A guide to public takeovers in Germany

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Introduction

This guide provides a high level overview of the legal framework regarding public takeover bids in Germany.

The takeover of a listed company can be effected by virtue of a public offer addressed to the shareholders of such listed company for the acquisition of their shares in exchange for cash, securities, or a combination of the two.

The German public offer rules apply when the target company of such offer is a German listed company whose shares are admitted to trading on a German stock exchange or another regulated market in the European Economic Area. The German rules may also apply if the target is a foreign company whose shares are admitted to trading on a German stock exchange.

If the target is listed both in Germany and in another jurisdiction (inside or outside the European Economic Area), additional foreign regulations may apply. This brochure is limited to a discussion of the law regarding public bids for companies listed only in Germany.
Pre-bid issues

Announcement obligations

The German rules lay down strict requirements for when an announcement must be made. Therefore it is very important for the potential bidder and the potential target to maintain the utmost secrecy prior to the announcement of an offer, so as to avoid a forced premature announcement before the preparations have been completed. Furthermore, as the pricing rules for takeover and mandatory bids are tied to the stock exchange price of the target shares and as information about the upcoming bid will be likely to result in an increase of the stock exchange price, it is in the interest of the bidder to avoid any leak.

Due Diligence

Recommended offer

The management board of the target company is the gatekeeper for due diligence based on the books and records of the target company. The management board of the target may permit a bidder to conduct due diligence if and to the extent this is in the best interest of the target company. A confidentiality undertaking of the bidder is a “must have” condition for this exercise. Apart from that, it is up to the management board of the target, based on a letter of intent or an indicative offer submitted by the bidder, to assess the interest of the target company in the proposed transaction, the consideration to be offered by the bidder and the chances of success of the offer. If the bidder is permitted to conduct due diligence based on the books and records of the target company, the bidder will usually be given only limited information during a limited period of time.

Hostile offer

If the offer is hostile, the bidder is usually confined to base its bid on public information. This is the case even if the hostile offer is competing with a recommended offer of another bidder. There is no rule under German law under which a competing bidder would be entitled to receive the same level of information as the previous bidder.

Public information

Information which can be retrieved from the website, the commercial register of the target company or other public sources usually comprises the following items:

- the annual accounts;
- the articles of association;
- major shareholders (disclosure of substantial shareholding starts at 3% of the voting rights);
- members of the management board and the supervisory board;
- issued share capital, the delegation of powers to the management board to issue new shares;
- minutes of shareholder meetings including shareholder resolutions; and
- a description of the corporate governance and any takeover protections installed.

Offer-related arrangements

Can the target grant exclusivity?

Yes in principle, but the management board of the target company must act in the best interest of the company. Entering into an exclusivity agreement may not be in the interest of the target if this prevents the target from considering alternative transactions. Therefore, depending on the specific circumstances, granting exclusivity may not be a proper discharge of the target directors’ duties.

This is the reason why target companies will usually seek to agree on a “fiduciary out” in the event of a superior offer. These kinds of arrangement are usually part of a business combination agreement or investment agreement entered into between the bidder and the target.
Confidentiality and standstills

Is a confidentiality agreement enforceable?

A target will require a potential bidder to enter into a confidentiality agreement or non-disclosure agreement before it is willing to hand over any non-public information. If the target also wishes to conduct due diligence on the bidder, the bidder will want a reciprocal agreement. It is quite common to include standstill provisions in confidentiality agreements of this nature.

The target may be required to disclose the preparation of an offer if the offer preparations have progressed so far that they constitute inside information. A premature disclosure is usually in the interest of neither the target nor the bidder. To prevent premature disclosure, the target may decide to delay disclosure, which is permissible if (i) delaying disclosure is in the interest of the target, (ii) the target can ensure confidentiality and (iii) the non-disclosure will not mislead the market. Careful planning is key for bidders and targets to avoid premature disclosure.

Irrevocable undertakings by shareholders or pre-contractual agreement with other shareholders

Can target shareholders irrevocably bind themselves to accept an offer before the announcement of the offer?

A bidder may wish to approach key target shareholders shortly before announcing an offer, and request the key target shareholders to provide undertakings to accept the bid. This is permissible to the extent the approach of the key target shareholders does not constitute the improper conveyance of inside information. There is no hard and fast rule like the “rule of six” under the UK Takeover Code, hence bidders will have to weigh carefully whom to approach. An approach to target shareholders should be permissible to the extent that the irrevocable undertaking is reasonably required to make the offer successful.

To avoid the requirement of immediate disclosure, the bidder must secure the shareholder's commitment to confidentiality before informing the shareholder about the proposed transaction. Furthermore, it should be noted that the bidder is required to disclose irrevocable undertakings without undue delay if the bidder's aggregate long position in target shares, and financial instruments referencing target shares, extends to 5% or more of the share capital of the target company.

When shareholders are contacted about a proposed offer, they usually become insiders and can no longer trade in their shares or tell anybody about the proposed offer. The irrevocable undertaking must specify the exact number of shares subject to the shareholder's commitment.

