if damage is caused by a state-approved product? For example, if people are injured or financial markets collapse, and no one can understandably explain how this happened. Will the company claim that the state gave approval, and how will the public authority responsible react to this? Who will the public anger be directed at? Please don't believe that this is not a lawyer's problem; I can assure you that these questions are being asked today already. Within corporations, they are being addressed primarily to the Legal Department.

What we can observe is that the public authorities themselves, particularly in democracies based on the rule of law, react aggressively where knowledge asymmetries have a detrimental effect on them. As long as a company can still balance its own knowledge-based lead by disclosure, the risks resulting from this can be brought under control. What will happen if the company cannot provide an explanation any more and the public authority believes that existing knowledge is being withheld? Then things will get very uncomfortable for the company.

We lawyers at Bosch feel that it is our job to consider scenarios like this today, to be prepared for them, and to find ways to mitigate them. This is a particularly attractive task in a technological enterprise that is as broadly based as Bosch. That's why I'm very much looking forward to continuing to work with a great Legal Department.

Thank you very much. [APPLAUSE]

KAREN TODD: Before we move on to the panelists, I wanted to ask Sebastian a couple of questions.

DR. SEBASTIAN BIEDENKOPF: I've got my instructions!

KAREN TODD: With all the expansion you've experienced over the last five years, how are you coordinating and communicating with a team that's spread all over the world, and keeping everything moving together?

DR. SEBASTIAN BIEDENKOPF: We have our reporting meetings; we have telephone calls – the classical tools – but we try to develop additional tools. One of the things we are looking at, for example, is video – not live video, but taking a video clip, where you explain to every member of the Legal Department what's going on and broadcast it. It's hard for me to imagine doing that. It would be very new, but some of our operational units are doing that. Besides that, we are trying to do whatever we can to be extremely transparent and that means sharing information.

There are great tools. We have to implement them; we have to deploy them. One very clever thing we did, we also calculated some resources for an operational team. Right now, we have a project office with four people working in it, and they are really supporting us in developing these skills and tools.

KAREN TODD: Great. Beyond the communication, how do you see technology changing your job in the next five years?

DR. SEBASTIAN BIEDENKOPF: This is something we want to do, actually, in the second part of our journey. I'm not kidding! [LAUGHTER]

We are hiring 150 people. Logistically and organizationally, that is a tremendous challenge. Imagine how many job interviews you have to sit in if you hire 150 people. I'm not personally sitting in these job interviews, but it is a large number of hours people spent interviewing people and related tasks. Since November 1, we have a chief operating officer, who's also here, Maik Ebersoll, who was very successful fulfilling that job at Linde before. He will help us with that. The first thing we look at is document management. That's key, it's not very sexy, but it's key. Right now, our document management works in Germany, but it's not a worldwide one. The second task, then, would be better budget control – also kind of old-fashioned. Then we'll see what we'll do next.

As I mentioned, legal artificial intelligence is not on top of our list right now. We'll see how it develops. Yesterday, we heard that it's really in its early years. I share that view.

KAREN TODD: Thank you. Our next speaker is Ellen Braun with Allen & Overy.

DR. ELLEN BRAUN: Thank you, Karen. I'm standing here next not because we are the hosts, but because we have a strict order by the alphabet and A&O happens to be the first. [LAUGHTER]

Just saying, because there are very esteemed colleagues sitting here, and by no way would I like to imply that I should be the first to speak.

What I'm going to speak about is a bit similar to what I heard about my co-speakers' topics around the table. It is also going to be a testament to our friendship, Sebastian,

that we have had now for almost 25 years – I'm not exactly sure, but it's almost that long. When you recently turned 50...

DR. SEBASTIAN BIEDENKOPF: Why do you disclose that? [LAUGHTER]

DR. ELLEN BRAUN: Well, I said, "Recently,"! So, on that day, recently, I congratulated Sebastian, with a little twinkle in the eye, on his uncanny ability to, whenever he landed a new position – he just said that he was never too long in any single one to somehow hit one of the largest-scale issues in that particular industry right there and then, basically on day two. Yes, it takes character to find these places, but he has consistently done so.

That, of course, has given me – and, I suppose, a lot of my colleagues – an excellent opportunity to discuss matters of life and death in our world, essentially important matters. This presentation follows a little bit on what you said in your part II, Sebastian, and it's a little bit along the lines of what we've discussed these past almost 25 years, and let's see where we end.

Our context – and I think this is mentioned in every conference within the first 10 minutes – is that we are experiencing radical change.

The first factor of radical change is the "information age," of course. Eric Schmidt, the former chairman of Google, is on record saying that information is ballooning in ways that are beyond our grasping. There is another aspect about information: it is immaterial. It grows when you deal with it (meta-information added to information). It's not a raw material that is consumed, but rather, it grows in volume when you work with information. There's a third aspect about information that we are just beginning to understand: if "networked," it works best. For the moment, it means that the giants in the digital sector are considered with quite some apprehension, if not distrust, because they command lots

of "networked information." Google and the other tech giants are market leaders and therefore have unsurpassed volumes of "networked information." Or, in China, the state owns information as a public good, which I'm not sure we would agree with in the Western world. The fact that it's "networked" may mean that new business models which allow networking across company borders may prove superior. That raises a whole host of new (data property and data handling) issues.

Of course, following on from that, the next factor of radical change is "digital transformation" where everything goes down to zero – costs, time, friction, and the knowledge gap, as well. That has good and bad consequences, as we all have come to know from the Internet. The leaders in a lot of technologies are approaching a paradigm shift. Artificial intelligence has already been mentioned and, although it's in its infancy, it is developing in leaps and bounds into digital medicine; biotech is a very strong sector and I'm going to come back to that.

Finally – and I'm just setting the scene here, as I'm not an expert in any of these – there is the factor of radical change which is "great acceleration." Everything seems to be going "through the roof," to put it simply. Both socioeconomic trends as well as earth system trends, whether you consider the world population or water use or international tourism, anything you look at is exponentially growing in ways that we can also not fully comprehend.

That is a quick look at "radical change" through the lenses of just a few aspects. Radical change, as we all know as lawyers and businessmen and women, creates massive opportunity and great risk – especially living in such a connected world as we do today.

There is a very interesting report – the Datum Future Report, November 2018 - from a new think tank formed by a group of digital companies, and you can see them at the bottom of the slide – it's Accenture, Experian, Facebook, Microsoft, Novartis, Publicis Group, etc. They have been studying together how the world looks at the promises of the booming data technologies. They've used desktop research interviews, but they've also employed a powerful web crawler to find out what opinions are expressed directly on the net. They've grouped the results in "opportunities" on the left-hand side and "risks" on the right-hand side. The goal for this research was to detect opportunities arising from data technologies. And the results were that we all can deal with the world in very different ways; we are much more informed; and we have many types of personal assistance. Additionally, there is digital medicine, smart pills, etc. A brighter economic outlook is what it all adds up to – this is likely very clear to all of us.

On the right-hand side, though, there is considerable risk as well. That we have seen an exponential surge in data-related technologies and in the opportunities that come with it, is commonplace knowledge. The fact that the trust in data handling institutions – and that's all of us, all businesses handle data nowadays – has been waning, can also be shown, and this is so for many reasons: There are fake news, Cambridge

Analytics, and the whole data privacy and data manipulation problem. Going forward, there could also be new problems such as digital exclusion and algorithmic bias. There are a lot of scenarios that don't look too good. So they are right: There is opportunity and risk. But: The risk is not only economic; it translates into political risk, as well. We know that, too.

As Sebastian mentioned, the civil law won't help us – or at least only to a certain extent, because the liability for harm caused by autonomous devices is very difficult to allocate in civil liability terms. First of all, you don't know who to sue. Is it the manufacturer or the operator or the regulator because he didn't do enough? What's ill-suited is the base for the liability, because you cannot ask the software nor it's developer to provide an answer of what happened, "how" and "why." How do you prove cause and effect?

There are many systems that are already run to some extent by software. Financial markets, and customer service – with self-driving cars as the next big wave.

Finally, sector regulation won't do it, either – as an example, autonomous driving – this developing sector draws a completely mixed crowd of companies: We have the usual suspects, OEMs and suppliers like Bosch and Automotive, but we also have telecoms, Internet giants, computing, info and data tech. Google is in there. This is the list of who has the most patents from the European Patent Office in that area, and you can see Bosch right up there, but there are a lot of others that you wouldn't necessarily expect.

To put in place adequate regulatory frameworks will be a challenge; it will be difficult.

Something that's very close to my heart, and from what I heard in the discussions last night, close to some of my colleagues' hearts: regulation has its own issues. After the financial crisis – I work in antitrust – we know there's over-enforcement now. It

> "I have observed that the overwhelming majority of our colleagues are happy to assume responsibility and are extremely motivated by the explicitly defined tasks that have been allocated, and the corresponding autonomy. We can also detect an increase in creativity. Our colleagues are employing the leeway they have been given to implement their own ideas."
>
> – *Sebastian Biedenkopf*

mirrors a certain distrust in public institutions – that distrust includes all economic stakeholders, many of our clients as well. For example (in antitrust), information exchange is nowadays treated as a cartel. Not only are fines being levied, but private enforcement follows suit. The whole discussion of platform (intermediary) power that we're now witnessing is the next big trend, where clients, if classified as a platform, are drawn into the maelstrom, especially if they have market power: then they are watched with heightened scrutiny every step along the way.

Apart from new rules and (over-)enforcement of such rules, compliance requirements are the second part of the regulatory response, compliance requirements in all shapes and forms. That's another part of the overload on legal departments; our own special global counsel, Philip Wood, who was his own think tank on international law on two legs; said that the volume of law, internationally, is out of control. This is true and it's still growing.