The bidder must describe the irrevocables in the offer document so that the other shareholders have transparency as to the expected acceptances.

Shareholders may try to agree that an irrevocable undertaking lapses if a higher competing offer is made. Bidders will usually oppose such request, not only because it is always better to have certainty but also with a view to merger arbitrageurs and bid tactics.

Can the bidder agree to acquire the shares from shareholders prior to the announcement of an offer?

Alternatively to an irrevocable undertaking by a shareholder the bidder may agree with the shareholder to acquire its shares. This agreement may be subject to the completion of the offer. It is not uncommon that the shareholder may grant certain representations and warranties.
Dealings in target shares

Scope and restrictions

A potential bidder can buy shares in a target before announcing its bid, unless it is in possession of inside information. The bidder’s knowledge of its own intention to make a bid usually does not preclude a bidder from buying target shares in the target. However, no one else who is privy to this information may deal in target shares, except on behalf of the bidder. A bidder can also buy target shares following the announcement of its bid, and throughout the offer period, subject to insider dealing rules and applicable disclosure requirements.

Purchasing 30% or more of the voting rights of a target triggers a mandatory offer for the target shares not already owned by the bidder.

Stake-building may itself lead to anti-trust issues, depending on the degree of influence obtained. Clearance under German merger control rules may be required as early as when the shareholding confers influence which is significant from a competition point of view. This depends on the respective businesses and markets and is usually the case where the shareholding confers 10-15% of the voting rights.

Other consequences

Dealings in target shares may trigger the requirement that the consideration owing under the offer must be in cash. This is the case where the bidder acquires 5% or more of the target share capital for cash during a period beginning six months before announcement of the offer and ending with the end of the offer period.

Acquisitions of target shares in parallel to the offer are permissible, but such acquisitions must be disclosed and, if made at higher price, will lead to an automatic increase of the offer price.

Acquisitions of target shares within a period of one year after the end of the offer period which are made at a higher price than paid under the offer may lead to the obligation of the bidder to pay the delta between the higher price paid and the offer price to all shareholders who had accepted the offer. An exception applies for stock purchases on stock exchanges and in the course of transactions requiring mandatory exit compensation (e.g. domination agreement, squeeze-out).

Disclosure thresholds

General disclosure requirements concerning shareholdings in listed companies

A shareholder in a listed company shall notify BaFin and the target company promptly if reaching or exceeding certain levels of voting rights in such company. These are 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75% of the voting rights. Voting rights include not only voting rights from own shareholdings, but also from shareholdings of subsidiaries, trustees, parties acting in concert and a few other parties as set out in the applicable anti-circumvention rules.

In addition, disclosure requirements apply for the holding of certain equity derivatives conferring long positions in shares of a listed company, regardless of whether they are to be settled in kind or in cash.
The entry threshold for disclosure is 5% of the voting rights. Voting rights from shares and equity derivatives must be aggregated. Hence the maximum position which can be held without disclosure is a combination of 2.99% voting rights appertaining to shares and 2.00% equity derivatives.

Violations of disclosure obligations are subject to administrative fines, profit disgorgement and loss of shareholder rights (such as the right to cast votes in the shareholder meeting).

A shareholder of 10% or more of the voting rights in an issuer based in Germany is required to publish its intentions and the sources of the funds used for the acquisition of the shareholding.

Additional takeover disclosure rules

A bidder must disclose in the offer document all shareholdings in the target owned by or attributable to the bidder. Furthermore, the offer document shall mention all acquisitions of target shares by the bidder or persons close to the bidder during the six-month period preceding publication of the offer document.

During the offer period, the bidder must disclose acceptances received, and shares acquired outside the offer, on a weekly, and during the last week of the offer period on a daily, basis.
Structuring German takeovers

**Takeover offers**

The most common method of structuring a bid for a German target is by means of a voluntary general recommended offer to all shareholders (Takeover Offer).

Other methods used of acquiring control:

- **Mandatory offer.** Triggering a mandatory offer by purchase of shares (block purchase or on the stock exchange).
- **Merger.** Merger (or demerger) pursuant to the Transformation Act.

What types of public offers are available?

Regarding the consideration payable under the offer, three types of public offers can be distinguished:

- **Cash offer.** A public offer to acquire all the shares in the target at a specified offer price payable in cash.
- **Exchange offer.** A public offer to acquire all the shares in the target in exchange for shares in the bidder or a group company (shares must be liquid and listed in the EEA).
- **Combination of the above.** Shareholders in the target may be offered the choice between cash or shares or a combination of cash and shares (shares must be liquid and listed in the EEA).

Other distinctions between public offers:

- **Full offer.** A public offer for 100% of the target shares not already held by the bidder. This is required in the cases of a takeover offer and a mandatory offer. Where the offer is neither a takeover offer nor a mandatory offer, it is up to the bidder to decide that the offer shall be for all shares not already owned by the bidder.
- **Partial offer.** A public offer for the acquisition of less than 100% of the target shares not already held by the bidder. This permissible only if either the bidder aims at getting a shareholding of less than 30%, or if the bidder owns 30% or more in the target and aims at acquiring more shares.