Finally, there is ethics. New ethics frameworks are being debated at all levels. Certainly, at government levels, at the EU level, but there are also private parties that are trying to fend off regulation or pre-think regulation. Where does that leave us?

Our clients still want the same things: quality of service, innovation and risk management, all in cost-effective ways. As we have seen, we may expect an avalanche of new regulation and, alongside, new risk. If we need more of something, it's probably cost-effectiveness. This (a summary slide on A&O's Advanced Delivery) is our own version of adding technology and resourcing to our legal expertise, and I'm sure we're doing this all in some way. What it will lead to, likely, is disruption in the legal market. There is a new McKinsey study which has just come out and puts into nice graphs what we all know, that the operators in the legal market will be increasingly specialized on certain parts of the overall task. We do see third-party services, legal tool and information providers taking center stage already, some are represented in the room. This is because of the increasing regulatory scrutiny and costs that are imposed on the legal departments, which make cost-effective service delivery ever more important. Therefore, according to the consultancy BCG – and maybe there's some truth to this – the "pyramid structure" around which law firms are organized today may have to change. We will have to adopt the role of first-tier suppliers, like Bosch or the OEMs; we will have to become supply chain managers and include legal tech as well as other services in our supply chain. Tech management, project management, outsourcing, tax solutions, consultancy; we may need to work in cooperation with a number of specialized service providers. The result is the BCG's new "rocket shape" (morphing from the traditional "pyramid shape") with less lawyers and more other experts and engineers.

My last point is that maybe all of this is not enough. You've mentioned, Sebastian, that ethical frameworks are just another burden on legal departments, and it's very difficult to foresee whether they will not turn into a rule of law tomorrow. You could say that "Cum-ex" is such a case, where an accepted practice (i.e., the use of legal "lacuna" in tax laws) leads to investigations and massive fines. But that may only be the beginning.

Here is a famous example of why ethics may reach paramount importance, long before regulations arrive on the scene: "Alba the rabbit." I don't know if you heard about this experiment: An artist asked an engineer to gene-edit a rabbit by adding jellyfish genes so it would be fluorescent in the dark. For a certain sum, he achieved what he wanted, and this is a picture of Alba the rabbit, glowing in the dark.

You could already question whether that is a sensible thing to do. And, we may believe that following that early step (gene editing of animals), human enhancement is the next step up. Our clients in the health industry and other industries will be thinking about that and decisions will have to be taken.

Another example, on the other end of the spectrum is "Muufri." That is a very interesting experiment where the milk-making gene in cows was identified and put into yeast bacterias so that yeast cells now can make milk. It probably helps with the exponential growth of the world population, because cows are "non-effective" in making milk.

What I'm trying to say is that there will be a lot of ethical decisions to be made, and those ethical decisions will be made in-house, at Bosch, at A&O, Linklaters, Cleary, Hengeler, Gleiss. I wonder whether that will be sufficient. The Datum Future report, mentioned above, advocates that effective governance of all these paradigm-shifting technologies needs to be brought about by a collaborative process between all the actors on the economic scene. That includes regulators and companies, but it also includes

law firms. It might be necessary to even include a cooperative approach between law firms, because the dangers are there, and we will have to make a lot of decisions going forward. [APPLAUSE]

KAREN TODD: Even in the U.S., we're aware of GDPR [general data protection regulation]. Could you comment on the evolution you see happening with regard to that?

DR. ELLEN BRAUN: That's a good question. All businesses are grappling with it. It was well-intentioned and was supposed to be the European response to the problems of prevalent data use, abuse and connectivity. Whether it was the right response remains to be seen; it certainly puts us at a disadvantage to the U.S. and to China, more prominently. In fact, what the Datum Future report that I talked about is advocating is that we need to be faster than the governments (and their regulation), because what they come up with may over-engineer the problems. It falls to us, in fact, to find the right ways of approaching societal and political problems that we, all together, cause – such as in the case of data use (and the possibility of its abuse).

When we start facing that, the next regulation might be finer-tuned. It's too early to say how the GDPR will play out. It will depend on how enforcement is going to be handled. It could go well, but it may also invite more over-enforcement.

KAREN TODD: In terms of corporate ethics, do you usually find that your clients need to up their game?

DR. ELLEN BRAUN: Nice question, thank you! [LAUGHTER]

I wouldn't put it in these strong words, but it is certainly true – and I also do compliance work – that the large corporates now all have compliance systems, but many of the SME [small and medium-sized enterprises] companies, the famous Mittelstand, are still in the process of looking at the introduction of compliance management systems. You do encounter approaches to compliance that are the famous, "Let's do it, get it over with and be done with it." In other words, I want to be able to say in my contracts, on my reps and warranties that I have a compliance management system, but do we really need to take this seriously? What follows every time there is a discussion about how serious we need to take compliance at the management level, if they're very conscious of a potential "double bind," or later, when you start training the employees: because they realize the risks they turn to management for orientation. So, in some ways, yes, some clients need to look at the import that they are willing to give compliance management, but most of our clients are trying to do the right thing and it's more on us to help them with that.

KAREN TODD: Thank you. Our next speaker is Jeremy Calsyn with Cleary Gottlieb Steen & Hamilton.

JEREMY CALSYN: It's good to understand what the order is! [LAUGHTER]

We've talked a lot about the future; I'm actually going to talk about the past a bit, and some guidance that a judge that I clerked for, who was 90 years old, gave me a long time ago, that I think is still very valid today.

It's a privilege to be present and to honor the Robert Bosch Legal Department, this group of distinguished attorneys. I first had the opportunity to meet with members of the Bosch Legal Department in the beginning of 2014. This was the first time I learned about the company and its unique history. It is very unique compared to U.S. companies, having a Foundation that allows the company to remain so keenly focused on innovation, and invests in innovation in a way that is a great model for companies around the world.

With the background of the corporation, I got to meet the Legal Department and a lot of people in the Legal Department, on the various projects I've worked with the company on. This is a group that's relentlessly focused on understanding the legal issues and the facts, thinking strategically about resolving the company's issues, guiding the business management teams, and ensuring the best outcomes for the company and its employees, so that the corporate focus on long-term investment and innovation can continue without interruption. There are complicated issues, but this is a great team, focused on solving these issues.

Throughout this time, I also learned how hard the CLS (Corporate Legal Services) team worked, and how few Legal Team members, as Sebastian said, there were for such a large and diversified company with truly global operations.

I also learned a lot about acronyms! [LAUGHTER]

I still have trouble when I hear the acronyms, in determining what group we're talking about! I finally got CLS down [LAUGHTER], and I'll talk about that today.

After this initial project, we've had another opportunity to work with the CLS on a new project with a new team, basically, and new challenges and additional complexities. As before, the approach and the goals have been consistent across CLS. There is a focus on understanding the legal issues, clearly assessing the facts, and defending legal positions where the facts and laws support them. They are developing the best strategies to solve these issues, and to build a strong basis for the future of the company.

Over this recent period, I've learned a lot about the efforts within CLS to further build a creative, client-focused legal team that's accessible to its business clients and closely involved in the many businesses of Robert Bosch. Sebastian talked about that in detail.

That brings us here today and this small speech. I was told I could pick any topic and talk for about 10 minutes. What could I talk about? I'm an antitrust lawyer at heart, so I could talk about the rise of private damage litigation in Europe and how that's going to eventually lead to less enforcement as fewer companies come in with amnesty and leniency applications, now that the cost of making these applications is so high. I talk a lot about these things, so how about something new. Maybe I could just talk about books and movies I've read recently. *Exit West* is a great novel; I recommend it as I just finished it on the plane. Maybe I could talk about something more salacious – it's early; people are tired. We could talk about the U.S. president, Stormy Daniels, the Kavanaugh hearings – there's lots we could talk about! [LAUGHTER]

Again, it's only 10 minutes. I thought about the evolution of CLS, and the effort to transform the Legal Department. I thought about my own evolution as a lawyer – I still think of myself as an infant lawyer, learning from so many people that I come in contact with each day. I could pass along a few things that I learned from someone who was not in his infancy when I worked for him. I clerked for a federal judge named Louis Oberdorfer who was about 90 years old 18 years ago.

He was a sharp, brilliant, wise person at 90. He had a long career; he's one of the first partners at Wilmer Cutler and Pickering – now it's WilmerHale. He had then become an assistant attorney general in the Tax Division under Robert Kennedy, working with John Kennedy. Although he was on the Tax Division side, he had grown up in Alabama – and when the race riots took place in Alabama in the '60s, he was asked by the Kennedys to go down and try to deal with them. He was also involved in the Cuban crisis – it's an amazing history of experience.

I learned a great deal from the judge in my year with him, and a few points in particular stand out today, as I was thinking about this speech.

First, he reminded me consistently and constantly that the law is not just a job. You're not here just to make money. You're not here just to have a short-term job where you go home and you're finished; this is a profession. A profession like the law involves

lengthy training, as everyone knows. The Europeans may know more than even the U.S. lawyers do!

It's a life-long pursuit and it carries with it a civic responsibility to your clients and to those in need. Judge Oberdorfer taught that it was a privilege to be an attorney, and it carries a weightier responsibility to serve your clients and the community.

Second, I learned from the judge the value of collaboration in spotting and analyzing issues. Even though we're dealing with these complicated problems, in the legal world, there's still this tendency potentially to become isolated. You're sitting with the books and thinking about legal issues, especially for a judgeship. Before I was clerking, it seemed like an isolated job where the judge sat in his room and thought hard about how to solve problems. What I learned was even though we researched every case to the end and we spent a lot of time in the library reading the briefs, testing the arguments, understanding that the cases that were cited really said what the lawyer authors said they said, and writing memoranda – a lot like law school – I also spent a lot of time every day in the judge's office, just kicking around the issues from every angle imaginable.