Are hostile bids allowed? If so, are they common?

Hostile bids are permissible. They do occur from time to time, but not frequently. Despite a common prejudice, German listed companies have access only to a limited arsenal of anti-takeover devices.

In case of a recommended offer, is it common to have a formal agreement between the bidder and the target?

Yes, it is. This agreement will most likely be in the form of a so-called investment agreement or business combination agreement. Such an agreement often deals with issue such as:

- The proposed consideration payable under the offer.
- Further terms of the offer (such as offer period and conditions).
- Support of the offer by management board and supervisory board of the target.
- The future corporate governance of the target.
- Any further confirmatory due diligence on the target.
- Deal protection, competing offers and break fees.
Are there any requirements for the management board of the target to inform or consult its employees about the offer?

The management boards of both bidder and target must inform their respective works councils (or, if there are none, their respective employees) immediately of the announcement of a public offer and of the publication of the offer document.

Furthermore, the works council of the target (or, if there is none, its employees) may submit to the target management board a reasoned statement commenting on the offer. If submitted, the management board of the target is required to publish the works council statement together with its own reasoned statement commenting on the offer.

The management boards of neither the bidder nor the target are required to ask their works councils for advice, or consult with their works councils, in relation to the public offer.

Are there rules on employee participation?

There are no such rules. However, members of the management board holding shares in the target are obliged to communicate in the reasoned statement commenting on the offer whether or not they intend to accept the offer for their shares. Furthermore, bidders are prohibited from granting or promising unjustified monetary benefits. Benefits that are in the interest of the target are permissible but must be disclosed in the offer document.

Are break fees permitted? If so, under which circumstances are break fees likely to be payable? Are there any restrictions on the size of the payment?

Break fee arrangements are not common place in Germany, but they have been agreed from time to time. If agreed, the break fee arrangement would include a break fee payable by the target to the bidder, in particular if the target withdraws its support for the initial offer in view of a superior offer by another bidder.

The permissibility of break fee arrangements is still an open issue under German law. The general view of the leading legal literature is that break fee arrangements should be permissible, depending on the circumstances of the individual case. It is generally understood that any break fee payable by the target should not be set at a level that would prevent any competing offer from succeeding; although no conclusive case law exists on the size of break fees, the majority of the legal literature considers break fees in the amount of up to 1% of the deal value as permissible.
Financing and ‘certain funds’

Can a target provide financial assistance, e.g. by way of a loan or guarantee for acquisition finance?

German stock corporations are prohibited from providing advances, loans or security for the benefit of third parties in connection with the acquisition of its shares. This applies to assistance prior and after the acquisition of shares. If a domination and profit and loss pooling agreement were implemented between bidder and target, or the target company were transformed into a German Limited Liability Company, after the consummation of the offer, more relaxed rules would apply. But the conversion cannot be used for the circumvention of the prohibition of financial assistance.

Is committed funding required before announcing an offer?

Yes, it is. Statutory law requires the bidder to demonstrate certainty of funds when submitting the offer document to BaFin. Therefore, the bidder must ensure that its financing arrangements are in place before launching the bid. The bidder is obliged to describe in the offer document how it will finance the acquisition of shares which are subject to the offer. With regard to the cash component of the consideration, a written confirmation from an independent bank must be submitted together with the offer document. The bank issuing the financing confirmation must be licenced to do business in Germany (i.e. domiciled in Germany or operating in Germany under the European passport; i.e. Swiss or US banks are not eligible). The bank will be liable towards the shareholders if the bidder fails to pay the consideration and the bank was aware, or failed to know because of gross negligence, that the funding was not certain.

Key percentage thresholds

Minorities

– **one share** – making motions in general meeting; making counter-proposals within the scope of the agenda for the general meeting; proposing candidates to the supervisory board; proposing statutory auditors, proposing the appointment of special auditors; challenge shareholder resolutions in court (Anfechtungsklage); right of information during general meeting concerning any matter relevant to agenda of general meeting (Auskunftsrecht); initiation of legal action to enforce disclosure of requested information (Auskunftserzwingungsklage); application to the competent court to appoint a special auditor for auditing the company’s relations to its affiliated companies; initiating judicial proceedings to determine the amount of the adequate compensation and settlement due under a domination and profit and loss transfer agreement or cash compensation after a ‘squeeze-out’.

– **1% of nominal capital or shares with a nominal value of at least EUR 100,000** – application to the competent court to assert civil claims against members of the management board and the supervisory board in the name of the respective applicants and on behalf of the company; application to the competent court to appoint a special auditor, application to the competent court to appoint a different person as special auditor; application to the competent court to appoint a special auditor for evaluating an undervaluation of assets.

– **5% of nominal capital or shares with a nominal value of at least EUR 500,000** – amendment of the agenda of a general meeting by additional items, application to the competent court to appoint a different statutory auditor.
– **5% of nominal capital** – convening of a general meeting.

– **5% of nominal capital plus one share** – can block ‘squeeze-out’ of minority shareholders, unless majority shareholder pursues the new upstream merger procedure (which requires a shareholding of only 90%).

– **10% of the capital present in the shareholder meeting** – can request that, in the shareholder meeting, a proposal for the election of members of the supervisory board of a single shareholder is resolved upon prior to voting on the election proposal of the supervisory board.

– **10% of nominal capital or shares with a nominal value of at least EUR 1,000,000** – right to request individual discharge of members of the management board and the supervisory board (Einzelentlassung), rather than "block" discharge of the whole board; application to the competent court to dismiss a supervisory board member appointed pursuant to special appointment rights in the articles of association (entsandtes Mitglied); application to the competent court to appoint different special representatives (besonderer Vertreter) for the assertion of claims against members of the management board and the supervisory board.

– **10% of nominal capital** – prevent a shareholder resolution regarding a waiver of damage claims against members of the management board or supervisory board.

– **10% of nominal capital plus one share** – can block ‘squeeze-out’ of minority shareholders, even if the majority shareholder pursues the new upstream merger procedure.

**Majorities**

– **50% plus one vote** – general principle of ‘majority rule’ subject to limited minority protection rights; in particular voting control over target on ordinary resolutions, e.g. declaration of dividends, appointment of members of the supervisory board (in many cases also, pursuant to the articles of association of the relevant company; if provided for in the articles of association: dismissal of members of the supervisory board before the end of their term).

– **75% of the capital present and voting in the shareholders’ meeting** – resolutions on the amendment of articles of association, transfer of all assets, capital increase or decrease, mergers, demergers and change of legal form, dissolution of the company, domination and profit and loss pooling agreements; unless a different majority is stipulated in the articles of association: dismissal of members of the supervisory board before the end of their term.

– **90% of the nominal capital** – ‘squeeze-out’ of minority shareholders in connection with upstream merger into another German stock corporation.

– **95% of the nominal capital and 90% acceptance of the offer** – allows for ‘squeeze-out’ of minority shareholders according to Takeover Act at the offer price following a successful takeover offer (within three months after the lapse of the offer period and without shareholder resolution).

– **95% of the nominal capital** – ‘squeeze out’ of minority shareholders at fair value (audit and appraisal rights) pursuant to shareholder resolution.
Conditions

A public offer is irrevocable once the offer document has been published. It can be made subject to conditions, but an offer must not be subject to conditions solely controlled by the bidder. A takeover or mandatory offer must extend to all shares. All shareholders of the same class must be treated equally.

Examples of conditions often seen in German takeover offers:

- Merger control and other regulatory clearance by relevant authorities.
- Minimum acceptance condition such as 50% or 75% of the voting rights of the target to assure a certain majority in shareholders’ meeting.
- No MAC having occurred (accepted by BaFin only if precise enough).

In case of a mandatory offer, only regulatory approvals can be stipulated as conditions. Under BaFin practice, offer conditions must generally be met or waived during the offer period. This is different under the takeover rules of certain other jurisdictions where the bidder may subject the offer to the condition of a certain acceptance threshold and, if the acceptances fail to meet such threshold, decide after the end of the acceptance period to waive the condition and consummate the offer despite missing the stipulated acceptance level.

Deviating from this general approach, BaFin permitted that regulatory conditions such as merger control clearance can be met after the close of the offer period. Otherwise the timetables under the Takeover Act and the scrutiny periods under relevant competition laws could not be reconciled. In a recent decision, BaFin permitted for the first time that in an exchange offer the bidder’s share capital increase creating the exchange shares may be registered in the commercial register even after the close of the offer period. This turn in BaFin’s administrative practice has made it easier for German bidders to complete exchange offers.
Announcing and making the offer

How does the offer process usually start?

The offer process starts once the bidder has taken the decision to launch an offer. If the bidder agrees with a shareholder an irrevocable undertaking or a separate agreement to acquire its shares these agreements are concluded simultaneously with the decision to launch an offer. Forthwith upon this decision, the bidder is required to

– Notify its decision to BaFin and the stock exchanges on which securities of the bidder, the target company, and other companies directly affected by the offer and, where such securities are the underlying of derivatives, such derivatives are admitted to trading (so that the stock exchanges have the opportunity to decide whether or not to suspend trading);

– Thereafter: publicly announce its decision in the German language (i) in the internet and (ii) through an electronic information dissemination system with a wide circulation among banks and other financial service providers; and

– Without undue delay thereafter: notify the management board of the target in writing of the decision to launch an offer.

The announcement triggers a four-week period during which the bidder must submit the offer document to BaFin for review and approval. In practice, many bidders prefer to deliver the offer document to BaFin just a few days after the announcement. BaFin may extend the submission period by up to four weeks, but only if and to the extent the bidder needs additional time for raising equity capital or because of the cross-border nature of the offer.