We would need to consider the legal issue at hand and the effect this decision will have on citizens who aren't before us in this case, that aren't parties here. Let's think about how the appellate court's going to think about this case when we make a decision. Let's also examine the right moral outcomes, from the judge's perspective.

It wasn't just with me, because what do I know? I'm just a new law school grad. The judge also discussed complicated issues with his fellow judges at collaborative lunches and visits throughout the day. This was not a person, even at 90, who sat in his office and had purely academic thoughts; he was bouncing ideas off of people constantly. He would come back and say, "I had lunch with Judge Robertson and Judge Bryant, and I've got a new idea. Why don't you go research this for the rest of the night?" [LAUGHTER]

> "... a phenomenon that has become obvious, ever since the financial crisis, when bankers publicly declared that they now couldn't understand the toxic products they had put on the market. The combination of big data, self-learning software and total connectivity is enabling this asymmetry to grow exponentially."
>
> – *Sebastian Biedenkopf*

I would do that, because he was working hard, and I could, too.

Being able to draw on these experiences and the perspectives from lots of different angles, practices, people, and the life experiences that we've all had, is really important. This collaboration is key, and the lesson was, "work hard to avoid isolation and take the time to exchange ideas with your colleagues, both within your little specialty and outside your specialty."

Third, Judge Oberdorfer taught me something that it is very difficult for a lot of lawyers. He said, after thinking through all the issues, angles and risks, you need to reduce it all to key points that draw on common sense. Clients appreciate it, the government enforcers are more persuaded by common sense, and judges and juries will respond. It sounds simple, but simplifying the complicated issues that Ellen and Sebastian have raised is extremely important, even as we look to the future and we try to figure out what the rules are or what the answers should be for things that I read about in science fiction novels growing up.

That's a few points that come to mind when I think about the judge and his life of experience, and what I think about as a lawyer looking forward. They fit well with some of the goals I've seen for CLS as it steps into this new era, even though the challenges of the future are significant.

Finally, one last point I learned from my partner at Cleary, David Gelfand: he said, "Have fun." We're privileged to have this job; the issues we get to consider, the clients we get to come in contact with, the problems that come to us each day. I love practicing law, and I have fun every day that I've been able to do it. I hope you'll find joy in your day-to-day, as well, whether it's wrestling a tough legal point, polishing a brief, or just taking an hour to clear your head when you're traveling to some city you've never been to before. I'm thinking of when Sebastian and I were in Detroit and took our tour of some of the different areas of Detroit that were in various stages of development at the time. It's serious business, but Dave said, "You've got permission to have fun."

I appreciate the opportunity to work with CLS. I've learned a lot from Sebastian, Bettina, Martin, Matthias, Philip; and so many others, I can't name everybody. I look forward to the future, and I'm sure that with this team, you'll solve many of the challenges you've outlined today. Thank you. [APPLAUSE]

KAREN TODD: In terms of collaboration, as an antitrust lawyer, what other practice areas do you find yourself most often working with?

JEREMY CALSYN: Well, Matt Slater, a general litigator in complicated litigation issues. I deal with the M&A group all the time on transactional work. In antitrust investigations, we're specialists, but it's similar to any kind of criminal investigation

when you're dealing with a price-fixing case. Any type of civil litigation, you can draw on the knowledge of other civil litigators.

When I was thinking about this speech, I thought of one other thing I learned from civil litigators: never argue the merits if you can get by on a technicality. [LAUGHTER]

You learn about these things that the antitrust lawyers didn't teach me about, but the more general civil litigators have taught me about. We could talk about antitrust, but it's really M&A support, it's litigation, and it's investigations, just like anything else.

KAREN TODD: Thank you. In working with corporations, do you find it difficult to simplify what you're doing so that they understand it?

JEREMY CALSYN: No, I'm very simple! [LAUGHTER]

Usually they want me to make it more complicated! [LAUGHTER]

KAREN TODD: Great. Our next speaker is Dr. Matthias Karl with Gleiss Lutz.

DR. MATTHIAS KARL: Ladies and gentlemen, again, an antitrust lawyer, so by then, you are done with it! [LAUGHTER]

It's an honor to work for this department, and I will try to elaborate in the next 10 minutes why this is an honor.

When Sebastian came in 2013 to the Legal Department of Bosch, I was in a tricky situation, because, "Yes, I'm a lawyer and doing antitrust work for Bosch for the last 15 years, and there is a certain project we have to tell you about." Sebastian mentioned, "Why are you joining and coming from Hamburg to Stuttgart?" For Americans, it's like coming from Alaska to Florida. [LAUGHTER]

Not in terms of the weather, but in the emotional approach to things.

I'm interested in the corporate structure and how a foundation is organized. I'm really interested in the corporate issues that might be around at Bosch. I said, "Yes, Mr. Biedenkopf," we were more formal then, "as well as antitrust issues." "Okay. Something is wrong, what do we tell the management?" We are in a situation like in the *Apollo 13* movie, "Houston, we have a problem." What does it mean for a relationship? You are working 15 years doing antitrust, it's a hard story to tell.

I learned in the next two or three meetings about your approach, the best in legal management, and it was a radical rationalism. I learned what that means for managing legal issues. That's something, I should pass on to the audience, the specific gift you have in doing this complex handling – it's thinking in alternatives. Don't use hypos; don't jerk around with typical lawyer's talk, "Yes, there's a risk in there, how high, it depends." Then you use any meeting to nail it down, what are the alternatives and how do we measure those, and how do we get along with those alternatives to the most prudent and effective solution to that.

That is a concept which I really adore, and I structure my own thinking in the same way. When I came into a meeting with Sebastian, I said, "Okay, what are the alternatives? What is the best advice deriving from those alternatives?" Yes, our nice project was dwarfed by the next project. You had the same approach, and you can show that this way, managing the alternatives in the best effective way by assessing those is a result of your supreme rationalism, kicking out all kinds of emotionalism. That's because you are Hamburg-born and trained. My learning curve was to cope with it. [LAUGHTER]

That's why both Bavarian-born and Hamburg-born can cope in those five years, which I really felt as a deep honor to work for you and the Bosch team.

Antitrust is a tricky thing, and that's the second part I would like to address. Ellen Braun already mentioned it – we need to understand that we are in a critical legal situation regarding policymaking. Far too much, we run into regulation. Any problem a lawmaker realizes is immediately turned into regulation, or a rule, or a law. If we go to ethical standards, we sometimes need to rethink whether anything that is regulated is the right thing for a law. You touched upon the idea that ethical standards are not a solution. We need to have an analysis of what is ethics, what is open for legal discussion, and what is enforceable. Here again, rationalism and thinking in alternatives is a way to get to some answers. This is more about policymaking, but we need to be aware, in all our democracies, that we are running a risk that we harm the political system if we do engage in policymaking and lawmaking where we do not know whether it can be enforced. Understanding that here is a huge group of lawyers, the Hengeler team, the Gleiss team, just doing compliance investigation, should give you the idea that the legal system is not okay if we need to have hundreds of lawyers to make sure that companies follow the law. We are not all unethical guys. Companies try to cope with the law. Is the law still in good order, or is it over-legalized? We need to rethink whether a legal system which requires hundreds of lawyers to make sure that companies *who are ethical* are acting correctly, indicates a

complete problem in the system. Bosch *is* an ethical company; we have the Bosch values, and this is not something which is just around in the air.

As an antitrust lawyer, you always think, "What do I do here when I do a training for antitrust?" As Ellen Braun mentioned, exchange of competitive, sensitive information is completely illegal, because it could probably lead to a conspiracy, and therefore an infringement of free and unrestricted competition.

The American guys say, "Walk away with your exchange of information; I need a full-fledged agreement. I have a crime and I'll send the management to jail." So, clear-cut! [LAUGHTER]

We do not do a real rethinking. Combine that with a system of whistleblowing, of coming in for bonuses, asking for leniency; it leaves out all kinds of alternatives. Our discussions with Sebastian and the legal team were always extremely fruitful, because they were always thinking *in those alternatives*. The more complex it gets, the more important is it to rationalize it, to define the alternatives, and to avoid thinking in just hypos – what could be around, really nail it down to the alternatives.

That is a situation where we, as antitrust lawyers, always think we need to come to a stop. Not only running in for leniency and then admitting everything and coming up to a situation where *any* kind of information is already in the area of legality. It's not that we should abandon antitrust, but we should, as a company, as lawyers, probably race ahead and say, "What are we doing here? Is this still harmful?" If you talk to a regulator, they say, "It's absolutely not necessary that we show *any* effect to the market. Just the mere fact, it's a dangerous deed, and therefore, you may not do that. This is illegal; you have to pay at most around a hundred million in fines and then damages!"

We should be aware, and we should probably point to a fact that the legal system is only as good as people recognize it as a legal situation. If we are going to over-regulate and over-enforce, we probably don't do good to the consumer or to competition. Instead, we probably hurt, as well, the legal system in total. If you think of new issues like prohibition of driving diesel cars on Stuttgart's streets and the Autobahn and then who is enforcing it. This is an invitation for collective breach of law. Is this at all serious? That's where we're abusing it.

Bosch's Legal Department is active, and I appreciate it very much that you are sending members of the Legal Department to those institutions where this kind of discussion should start. We *need* this kind of discussion to a greater extent. Going back to your remarks on artificial intelligence, on simulating issues, if you think of CRISPR (gene editing) or other ultramodern technologies, if we regulate it, we will probably lose control of enforceability. We may not come to the situation of collective breach of law, but then trying to do that with a lot of compliance work afterwards.

The way you have taken on your job was absolutely a tremendous success story. With these huge projects around – first, our small antitrust issue, then the larger diesel-gate issue – and just having a rational approach, seeing the alternatives, and then reacting to it in a rational way. Not throwing out everything, even keeping an old Bavarian lawyer in that team who was already working for 15 years, and not doing a radical change, but evolving it. There's still one picture in the Legal Department, there is Sebastian and behind, is transparency, "Run – compliance is coming." This was a shift in situations; we talk about the issues; we talk about the needs. It was a transparency situation, and it was an absolutely all new situation. When you told me, "Yes, we have a presentation to the board of management," and "What, I'm accompanying you there?" "Yes, sure! You get money for that. You go there, and you tell the story and what we discussed." It was the way of getting transparency – clear-cut legal advice – and that brought us together over five years of exercise with Jeremy on the U.S. side, to solve this antitrust issue, where we still could discuss the political impact, whether this is all still in line. We will probably have to look into the future, because new antitrust fields will come under those radical approaches. If you think of a working out loud situation in the new disruptive age as warm intelligence where competitors are sharing all kinds of ideas, then the antitrust lawyers say, "If you share information, this is almost illegal!"

New challenges are around. I am happy to accompany the CLS ATL [Antitrust Law] team in the future, assessing those risks, looking at the alternatives. I will personally be honored to work for you, Sebastian, and the real model of Bosch Legal Department. Thank you. [APPLAUSE]

KAREN TODD: Great. Can you give us some information on the metrics you're now using in antitrust?

DR. MATTHIAS KARL: We basically don't do any kind of metrics. We are still fighting the standard type of investigation. We go into training face-to-face; we do interviews; and try to understand the nuts and bolts: what is discussed in the industry,

why people are thinking that their conduct is still in line with law. If we try to do it all in an econometric way, it will not lead to the solution of really assessing the antitrust risk, because that's our job. Probably the antitrust people on the Hengeler team doing the investigation on the other project – people are not considering that as illegal. They are telling you, "You are nuts! This can't be true! Why shouldn't I – I'm under such pressure from Daimler and BMW, and if I ask my partner – and my competitor is sometimes my partner – whether he has the same issue, the same problem, and I'm not doing anything illegal." It's beyond the metrics; it's still a people business. It's a battle of the minds, whether we are nuts or we are still telling something which has a legal aspect, whether you should adhere to the rule because it is ethically, legally a sound rule. That's the inherent problem of antitrust policy at war with itself. It's posing a theorem which we all read back in doing the LL.M. It's still the same. We are working in the wrong direction. We are over-regulating and over-sizing an issue if we say, if you talk to a competitor, you are almost in jail – that's the European system – it might appear to connect you to a collusion or to that kind of conspiracy, and the burden of proof is on you that this is not the case.

KAREN TODD: In terms of regulatory regimes, which one is the most difficult, and why?

DR. MATTHIAS KARL: The most difficult is the one where *any* social problem, any evolutionary issue, is immediately transformed into regulation. I would advocate for an "assessment of enforceability" of a regulation. I would always try to challenge the lawmaker and say, "Have you ever thought about the effort you have to spend to make that enforceable?" Then I have an indicator of the *self*-execution of a rule. You should not kill somebody – it's in the Bible. Everyone knows it. You should not talk to your competitor because it's illegal if you use competitive, sensitive information (it's not in the Bible anymore) – so you need to get a greater understanding of why this is bad. That's missing, and therefore, I always advocate against those regulations, those lawmakers who just solve an upfront problem by saying, "Let's do a regulation people will adhere to." No, they don't do it. We need to employ millions of compliance officers in order to enforce not self-fulfilling, not forceful, legal statutes.

KAREN TODD: Thank you. Our next speaker is Dr. Wolfgang Spoerr with Hengeler Mueller.

DR. WOLFGANG SPOERR: Thanks to Ellen for hosting and Karen with Directors Roundtable for organizing this event. Sebastian and his colleagues, many of whom are here, whom I have had the pleasure to work with, are passionate lawyers of exactly the type that Jeremy has outlined.

Sebastian has a deep understanding of corporate governance. This has become clear to everyone throughout his contributions at Bosch. Corporate governance has very strong implications for the political process in society. For this reason, I would like to address, on this occasion, the current plans of our German federal government to introduce new rules on corporate criminal liability.

There is nothing really new about corporate criminal liability in German law for criminal conduct. Under paragraphs 30 and 130 of the German Law on Administrative Offenses, criminal liability of companies has existed for many years. Thus, we need to ask ourselves the question, why do we need this new law, or is this just another example of over-regulation that Ellen and Matthias have very clearly seen in many areas, including antitrust law.

Now, even the purpose or the motive of corporate criminal liability is highly disputed. Corporate criminal liability ultimately affects stakeholders who are different from those who were responsible for the criminal conduct itself. The compensation and retribution aspects of sanctions for criminal conduct often miss the point. Therefore, the advocates of corporate criminal liability focus primarily on the principle of general deterrence. Whether such deterrence actually works if targeted against organizations and not individuals is an open question. The empirical research is pretty unclear. There are results that say that a general deterrence effect does exist, it cannot be *completely* discarded, but there is also a general agreement that any such effect is much weaker than the positive results that can be obtained from an effective enforcement of *individual* criminal liability in the organization or corporate context.

For this reason, the recent discussion on corporate criminal liability in Germany has focused very much on *specific* deterrence. Corporate criminal liability is seen by many scholars as an effective means of fighting against specific company and even industry-wide undesirable organizational failures. Here, we see a mixture of administrative law and economic regulation, which is the natural area of law where you introduce preventive rules. An example of the mixing of criminal sanctions and economic anti-regulation can be seen in the U.S. model of corporate monitorships, where preventive regulation, the reeducation of companies, and ultimately governmental action are

privatized to private actors, with effects that are not only seen as positive from the European perspective.

In summary, we have very little evidence that really supports this new proposal. What is the political background motivating this project? The starting point was the perception that there is a lack of enforcement for criminal misconduct against corporations. This was the argument that was used by the very poor draft of the then-government of North Rhine-Westphalia a couple of years ago.

Now, if we respond to a situation of a lack of enforcement by public prosecutors in certain states in Germany with stricter laws, then the whole situation can get out of control. If you have to improve enforcement, you should just focus on that and not enact new laws that create new enforcement problems.

Another argument that has been put forward has been based on considerations of competitiveness of the German legal order. I personally must admit that this kind of competition, who has the higher level of sanctions, somehow makes me feel uneasy. Of course, it is safe to say that the impact of law enforcement by the U.S. Department of Justice has been felt worldwide. The Department of Justice has well over 100,000 employees, many of them highly qualified lawyers.

In my opinion, even if I think the German public prosecutors are doing quite well in cases where there are direct parallel proceedings in the same matters, the American model somehow seems to be a standard in terms of a globalized prosecutorial culture.

However, a new statute on the books in Germany will do nothing to change that. What would really help would be the institution of a more centralized or a highly centralized federal prosecutor for business matters. However, this is impossible due to constitutional impediments in Germany.

> "Can I rely on empirical data if my product's software constantly continues self-developing throughout the product's lifetime? The answer may be, 'Don't just test, but insure, too.' That could be a possibility. But then the insurance company would have to ask how they establish and evaluate their risk."
>
> – *Sebastian Biedenkopf*

Here, as elsewhere, we see that German federalism, in its specific form, is no longer suitable for taking on the great challenges of a globalized society.

The only argument that really remains, and which is now in the public discussion, is the apparently insufficient level of sanctions enabled by the current law. If you look at the sanctions against Volkswagen AG in the amount of $1 billion, or against Audi AG, part of the same group, in the amount of $800 million, I do not think that these can be seen as insufficient sanctions.

Nonetheless, the current government plans a fine level of up to 10% of annual sales, in addition to a forfeiture component. The Federal Ministry of Justice is now preparing a draft law which will be most likely a case of heavy regulation. Any idea how many paragraphs it will have? If you talk about the sanctions level, you could just change one paragraph and say that the maximum is not $10 million fixed; but rather 10% of the revenue. One report says it will have close to 100 paragraphs. There will be an additional statute on internal investigations, with probably yet more paragraphs.

Now, it is obvious that the federal German government is not just addressing the political motive of increasing the level of permissible sanctions, but it's using the political moment to realize a grand project. Of course, there is a big danger of over-regulation once again. This promises interesting discussions for the future.

Bonuses for disclosure, internal investigations, internal review and cooperation with public prosecutors will most likely become the subject matter of the statute.

There is also a lot of discussion about explicit statutory legal requirements for internal investigations. Frankly, I am very skeptical about that. Internal investigations do not constitute state action but are an expression of the societal responsibility of individuals in corporations. Therefore, it is not appropriate at all to put a public law framework around internal investigations, as if we were talking about something governmental, or as "*Beliehene*" in German law, i.e., private persons who are exercising a quasi-governmental function.

We must not lose sight of the fact that companies have an international presence and exposure – and all successful German companies, of course, *do* have an international presence – for example, Bosch has had an international presence since the very early days of Robert Bosch himself. These companies need the flexibility to fulfill the legal requirements and expectations of various legal orders of various jurisdictions. If you impose a tight statutory framework in Germany, then there is a great danger that German companies cannot meet these requirements, let alone the expectations of other jurisdictions.

We have some hope, also, that the weak protection currently afforded to external and internal work products will now be scrutinized and perhaps improved, although

I'm again skeptical whether this is not ultimately asking too much of the abilities and the will of the German legislature.

You all know that the existing case law following the recent decisions by the Federal Constitutional Court on privilege protection is so poor that the law can only get better. Here, there is some reason for hope.

There are two very critical issues I would outline. First is the level of sanctions. If they are set up to 10% of annual turnover, for any and all cases, then companies will no longer be able to defend themselves in the future, as a result of the sanction level being so high that companies simply cannot risk taking the case to court. Ultimately, companies will then have to give in to the will of the public prosecutor of the local prosecution office.