Can a requirement to announce be triggered by an approach by a bidder?

This may be the case under the rule that listed companies, such as the target, must disclose price sensitive information without undue delay (the same applies to the bidder if the bidder is a listed company). Potential bidders will have to handle this issue with care. They are usually interested in preventing disclosure at an early stage where it is unclear whether an offer will be made and, if so, at which terms. Therefore bidders will usually see to it that the target takes the decision to delay disclosure.

For the target, it is permissible to delay disclosure if and as long the following requirements are met:

– There must be a legitimate interest of the target. After an approach by a potential bidder, this is usually the case, given that a target usually wants to discuss the potential transaction with the bidder rather than putting itself “in play” at a time when it is unclear whether the potential bidder will go ahead and, if so, what the terms of the offer will be;

– The price sensitive information must remain confidential; and

– The market shall not be misled.

Conversely, if there are rumours about the transaction or if there is an untoward movement in the target share price, an announcement must usually be made.
No ‘Put up’ or ‘shut up’

There is no “put up or shut up” rule in Germany. Therefore, if a rumour of an upcoming bid emerges or there is an untoward price movement in shares of a listed company, BaFin has no authority, except if such behaviour is abusive, to force the rumoured potential bidder to decide and announce, within a limited period of time, whether the bidder wants to go ahead with the offer or, if the bidder does not announce to go ahead, ban the rumoured potential bidder from making an offer for a certain period of time.

Other European jurisdictions have implemented “put up or shut up” rules mainly to prevent “virtual bids”, i.e. potential bidders gauging interest in a public offer on an undisclosed basis. Germany has not faced issues with virtual bids so far. This may be due to the fact that a move in the stock exchange price has an impact on the consideration of an offer even in the case of a voluntary offer. Therefore it is in a potential bidder’s own interest to avoid upward speculation in the target shares before the formal announcement.
Conduct during a bid

Must the target board seek independent advice?

There is no legal requirement to do so. However, in practice, target management boards regularly engage a legal and a financial adviser. Where the transaction is sizeable, usually the target also retains a communications advisor and publishes a fairness opinion issued by the financial advisor.

Best price principle

The Takeover Act requires that all shareholders be treated equally. Inter alia, shareholders holding the same class of shares must receive the same consideration.

Under a takeover or mandatory offer, the consideration shall not fall short of the higher of:

- The price the bidder has paid or agreed to pay for target shares within the six-month period before the publication of the offer document; and

- The volume-weighted average stock exchange price during the three-month period before the announcement of the decision to launch an offer or, in the case of a mandatory offer, the disclosure of the acquisition of control; if the target shares are illiquid, rather than the volume-weighted average stock exchange price the fair value of the target shares pursuant to an appraisal of the target company will be decisive.

If there are different classes of target shares, the best price is to be determined separately for each class.

The rules outlined above apply to exchange offers mutatis mutandis. If the bidder shares are illiquid when the offer is announced (but are expected to become liquid upon settlement of the offer), an appraisal of the bidder shares will be required.

If the bidder exchanges its shares for target shares within the six-month period before the publication of the offer document, the minimum consideration under the offer shall be the higher of the stock price at the signing date of the pre-bid exchange and the stock price at the closing date of the pre-bid exchange.

If the offer is neither a takeover offer nor a mandatory offer (i.e. where the bidder aims at a shareholding below 30% of the voting rights post-offer, or where the bidder holds a shareholding of more than 30% pre-offer), there are no rules governing the consideration, except for the equal treatment principle. Hence, the bidder is free to decide on the compensation to be offered, provided that all target shareholders in the same situation are treated equally.
Can the offer price be increased?

Yes, the offer price can be increased. Two different procedures are available:

– The bidder may amend the offer; i.e. file with BaFin an amendment document stipulating the higher offer price (together with a funding confirmation in the case of a cash offer). This is permissible until one business day before the end of the offer period. If the bidder increases the offer price within the two weeks before the end of the offer period, the offer period will be extended by two additional weeks. No further amendment to the offer is permissible; or

– The bidder acquires shares of the target within the offer period for a price higher than the offer price; in such case the offer price will increase automatically to the price that the bidder has paid, a funding confirmation is not required, and the offer period will not be extended.

If the offer price is increased by amendment of the offer, shareholders having tendered their shares may withdraw their acceptances until the end of the offer period.

Are there restrictions on the making of competing offers?