For this reason, the rule of law requires that draconian sanctions be structured legally – for example, by differentiating between kinds of underlying offenses or creating different exceptions to the general rule. It should make a difference whether the underlying offense of corporate criminal liability is a capital crime, for example (which rarely happens in well-run companies), or commercial fraud, or even a crime based on negligence, that occurs much more often.

The second issue, somewhat related, deals with the forfeiture of revenues. In the current law, the advantage of companies is that the OWiG (Act on Regulatory Offenses) clearly establishes the forfeiture of net earnings. Conversely, the criminal code and, since 2017, even more strictly so, deals with this issue very differently going after gross revenues, with very unclear exceptions to the rule.

In my view, gross revenues are completely unsuitable as a sanction for companies. For example, if you look at a supplier in the automotive industry, you typically have a huge turnover. They are successful companies, but their profit margin is fairly low. They have high labor costs and they do a

lot of research. If you go for an asset-based forfeiture on gross profit, this is completely unreasonable.

The Federal Ministry tries to cleverly avoid this debate by formally leaving untouched the forfeiture provisions in the criminal code and taking *away* the protection under Section 17 of the OWiG, with the dramatic effect that the protection of clear net principle only on profits and not turnover has been taken away from companies.

To summarize, based on an idea that originates from more political populism than a clear analysis of the need to regulate, there is some hope that the government will create a pretty reasonable statute in its drafting process. However, there are certain areas that require attention. I've mentioned three of them – internal investigations, sanction level, and asset forfeiture – that require attention, and I kindly ask you all in this audience to collaborate, that we enter the political debate of experts jointly, diligently and constructively, to make sure that this legislative project going forward is not extreme over-regulation but is in line with reasonable rule of law principles.

Thank you very much. [APPLAUSE]

KAREN TODD: In the U.S., boards normally initiate an internal investigation when an allegation occurs. Is it different in German companies?

DR. WOLFGANG SPOERR: I think more or less the situation is the same now. I've discussed this with American lawyers and they also say that not always do the companies initiate internal investigations. It's a perfectly legitimate response in some situations to say, "This is a situation where investigating the matter doesn't make much sense; it's a very complex situation." Overall, I would say the cultures with regard to investigating allegations or suspicions have become pretty similar. In most situations, companies will investigate. I'm not sure about the U.S. situation, but companies have very strong internal capacities in Germany, so much of it is done by compliance or internal audit departments. What might also be different is the disclosure culture. In Germany, if you go to a prosecutor and tell him you may have a problem, this is something pretty new; it's not unheard of now, and the big prosecutorial offices have good experiences with it, but it is still somewhat different.

What's lacking in Germany is a clear role expectation for external lawyers and company lawyers. There is often lack of trust, generally, between the public prosecutors and the lawyers in private practice. That's very different from the U.S. situation, where there is a very strong institutional trust between lawyers across the various institutions.

KAREN TODD: Thank you. How would you recommend that that trust aspect be improved?

DR. WOLFGANG SPOERR: It also applies a bit between in-house lawyers and external lawyers. It's a very important issue to strengthen the rule of law, to know what lawyers do and what they don't do, and to develop a greater common understanding. We are making improvements; for example, the German Bar Associations were terrible

a couple of years ago by trying to exclude the in-house lawyers, based on crazy competitive considerations of small, local lawyers who were predominant in their bodies. This is stuff that really weakens the rule of law, but it's getting better. We also need to work, now, on our own prosecutors' distrust. Private lawyers are distrusted by prosecutors for a lot of reasons. Both perhaps have had experiences that cause them not to trust the other. We need to improve that by developing joint principles and joint understanding, and by living by them. This, of course, doesn't mean that you need to tell a public prosecutor everything, but you need to establish clear ground rules – are you in a classic defense (which is perfectly legitimate) – then you don't tell anything at all. Or are you in a corporate investigation situation? Quite often, German companies have made the big mistake that they've told the public they are fully cooperating, and the strategy of the lawyers was different. This doesn't work well.

KAREN TODD: Thank you. In the U.S., I'm aware that if you disclose early, they can mitigate the penalties. Is that also true in Germany?

DR. WOLFGANG SPOERR: Yes, of course. There's no math around it, and my understanding of the U.S. process is also that the math behind it is rather artificial, but it's clearly the case that prosecutors give quite a bit for disclosure.

KAREN TODD: Great. Our final speaker is Ulrich Wolff, with Linklaters.

ULRICH WOLFF: Good morning, ladies and gentlemen. Now I know what my kids are on about when they complain that I didn't take the name of my wife. Always last, with a name like Wolff!

"Last" also means that I have to adjust what I planned to say so as to not openly contradict someone (which would be impolite) or repeat what has already been said (which would be rather boring). So, bear with me.

What I am going to talk about very briefly is something that I personally feel very strongly about, and something the firm – at least a group of people in the firm – are very engaged in. It's a particular aspect of the rule of law. The rule of law itself is a big body of law and jurisprudence. It's also a bit of a patient ass, because sloppy lawyers can invoke it whenever they feel uncomfortable or outraged with something the government or the legislator does.

More specifically, I will be talking about the "predictability of the law," sometimes referred to as the "certainty of law." I'm convinced – and that resonates with a lot of what you already said – that it has become an increasing problem. A problem not only for us lawyers but, more importantly, for you as clients.

The predictability of the law is a very difficult thing to grasp. How clear is clear? How much room for interpretation still leaves a rule to be "predictable"? I'm always envious of people like you, Wolfgang, who can talk in a specialized and very clearly defined area of the law and about how it is interpreted and applied. I'm just a corporate transaction kind of guy; and for us, law is almost like an operating system. It's in the background, nobody cares about it, really. Nobody particularly wants to know about it, to be honest. Certainly not our clients. They just don't want their transactions to run into the law as an obstacle. What we are doing (and that is you all) as a job is to tell our clients, in-house or external, where these big legal icebergs are that can sink the transaction ship. And what we need to gauge the safe distance to circumnavigate the iceberg.

Now, the certainty of law is the question of how clearly I see the iceberg through the fog. The fog, I suggest, has thickened considerably in the last couple of years. We cannot however, as transaction lawyers, say to the client, "Look, I think there's an iceberg; looks slightly turneresque, because the legislators painted it in that pre-expressionist way." [LAUGHTER]

"We think it's an iceberg. Take that route around it." That's what a transaction lawyer does and that is what we are paid for.

These days, laws are written in such a sorry way that more often than not, we don't know whether that white mass in front of us is an iceberg or just a cloud or a little bit of fog, or simply a mirage. That's what I want to talk about.

Do we, as a legal profession in western societies, still feel comfortable that when we are coming to the office in the morning, we will find a legal solution that's relatively robust for our clients? Do we still know what the law actually is? I suggest, we increasingly do not. It's not just in competition law, where the situation is particularly awful. It is the same throughout our corporate laws. And that is a sorry state. Not only commercial law is affected: Family law, consumer protection, the law of unjust enrichment which has been famously unclear for many years and so on.

Arguably, we as serious lawyers have to accept a collective responsibility for improving the situation together with all the other players in the administration of justice.

We, as private practitioners, have it rather good. We can, so the conventional wisdom goes, sit on the fence. If it gets tough, we can retreat, write long, lovely memos on the intricacies and relative merits of various interpretations: "It might be that way; the courts, however, might also interpret the clause the other way. Sebastian, you take the decision, you take the risk."

Now, that is only uncomfortable on first blush. In reality, not being able to guide clients securely through a body of law that we specialize in, is very uncomfortable as counsel. At least we have to give our clients a clear view on the decision parameters. And ultimately, we as lawyers don't do ourselves or the profession and its reputation any favors by sitting on the fence like that, saying this may be like this, or it may be like that, and *you* take the risk, because we're in it together. You do that once or twice to a client, and he moves on to another law firm prepared to make more bullish statements and to risk their liability cover.

Let's just pause here for a minute and revisit what we actually mean. In Germany *Rechtssicherheit* (certainty of law) is an element of the larger *Rechtsstaatsprinzip* (Common Law). In Common Law, which I prefer, traditionally, it's part of the Rule of Law. The best way it has been described is in a judgment by Lord Bingham of Cornhill, who tried to grasp and condense it by saying:

"The law must be accessible, and as far as possible, intelligible, clear and predictable." He adds, in a different section, something that I as a German lawyer, find particularly important:

"Questions of legal right and liability should ordinarily be resolved by application of the law, and not the exercise of discretion."

This includes the discretion of a court or administrative agencies interpreting, willy-nilly, rules that nobody else has taken the trouble of actually defining. That is what resonates today.

We're square in the middle here of a fundamental issue, constitutionally and of our societies – how do we restore that type of certainty?

Before we can do that, we have to get clear about what has gone wrong. There are a lot of individual things and developments. I'm just picking out a cluster of cases that I find important, interesting and worrying.

One set of cases that I call the "good-intentioned politician with grand goals" is rather frequent: Someone has a problem in his constituency or there is an outcry about an issue that has occurred in the larger population. Politicians feel they must be seen to be doing something and so they act "decisively" and pass a grand law with wonderful goals and principles that nobody can say anything against. But more often the exact application of what is meant in practice is not spelled out or only in a very rudimentary way. One example is abandoning nuclear energy. Most people no longer wanted it. Fukushima had occurred; the government needed a win, politically. So, they simply said, we're going to exit nuclear energy. I personally think it's a great idea. In the first attempt in the early 2000s, the Green party did not succeed in organizing the exit definitely; their approach ended in a lifetime extension granted by the exact government that abandoned nuclear energy in the same legislature. After Fukushima, we suddenly had a moratorium, and thereafter these lifetime extensions adopted in 2010 were partially withdrawn in 2011 and half of the nuclear power plants even shut down immediately. The result is one thing; but it was just a grand scheme. Now we are stuck, as lawyers, with understanding what this actually means in practice and who shall bear which risk and which costs all of which is blissfully left vague by the well-meaning political class.

Another example for this overzealous, principle-based, grand scheme type of unclear lawmaking is the willy-nilly inclusion of protection of animals in the constitution. It's great stuff and we all love our cats and our dogs. But what about the cows we eat? Why are they not protected? Just because they are not as cuddly? That's a legal problem and it becomes a question of certainty. Grand schemes gnaw away at the certainty of the law because they tend to lack specific implementation language. They often avoid the careful weighing up of interests and leave that to "the practice."

Another group of cases comes from the lack of co-ordinated interaction of rule makers – I call them "uncoordinated cluster legislation" – some call it other names. We have the EU. We have treaty law. We have local law. We have ethical rules. We have a multitude of other rules and regulations. All these well-meaning bodies produce rules – "cluster legislation," and they too often leave it to the lawyers and the judges to make sense of the way they interact with each other. Often the producers of the rules do not even care anymore whether their rules fit together. They can't, sometimes, because the coordination between the bodies that create them is lacking. And the result is uncertainty about which rule prevails in which interpretation.

The Comprehensive and Economic Trade Agreement (CETA), the free trade agreement with Canada, which is close to my heart, is one of these examples. CETA has rules that seem to be difficult to operate together with internal Canadian law. Why? Because maybe the Federal Government entered into a treaty with a view to indirectly change provincial law? So, contradictions in cluster legislation can become political tools to force rule change where you do not have influence or jurisdiction.

The next reason for the decay of certainty, of course, is the proliferation of rules generally. I think word processing didn't help. It's too easy to produce text, and thus laws (anecdotally now in England, they are in the process of producing massive amounts of statutory instruments for Brexit, but *do not redline it*, because they then themselves are overwhelmed to coordinate the changes with the different departments of government). [LAUGHTER]

I would call it – in good Quebecois – "too much"! Too much law. There's just so much law and rules and guidelines and interpretative notes by the executive branch, or whatever all this is called. We can't even read all of it any more, let alone work out how to apply it effectively.

Then there are many cases that in my view should be much more controversial, the statutes that use the famous German *unbeschtimmter Rechtsbegriff* (undefined legal term). We love them; we always claim they're a civilian tradition. Actually, they're just sloppiness of thinking and drafting. Instead of actually defining a term, like we common lawyers normally do, the legislator uses a term and leaves its exact definition to the courts from time to time. They put stuff like *unangemessene Benachteiligung* (unreasonable disadvantage) or *guter Glaube* (good faith) and so on into law and basically leave the lawyers and their clients in the cold, waiting for 150 years of case law to fill in the gaps that a sloppy or cowardly legislator didn't want to define.

Our German history should actually make us think very much about whether this open wording – and I'm here in contradiction with some of you – is such a good idea. Sometimes a little bit more legislation, a little bit more clarity, a little bit more defining, helps the clarity of the law.

The last issue that gnaws on the certainty of law allows me to venture into something that is personal: legal writing; the unaccountable "source of law." The amount of quick, badly thought-through commentaries. The quasi-text leaves open how the writer actually gets to the results they like. They are often just a form of vanity and today there is too much of it. And it is largely unedited now. Everyone can write. There is no editor or publishing cost to stop them. A lot of people feel this absolute urge to write and a lot of stuff is written that's positively unhelpful. [LAUGHTER]

That is not just when you have a case in front of a court and a colleague writes something that completely contradicts your argument. Also, some of this "writing" is so intellectually murky that it just shouldn't happen! Let's think of these "authors" as arsonists that can burn down the house of law.

I could go on for much longer on the various reasons for the law being less clear than in previous generations. And I have a lot of ideas about what we could do about it, but I only have so much allocated time.

That is my last statement. The rule of law is normally something that we discuss in law school, but it is really an issue of the practice of law. We should all be much more careful and considerate about what we all do in the legal process. The rule of law is something that we should cherish and hold high, because it's at the bottom of our liveliness in a free society, not only as lawyers. [APPLAUSE]

KAREN TODD: Do you feel that government people, particularly legislators, should do due diligence on what they're proposing? To make sure that what they put out there will make sense or accomplish the correct result.

ULRICH WOLFF: I hope they always do! They sometimes can't, I guess. They're also sometimes too far away from the law as it is being practiced. By way of examples, I've been spending the last three years doing a transaction that plays out in the derivatives and structured finance space. Just understanding what these guys are actually doing there in the derivatives markets took me about a year and I am still far away from their business "customs." Now imagine the government. They are far away geographically – and otherwise – in Berlin, with travel budgets that are almost cut, and often with a political urge to distance themselves from us practicing lawyers. How are they going to do this diligence? How are they going to understand what we do here in the specialist areas, and how it interacts, and how it needs to be regulated? It's very difficult. There is little real interaction between the castes of the legal profession. It probably also has something to do with the fact that when the legislators, our MPs, and the staff in the ministries interact with us, they're often seeing lobbyists. And indeed, we often want a particular result and enter the discussion to obtain that exact result. We

in the legal profession should stop doing that, because we risk destroying our own franchise. We should be fighting for the law when we talk to the ministries and MPs, and leave the lobbying to the lobbyists, and that enhances our credibility.

KAREN TODD: Thank you. Should the bar associations be pushing for an increase in certainty and clarity? Or should it come from some other source?

ULRICH WOLFF: Which bar association? I'm kidding. We don't have one that cares for things like these. It has many reasons: big law firms like us do not actually engage. And as a result, the bar here deals with stuff that we're not really interested in. They also see themselves more like a regulator. We certainly have to change things there. Everyone in the legal field can do something about the rule of law. Certainly, as lawyers, we can choose not to take on a case that we feel is vexatious. Maybe it would suit us well to sometimes say, "No! Not everything needs to be litigated." Engaging more as lawyers in the larger political process would also help. Not only in these little groups of specialists that we specialists feel comfortable in. Actually, go out to advertise and explain where it hurts. Make the larger public understand what it means when you don't know what the law is anymore. It actually becomes a question of liberty and people out there can understand that, if we tried.

The public often thinks we lawyers love the status quo. They sarcastically say, as I hear it out here, that we make money from all kinds of laws that default too, everything potentially being forbidden. We are seen to love the poor man on the street being potentially caught by an unclear wording or excessive interpretation. People need to know and understand that in this state of affairs it becomes the executive branch that has unlimited power. The policeman who can freely pick on the pedestrian who crossed the street, or the cyclist who doesn't have a light, or the BMW that actually speeds. He is completely free to pick that. He becomes the norm-maker, because he picks the law that he wants to enforce. And we allow the executive branch to freely pick because we have a law potentially against everything.

> "The state makes potentially dangerous products subject to approval obligations, in order to comply with its duty of care to its people. Other products or types of behavior are prohibited by the state altogether. These are both becoming more difficult from the perspective of the state institutions if a human being no longer understands the product or its mode of action."
>
> – *Sebastian Biedenkopf*

But back to your question. We can all do much more to enhance the predictability of the law. For one, we can use restraint in the stuff we write. *Think* about what you write. Sometimes, it's fake law. In a legal system that, for some reason that I have never understood, sees legal writing as the one source of law – which, in my humble opinion, certainly it's not – it becomes problematic to write with biased motives. Also, just getting involved in the political process of lawmaking, helping to make rules clear. How many of us actually take the trouble of spending long evenings with their party or on the streets in the political process, explaining to people who have a completely different life and set of experiences that there is an issue here. I'm sure very few of us do, and it is incumbent on us lawyers, in-house and in law firms to get involved. Stop lobbying, stop showing off how clever your arguments are. Maybe that is also what they used to call "being an officer of the court."

KAREN TODD: Thank you. I want each of the panelists to say, from your practice area, what you feel the priority issues are for executive boards or corporations. We're going to start with Uli, because we're not going to let him go last! [LAUGHTER]

ULRICH WOLFF: The big issue in my experience is, how do you actually ensure that information and knowledge about the organization percolates up and down as freely as possible. A lot of businesses that are having serious problems have intentionally or as a result of all sorts of reasons, inhibited or cut that information flow. And that has been done for a lot of the reasons, that are good and that I understand. Sometimes you don't want the information to go unfiltered. On the other hand, it often means that board members or decision makers, generally, don't actually get the full picture of what the issues really are, and early enough. For me, that is the main issue of my frankly personal, anecdotal experience of the last couple of years.

KAREN TODD: Thank you. Jeremy?

JEREMY CALSYN: In the antitrust/M&A world, the big issues are predictability of doing a big deal when you have to file and face lots of different regimes' review process. How do you get that predictability? How do you get the deal across the line? Especially where it's been well reported that countries like China might hold up the deal just because they're not happy with what the U.S. government's doing, even if there is no antitrust issue. There may be no rule of law, just political issues driving things. Guiding boards through that issue, making sure their eyes are open for it and trying to find ways to deal with that risk in a way that protects the company but still permits the deal to go forward. That's a big challenge.

KAREN TODD: Thank you. Matthias?

DR. MATTHIAS KARL: I would assume my advice to corporate counsel is break any hierarchies, because you always see them, and that's typical middle class. You often hear, "You may not tell the old guy that there is a problem; he doesn't like that; he has a different view of it. Come again in three months, not now." My advice is always, "Don't hide away; don't lie to yourself about the legal reality," because that's an antitrust experience. You always meet people who have perfect defense arguments which are just useless.

"No, Matthias, we didn't do that in writing!" "That's a good one!" [LAUGHTER]

That's a situation. Sometimes we have too much anxiety about losing face and being in infringement of the internal organization. That's extremely dangerous advice, because sometimes you are the first that gets kicked out. You are vulnerating the genetic code of a 100-year-old company. If it's ruled by the big boss in the family for the last five generations, you need to be a bit careful. That's one of those issues I have seen for the last 25 years, which created a lot of problems where people have said, "This is not accessible for the board, stay out; this is not a problem." Therefore, it's always, think of breaking hierarchies, and get access to the people who are really in the driver's seat for the company.