No restrictions apply. If a competing offer is made for the same shares by a third party before the end of the offer period, and the offer period of such competing offer is stipulated to end after the end of the offer period of the earlier offer, the offer periods of both offers will be synchronized by operation of law. This means that the offer period of the earlier offer will be automatically extended to the end of the offer period of the competing offer. Target shareholders having tendered their shares to the first bidder before the publication of the offer document of the competing offer may withdraw their acceptances until the end of the offer period so that they are free to decide which of the offers to accept.
Timeline

Simplified overview of a takeover offer timeline (cash consideration)

**Pre-offer phase**

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<th>Step 1</th>
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<th>Step 3</th>
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<tr>
<td>Preparations and decision-making process</td>
<td>Decision to launch takeover offer</td>
<td>Announcement of takeover offer</td>
<td>Submission of the offer document to BaFin</td>
<td>BaFin review of offer document</td>
<td>Publication of offer document</td>
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<td>Information of management board of target company</td>
<td>Information of works council/employees</td>
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<td>without undue delay</td>
<td>up to 4 weeks (may be extended up to 8 weeks)</td>
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<td>up to 15 business days</td>
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Acceptance period

The acceptance period starts upon publication of the offer document. The minimum acceptance period is four weeks and the maximum acceptance period is ten weeks. During the acceptance period, the shareholders can tender their shares to the bidder.
Documentation for shareholders

Offer documentation

The offer documentation includes the following key documents:

– Public announcement of the offer.
– Offer document – content requirements are listed below.
– Specific public announcements required to be made by the bidder regarding the acceptance of the offer (“water level reports”).
– Reasoned statement by the board of management and the supervisory board of the target company.
  In this document the management and the supervisory board explain their position towards the offer.
– Reasoned statement by the works council of the target (if any).
– Funding confirmation (in the case of cash offers).

Bidders and targets (or large shareholders) may also sign business combination agreements or investment agreements. Bidders and targets may also seek fairness opinions from investment banks.

The offer document must provide all information that is required to enable the shareholders of the target to make an informed decision on the offer. The offer document must include the following information:

– Basic information on the bidder and the target company.
– The shares covered by the offer.
– Consideration and information on the valuation methods used to determine the offer price.
– Conditions to the offer.
– Offer period and offer procedures.
– Information on the measures taken by the bidder to ensure the full funding of the offer.
– Details outlining the expected consequences of a successful offer for the bidder’s financial position and performance.
– Information on the bidder’s intentions with regard to the future business of the target company.
– Number of target shares held by the bidder and persons acting jointly with the bidder when the offer document is published, and details of any acquisition by the bidder or a person acting in concert with the bidder of the target shares during the six-month period preceding the offer.
– Any bonuses payable to the target management or supervisory board members.
– In the case of an exchange offer all information to be contained in a prospectus.

Are there any restrictions on the supply of information during the offer period?

The bidder must send the offer document to BaFin for approval before publication. Apart from that, the general rules apply. Therefore, if price sensitive information emerges, the target must disclose such information without undue delay.
Introduction

The overriding objective for bidders under the vast majority of German takeovers is for the bidder to acquire 100% control of the target. In a successful takeover offer, however, there will always be a few target shareholders who, intentionally or otherwise, fail to accept the offer.

The ‘squeeze-out’ procedure

German law provides for three different procedures allowing for the ‘squeeze-out’ of the minority shareholders.

First procedure:

After completion of a takeover or mandatory offer, a bidder holding at least 95% of the total issued share capital of the target may acquire the remaining target shares for fair consideration. Fair consideration is a price equal to the offer price payable under the preceding takeover or mandatory offer, provided that such offer has passed the “market test” that at least 90% of the shares at which the preceding offer was addressed were tendered into the offer. If these requirements are met, the bidder may initiate a squeeze-out procedure with the Frankfurt am Main District Court within three months after the end of the acceptance period. Likewise, shareholders who have not accepted the offer during the acceptance period may request to be bought out by the bidder at the offer price within three months after the end of the offer period. This procedure is not pursued very often because bidders usually fail to reach a shareholding of 95% after the offer.

Second procedure:

The Stock Corporation Act provides for a general squeeze-out procedure which is available independently of a takeover or mandatory bid, i.e. the three-month limitation period does not apply. The procedure is available if a controlling shareholder holds at least 95% of the total issued share capital of a Stock Corporation and sends a notice to the company requesting a shareholder resolution on the ‘squeeze-out’. The controlling shareholder is required to pay a cash compensation to the minority shareholders, reflecting the fair value of their shares. Minority shareholders may challenge the shareholder resolution in court. In addition, they may start appraisal proceedings under which the fairness of the compensation will be determined (Spruchverfahren). Litigation against the shareholder resolution usually delays the implantation of the squeeze-out. By contrast, appraisal proceedings can start only after the ‘squeeze-out’ has been implemented, i.e. they cannot delay or prevent the ‘squeeze-out’.

Third procedure:

The Transformation Act provides for a squeeze-out procedure which is available where the controlling shareholder holds only 90% or more of the total issued share capital of the target. The procedure is available only for controlling shareholders incorporated in the form of a stock corporation (Aktiengesellschaft – AG), a partnership limited by shares (Kommanditgesellschaft auf Aktien – KGaA) or a European stock corporation (Societas Europaea – SE). The squeeze-out works in connection with an upstream merger (Verschmelzung) of the target into the controlling shareholder. Like the regular squeeze-out procedure, it requires a shareholder resolution and the shareholders enjoy appraisal rights.
De-listing requirements

New de-listing legislation took effect in November 2015. Unless the shares of the target company continue to be listed on an organized market in Germany or the European Union, the de-listing from the regulated market requires a public tender offer for cash that is open to acceptance by all outstanding shareholders.