KAREN TODD: Thank you. Sebastian?

DR. SEBASTIAN BIEDENKOPF: One thing I would like to point out is the amount of information. Many executives still live in a world where they think all the information which is necessary for my decision will come in a small file. [LAUGHTER]

That's not all the information, but I have to consider all the information; even the law requires me to consider all the information. The Legal Department is not thinking in gigabytes any more; we're thinking in petabytes [one million gigabytes]. The question is, how do you provide somebody with enough information to make the decision, with petabytes of information? You will actually keep the company from going on running.

One of our key tasks there is to filter. That has two aspects. They might be happy that you filtered the information, or they might come back and tell you that you withheld information from them. That's one of the great challenges we're facing on both sides. I'm not sure which side I want to be on! [LAUGHTER]

KAREN TODD: Thank you. Ellen?

DR. ELLEN BRAUN: The questions are not getting any smaller! Among the many things, we came in Germany from what was called utmost politic. It was an idea about how you would regulate, how you would write laws. There was a general principle underlying it, which was, the principle of liberalism. That includes market liberalism, social democracy, and so on. We came from a principled approach. I'm an antitrust lawyer, like many at this table. This general principle was called into question, because it created so many *per se* rules. We moved on to a more economic approach, which we learned from the U.S. The European Union adopted it first, and then it came to Germany. The idea was to be more just, to arrive at more justice in a specific case, rather than by our procedure, to achieve predictability. There was a tradeoff, but the tradeoff was dissolved or resolved in the direction of specific justice rather than general justice.

Now, today – even justices both in Germany and in Luxembourg are not sure how it happened – it's all down to effective enforcement. That's the guiding principle, somehow. That means you throw out the first two, but you have nothing to replace it. It means that decisions by authorities get upheld more often than they should, with all the consequences that come with private enforcement now fully in place in Europe. There is a very basic misunderstanding about the relationship between the judiciary and regulatory authorities that has somehow crept in, and I'm not quite sure how you can get it out again. With the Tenth Amendment of the German Antitrust Law, we're moving even further in the direction of more enforcement under ever more general clauses. That's quite a concern to me.

KAREN TODD: Thank you. Wolfgang?

DR. WOLFGANG SPOERR: The most important things have been said. The only thing I would like to add is that executive boards and government should engage more in the political process. I've seen a tendency to disregard politics in government, because they see it as too local, and they should do it more based on a principled approach and not just when their direct economic business interests are affected.

KAREN TODD: Thank you. Sebastian, what are some of the qualities that you look for in your corporate counsel? For the outside law firms, what qualities do you find it easiest to work with in a corporate group?

DR. SEBASTIAN BIEDENKOPF: That is a long list, and we don't have enough time for all of it! Of course, I need people who are excellent in what they're doing. They don't have to be the best in the law

itself. They have to be practical; they have to understand what the client needs; they have to understand the product. They have to have common sense. It's a very long list, and you never find all of that.

We defined three things we are looking for and want to promise to each other, which are essential, and that's responsibility, transparency, and accountability. These are really the things we are looking for in our team members. Taking over responsibility. I mentioned that's not typical for lawyers – at least's that the cliché. If you are transparent, most of the problems usually disappear, because it can be fixed. People have to be accountable. They have to say, "Yes, that is my responsibility." That goes in both directions.

KAREN TODD: Thank you. Wolfgang?

DR. WOLFGANG SPOERR: Transparency and being fully informed and sharing all goals, objectives and facts. Being candid is definitely the most important thing. Frankly, what I like most is direct criticism. Instant direct criticism instead of waiting and seeing, so that's the most crucial part for an external counsel, because we need to know what the expectations are.

KAREN TODD: Great. Ellen?

DR. ELLEN BRAUN: Sebastian has said it all already, and if you follow these three values, it means that you're reflective. You have a principled approach which means you have to reflect on what you're doing. That's what we need on both sides of the table.

KAREN TODD: Thank you. Matthias?

DR. MATTHIAS KARL: When we had a meeting with the Legal Department of Bosch some eight or nine years ago, I used a picture of the Legal Department as the orchestra. They play all and any music the conductor is putting in front of them. Sometimes, if the music is a symphony of Richard Strauss, or Mahler's Second or Mahler's Fifth, they probably need someone who comes in with a second tuba, that sits in the row with the Legal Department, listens to the conductor and is not acting up, but supports what they are doing. That was always what I told my people. We are just joining their forces; we have a clear, defined role. He is the conductor, and we try to make nice music. [LAUGHTER]

KAREN TODD: Great. Jeremy?

JEREMY CALSYN: It's a difficult question and I've had the joy of working with a lot of great clients over the years. For me, I'm very willing to be transparent. I love to debate the issues; I like to work through things. It's helpful to also be trusted. I'm putting myself on the line; I'm making judgments. I'm not saying it's a 50/50 chance, you choose – I'm going to say what I think; I'm going to develop a plan; I can debate the plan; it can be adjusted, but having trust is very important, and it's a key issue. I trust the internal people, too, but it's a two-way street. That's a key factor that makes life more enjoyable on the outside.

KAREN TODD: Thank you. Uli?

ULRICH WOLFF: I agree, of course, with all of the above. I have two additional ones. One is "clear instructions." I need to know what is going on, and when my instructions oscillate, often for good internal reasons, that makes my life pretty awful. The second basic criteria and hope is that people are nice. I don't really like to work for assholes. [LAUGHTER]

That is a fantastically important message that I only discovered about 30 years into my practice. Do not work for people you don't like, because the chances are, they won't like you back, and then it's impossible to get along and appreciate each other. And if you are in that situation, be open, raise it, discuss it, read the signs. Ask a partner to take over, or maybe another law firm. Often, it's just the chemistry between people that doesn't work, and you can't do anything about it.

KAREN TODD: Thanks very much.

I would like to thank our Distinguished Panelists for sharing their expertise and wisdom this morning. I'd like to thank, again, Sebastian and his legal team for the great job they are doing and for giving us an insight into their company. Finally, thank you to the audience for being here. [APPLAUSE]

Dr. Ellen Braun

Partner

ALLEN & OVERY

Ellen Braun, LL.M. (UC Berkeley), is a German Rechtsanwältin [lawyer] and head of our German antitrust practice. She specialises in EU and German competition law.

She has an active practice representing clients in competition proceedings before the EU Commission, the German Federal Cartel Office and the courts. Her broad practice covers the full breadth of antitrust law including advising on long-term competition and antitrust strategies; complex merger control cases including worldwide multiple filings; structuring of cooperation, joint venture and distribution agreements; compliance advice, audits and design of compliance programs; EU and German cartel investigations including leniency applications; as well as actioning and defending private enforcement cases in court.

Her long-standing client relationships encompass all industry sectors, with a particular focus on food, consumer products, general industry, construction, infrastructure and energy, media and entertainment, as well as financial services.

Ellen is recognised by all the principal legal directories, including Chambers Europe 2012 who say she "regularly demonstrates the ability and willingness to go the extra mile."

She regularly speaks and publishes on EU and German antitrust law issues. Her publications include the chapters on horizontal agreements under EU law, on horizontal and vertical agreements under German law, and on energy antitrust law and competitor co-operation, all in the Langen/Bunte, the leading German language commentary on EU and German antitrust law.

She holds an LL.M. from UC Berkeley and a doctorate in antitrust law from the University of Hamburg. She is also admitted to the New York Bar. She previously worked as an associate at a leading German antitrust practice.

German is Ellen's mother tongue and she speaks English fluently, as well as French.

Allen & Overy LLP

At a time of significant change in the legal industry, we are determined to continue leading the market as we have done throughout our 88-year history. We will do this by ensuring we always challenge ourselves to bring new and original ways of thinking to the complex legal challenges our clients face.

Over the past year, we have worked with some of the world's leading businesses on transactions that have changed their industries. These include advising: HSBC globally on the project to restructure its legal and business structure to meet the post-crisis regulatory reform agenda and is the single largest project undertaken by the UK financial services industry to date; 21st Century Fox on its proposed acquisition by The Walt Disney Company; the second restructuring of Edcon Holdings Ltd and Edcon Ltd, one of the market's most significant restructurings, which brought together experts advising on South African law, English law and New York law; and Worldpay on its merger with Vantiv, which involved lawyers from 20 A&O offices.

Building on our long heritage enables us to attract the most talented people and continue to deliver this level of innovation with and for our clients.

To support our clients' international strategies, we have built a truly global network now spanning 44 offices in 31 countries. We have also developed strong ties with relationship law firms in over 100 countries where we do not have a presence. This network makes us one of the largest and most connected law firms in the world, with a global reach and local depth that is simply unrivalled.

Global coverage in today's market does not simply mean having offices in important cities around the world. For us, it means combining our international resources and sector expertise to work on cross-border transactions directly in the markets and regions important to our clients.

Jeremy Calsyn

Partner

Jeremy Calsyn's practice focuses on the full range of antitrust matters, including merger review, criminal and civil government investigations, and litigation, including complex class actions.

Jeremy has represented clients in their most high-profile and sophisticated matters, including mergers and acquisitions requiring regulatory approval in dozens of jurisdictions, global cartel investigations, and in litigation in federal and state courts. Most recently, he has navigated several automotive parts suppliers through U.S. Department of Justice (DOJ) and worldwide investigations into industry-wide price fixing – described by the DOJ as the largest criminal investigation it has ever undertaken.

Previously, he was a Member of the ABA Antitrust Law Section's International Cartel Task Force. He also clerked for Honorable Louis F. Oberdorfer, *U.S. District Court, District of Columbia.*

Jeremy joined the firm Cleary Gottlieb Steen & Hamilton LLP in 1999 and became partner in 2008.

CLEARY GOTTLIEB

Cleary Gottlieb Steen & Hamilton LLP

Cleary Gottlieb is a pioneer in globalizing the legal profession. Since 1946, our lawyers and staff have worked across practices, industries, jurisdictions and continents to provide clients with simple, actionable approaches to their most complex legal and business challenges, whether domestic or international. We support every client relationship with intellectual agility, commercial acumen and a human touch.

We have a proven track record for serving with innovation. We are fluent in the many languages of local and global business. And we have achieved consistent success in multiple jurisdictions.

Clients know Cleary for our signature approach to serving their needs:

- Skilled resolution of high-profile, complex legal and business challenges
- A sharp focus on the issues that matter most
- A commitment to addressing our clients' immediate needs and advancing their longer-term strategic goals

We have 16 offices in major financial centers around the world, but we operate as a single, integrated global partnership and not a U.S. firm with a network of overseas locations.

- All Cleary clients enjoy access to the full resources provided by our offices and lawyers worldwide.
- The firm employs approximately 1,300 lawyers from more than 50 countries.
- Cleary received Chambers and Partners' inaugural International Law Firm of the Year award, recognizing our global practice and our pioneering tradition of developing homegrown talent in the different countries where we operate.

We serve international and national business organizations, financial institutions, sovereign governments and their agencies, nonprofits and community organizations, and civil rights and human rights groups.

We strive to admit to our partnership lawyers with demonstrated qualities of character, leadership and intelligence, who have the proven legal skills that will enable them to contribute significantly to our practice over the long term.

Consistent with the vision of our founders, Cleary remains committed to building a community focused on openness, diversity, individuality and collegiality.

The essence of the firm's culture is represented by our lawyers: talented and intellectually accomplished people of all nationalities, races and interests, who believe that the practice of law is a privilege that carries responsibility. Together we apply our legal knowledge for the benefit of those in need, dedicating a substantial amount of time and resources to pro bono legal work and other community activities.

Dr. Matthias Karl

Partner

Dr. Matthias Karl does extensive work in the area of German and European antitrust law. In addition, he specializes in, (among other things) merger control and distribution law. He also advises clients with regard to compliance issues.

Who's Who Legal Germany 2016 stated "Matthias Karl is an antitrust 'guru' and impresses with his 'creative approach' to client issues."

He studied in Munich, Hamburg and Ann Arbor, Michigan USA (LL.M.). He has been a partner at Gleiss Lutz since 2000.

In 1996, Matthias was admitted as Attorney at Law in New York State.

He is a member of the German Association for the Study of Antitrust Law. He is also a member of the Federal Lawyers' Association.

He speaks German, English and Spanish.

Gleiss Lutz

Gleiss Lutz

Gleiss Lutz is recognized as one of Germany's leading internationally active full-service law firms. Excellence is our aspiration; client and mandate are our passion. Gleiss Lutz stands for the highest quality legal advice, delivering practical and creative solutions in all areas of corporate law.

We are committed to delivering first-rate advice as well as workable and creative solutions. Our success and reputation are based on the seamless integration of legal expertise, experience and deep industry knowledge.

We have built a strong and tested international network with premier law firms and lawyers across the globe that allows us to provide seamless, integrated service on complex international projects.

Our commitment to business-focused advice and service delivery is the cornerstone of our philosophy. We invest considerable time and effort in building lasting client relationships. Clients value our clear communication, business-focused solutions and responsiveness.

We have over 300 lawyers, including 85 partners. Our lawyers work in small, handpicked teams (often across borders) that can be scaled as required. We make a point of not overstaffing projects.

Full Service: We advise on all aspects of business law.

Clients: Leading German and international businesses, including numerous DAX [a German blue chip stock market] -listed and Fortune 500 companies and public authorities.

Offices are in Berlin, Düsseldorf, Frankfurt, Hamburg, Munich, Stuttgart and Brussels.

Global network: We provide one-stop-shop support to clients on international projects, drawing on our close relationships with leading international law firms.

Dr. Wolfgang Spoerr

Partner

HENGELER MUELLER

Wolfgang is a senior member of the firm's public law and regulatory group and has broad experience in the multi-faceted institutional setup of government involvement with business in Germany, often for technology companies.

He specializes in contentious matters before state agencies, courts and arbitration tribunals, including the administrative, constitutional and social security court system, in the law making and technical standardization process, and in defending companies in administrative and criminal investigations and trials. He often advises companies that are faced with unusual legal challenges, especially in the high technology sector. For more than a decade, he has been heavily involved in license negotiations and contentious matters with copyright collecting societies.

Wolfgang has a specific focus on regulated contracts, their negotiation and related dispute resolution. In recent years, he has represented the largest German cable operator in a dispute on the conditions of distribution with German public broadcasters before various civil and administrative courts a major search engine operator in its dispute with major German press publishers and their collecting society resulting from the newly created ancillary copyright Deutsche Telekom in a dispute with a major mobile service provider and the Federal Government in arbitration proceedings and contract negotiations related to the toll collection system.

Wolfgang's practice includes corporate criminal matters including corporate defense at trial. Together with U.S. counsel, he has recently been advising European companies in industry-wide investigations of the U.S. Department of Justice and other U.S. regulators and German prosecutors, including Mutual Legal Assistance (MLAT) proceedings.

Wolfgang acts on a regular basis for a major European hospital operator and leading service providers in the ambulant healthcare sector on their medical law matters. Wolfgang's experience and principal areas of activity include data protection, product regulation, export control and financial sanctions, as well as planning, permitting and environmental law.

Hengeler Mueller

Hengeler Mueller originated in 1990 from a merger of two law firms: Hengeler Kurth Wirtz in Düsseldorf and Mueller Weitzel Weisner in Frankfurt. Our Düsseldorf office dates back over a century, while the Frankfurt firm was founded in 1947. Immediately after the merger we opened in Berlin, later followed by offices in Brussels, London and Munich. In 2014, we established a base in Shanghai. The firm currently has 280 lawyers including 90 partners.

Hengeler Mueller's clients include major domestic and foreign entities, as well as leading private equity investors and family-owned enterprises in Germany, Europe and worldwide. We work for large corporates and for small start-ups. We manage high-profile projects and apply the same level of commitment to less visible assignments that never hit the headlines. What counts is the value we add for our clients. That's what drives us.

Hengeler Mueller specializes in high-end legal advice to companies in complex business transactions. Some assignments are tougher than others. More delicate. More demanding. Or simply more complex. Where conventional methods fall short, where new approaches need to be adopted, new boundaries defined and new solutions provided that are robust and permanent. That is what we do. Nothing inspires us more than a challenge of charting the best course for our clients.

We believe in quality and in the value of the individual. We integrate many different talents, but above all, we are a partnership where calibre is matched by character. There is no sense of hierarchy in our teams, no room for egos – we all work with passion for the common good in overcoming the challenges we face. This sets the stage for remarkable results. And it's immensely motivating.

Ulrich Wolff

Partner

Linklaters

Ulrich Wolff is a partner at Linklaters LLP, where he has specialized experience in German corporate finance, M&A and banking, advising corporate clients, private equity houses and investment banks. Ulrich Wolff is leading the firm's initiatives regarding Canada and Canadian clients.

Professional Experience

2001 to date Partner, Linklaters

1995 – 2001 Move to London to head the London office of Oppenhoff & Rädler and, following the merger of that firm with Linklaters, the German Practice of Linklaters in London

1997 – 2000 Partner, Oppenhoff & Rädler

1991 – 1997 Associate, Oppenhoff & Rädler

Education

1991 – II. Juristisches Staatsexamen (Second Legal State Examination)

1988 – 1991 Referendariat (legal traineeship), Mannheim

1986 – I. Juristisches Staatsexamen (First Legal State Examination)

1986 – 1988 LL.M., McGill University, Montréal

1986 – 1988 LL.B., Université de Montréal

1983 – 1986 Law Studies, University of Freiburg

1981 – 1983 Law Studies, University of Tübingen

Linklaters LLP

Our clients want a law firm they can trust, one that stands out for a commitment to investing in them and empowering our teams. We want to stand out for our distinctive Linklaters mind-set so our clients want to work with us above all others.

Delivering excellent client service and using our global capabilities to help them pursue the right opportunities means they benefit from long and lasting relationships.

To put clients at the heart of all we do, we recruit and develop exceptional people empowering them to do and think differently. We serve our clients as a team, with a common focus on innovation, efficiency and agility.

We work with companies, financial institutions, funds and governments to execute the most significant deals and to resolve disputes arising across the world. We want clients to know they have made the right choice, every time.

Working with our clients, we promise to provide not only our technical expertise, but exceptional client service – from every part of the firm. We field diverse and agile teams aligned to clients' needs and we create an environment in which they can exceed expectations. We invest constantly in our systems, technology and working practices to ensure that we deliver the right results.

Clients' businesses are our business. We bring a long-term perspective, embracing new ideas and proactively identifying future trends and products. We listen to our clients to allow us to understand their current and future needs and to shape our business to meet those.

Clients tell us they value our partnership culture, and we honor the spirit of teamwork and collaboration on which our firm was built – but we also provide the benefits of working with an ambitious, outward-facing, and entrepreneurial business. It is also important to us that we are recognized as a responsible business, one which uses its skills and resources to positive effect in the community.

We are a people business. Being best in class in the eyes of our clients means that our people must be exceptional.

We look not only for brilliant minds, but for people who will thrive in our environment: people who love working collaboratively and demonstrate the innovative, efficient, agile, entrepreneurial and responsible mind-set we aim to bring to every interaction.