The offer shall be governed by the German Takeover Act. It must be unconditional, i.e. it cannot be subject to an acceptance threshold or merger control clearance. Therefore bidders will be likely to launch two consecutive tender offers: First, an offer to gain control over the target (subject to acceptance threshold, merger control clearance etc.) and, second, the unconditional offer which is required for the de-listing.

The de-listing offer must provide for a cash consideration to be paid in EURO not below the volume weighted average stock exchange price of the target shares within the six-month period prior to publication of the bidder’s intent to launch the offer. If trading in the shares is illiquid, an expert valuation is required. The same is the case where the average stock exchange price does not reflect the true value of the target shares for a violation of disclosure rules or market manipulation.

Once the offer document has been published, the management board may lodge the de-listing application with the relevant stock exchange. The decision about the de-listing is within the discretion of the relevant stock exchange. At present, there is no legal certainty as to whether the relevant stock exchange may impose additional requirements in its stock exchange rules. Currently, the rules of two regional stock exchanges still require a shareholder resolution – as they did before the new rules became effective. It remains to be seen whether these rules will be repealed.

Domination and profit and loss pooling agreement

Bidders which want to tighten their control over the target company even though they have not reached the thresholds where the ‘squeeze out’ of the minority shareholders is possible may decide to implement a domination and profit and loss pooling agreement. This type of agreement is unique in the European legal landscape. Under the domination and profit and loss pooling agreement, the corporate governance of the target company is modified as follows (key aspects only):

- The parent is permitted to pass instructions on the subsidiary. The subsidiary is required to follow these instructions even if this is detrimental to the subsidiary’s corporate interests;
- The subsidiary may provide the parent access to its cash flows, i.e. may provide upstream loans and upstream security regardless of whether the terms thereof are at arms’ length; and
- If the subsidiary finishes a business year with a profit, such profit must be paid out to the parent. If the subsidiary finishes a business year with a loss, the loss must be equalized by the parent.

Implementation of a domination agreement requires a shareholder vote by majority of at least 75% of the votes cast. Minority shareholders may challenge the shareholder resolution in court. Litigation against the shareholder resolution usually delays the implantation of the squeeze-out, but following legislative reform in 2009 such litigation is no longer commonplace.

The domination and profit and loss pooling agreement must provide for a fair guarantee dividend and a fair exit compensation. Minority shareholders may start appraisal proceedings under which the fairness of the guarantee dividend compensation will be determined (Spruchverfahren). Appraisal proceedings can start only after the domination and profit and loss pooling agreement has been implemented, i.e. these proceedings cannot delay or prevent the ‘squeeze-out’.
Defending a hostile bid

Which defensive measures are available?

After the decision to launch an offer has been published, the management board of the target must not take any actions which could prevent the success of the offer. However, this restriction does not apply to:

– Actions that a prudent and conscientious manager of a company not subject to a takeover offer would have taken;
– The search for a competing bidder ('white knight');
– Actions approved by the supervisory board of the target; or
– Actions authorised by a shareholder resolution.

Based on one (or more) of the aforementioned exceptions, the following measures may be implemented as a defence strategy:

– Issue of new shares from authorised capital (genehmigtes Kapital);
– Acquisition of treasury shares to increase the voting power of friendly shareholders and to reduce the number of shares available to be bought by the bidder.
– Disposal of treasury shares to an anchor-shareholder.
– Disposal of material assets (crown jewel defence).

All these measures are available only subject to tight restrictions under the Stock Corporation Act, such as caps on percentages of the share capital increase or repurchase, and pre-emption rights of the existing shareholders. All these restrictions play out to reduce the “fire power” of the target in the face of a bid.
Mandatory offers

When is it required to make a mandatory offer?

Any party, acting alone or in concert with others, directly or indirectly, that acquires a controlling interest in a listed company, must launch a public offer for all outstanding shares. A controlling interest is defined as ownership of at least 30% of the voting rights in the target. Towards this threshold count voting rights appertaining to shares held by the bidder, and voting rights appertaining to shares held by certain specified third parties (e.g. subsidiaries, trustees, parties acting in concert) which are attributed to the bidder under applicable anti-circumvention rules.

The offer price must at least equal the highest price paid or agreed to be paid by the bidder for target shares during the six months prior to the publication of the offer document. The same applies for any price paid by a person acting jointly with the bidder. Furthermore, the offer price must at least equal the weighted average stock exchange price during the three months prior to the date on which the acquisition of control was announced. If the target shares are illiquid, the fair value of the target shares pursuant to an appraisal of the target company rather than the volume-weighted average stock exchange price will be decisive. The bidder may offer cash or liquid shares admitted to trading on a regulated market. However, a cash offer is required if the bidder or a person acting jointly with the bidder has acquired for cash 5% or more of the shares or voting rights in the target during the period beginning six months before the announcement and ending with the end of the acceptance period.

A mandatory offer cannot be made subject to conditions. An exemption applies for regulatory approvals.

Acting in concert

The obligation to launch a mandatory bid also arises where shareholders whose individual shareholdings are below 30% but add up to 30% or more, are acting in concert. This is the case where these shareholders, formally or informally, reach a consensus on the exercise of their voting rights in shareholder meetings of the target or where these shareholders collaborate in another manner with the objective of bringing about a permanent and material change in the business strategy of the target. An exemption applies to “one-off” voting agreements.

Are there exemptions to the mandatory offer rules?

Yes, there are. A mandatory offer is not required where control over the target company is acquired as the result of a takeover bid. Furthermore, BaFin may grant an exemption from the mandatory bid under certain circumstances:

First, BaFin shall permit voting rights to be disregarded when calculating them against the control threshold if such shares were acquired by way of:

– Inheritance, division of estate or donation among near relatives;
– Change of legal form of the owner; or
– Reorganisation of a group of companies.

Second, BaFin may exempt a controlling shareholder from the obligation to submit a mandatory offer where control has been acquired:

– Unintentionally;
– Solely for the purpose of securing a claim;
– In connection with the restructuring of the target where the target is in financial distress; or
– As a result of a reduction in the total number of voting rights in the target (e.g. by reduction of the share capital).
In addition, an exemption may be granted by BaFin if:

– A third party holds a higher voting share in the target;

– It is unlikely that the purchaser will be able to control more than 50% of the voting rights represented in future general meetings of the target; or

– Control over the listed target company is acquired indirectly and the book value of the target company accounts for less than 20% of the book value of the assets of the company whose shares have been acquired.
Regulatory overview

Legal framework

Public offers are primarily regulated by the German Takeover Act (Wertpapiererwerbs- und Übernahmegesetz – WpÜG). The Federal Authority for Financial Services Supervision (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin) monitors compliance with the regulations on public takeover offers.

Other relevant legislation:
- Ordinance on the Offer Content (WpÜG Angebotsverordnung);
- Stock Corporation Act (Aktiengesetz – AktG);
- Securities Trading Act (Wertpapierhandelsgesetz – WpHG);
- Transformation Act (Umwandlungsgesetz – UmwG);
- Act against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB);
- Regulation (EC) No 139/2004 on the control of concentrations between undertakings – EC Merger Regulation (EG-Fusionskontrollverordnung);
- Foreign Trade Regulation (Außenwirtschaftsverordnung);
- Securities Prospectus Act (Wertpapierprospektgesetz);
- Regulation (EC) No 809/2004 as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (Prospektverordnung);
- Securities Trading Act (Wertpapierhandelsgesetz).

How are the rules enforced?

The BaFin has authority to enforce the rules by imposing
- instructions for specific behaviour; and
- Administrative fines of up to EUR1 million.

Furthermore, non-compliance with certain rules triggers legal consequences by operation of law. For example, failure to comply with the mandatory bid obligation results in the loss of shareholder rights (including voting rights) for a period as long as the violation is on-going (under the Securities Trading Act, the ban on voting rights may last even longer).

Other regulatory bodies that may be involved in public offers:
- Federal Cartel Office (Bundeskartellamt);
- The European Commission as merger control authority for transactions with a European dimension;
- German Federal Ministry for Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie – BMWi) as authority for the clearance of foreign investment in the limited number of situations where such clearance is required.
What are the thresholds for notification under merger control legislation?

German merger control

German merger control is governed by the Act against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB). Such legislation is enforced by the Federal Cartel Office (Bundeskartellamt). The German merger control rules apply if, in the financial year prior to the transaction:

– The EU thresholds (see below) are not met;
– The combined aggregate worldwide turnover generated by the undertakings concerned amounts to more than EUR500m;
– The turnover in Germany of at least one undertaking concerned exceeds EUR25m and another undertaking concerned generates a turnover in Germany of more than EUR5m; and
– No de minimis exemption is applicable.

Compulsory waiting period

In general, clearance from the Federal Cartel Office must be obtained before completion of the transaction.

However, in case of a public takeover bid the prohibition of implementing the transaction does not apply if (i) the bidder notifies the transaction immediately and (ii) does not exercise its voting rights in the target company or exceptionally exercises the voting rights only to maintain the full value of its investment based on a derogation granted by the Federal Cartel Office.

Penalties

The validity of a transaction is suspended (schwebend unwirksam) until final clearance by the German competition authority. The Federal Cartel Office may impose administrative fines of up to 10% of the total worldwide group turnover on companies for closing a transaction before clearance has been obtained.

Investigation period

First phase:
The Federal Cartel Office in general determines within one month from the date of submission of a complete notification whether it intends to examine the proposed transaction in more detail (main examination proceedings).

Second phase:
– If the Federal Cartel Office decides to enter into main examination proceedings, it must in general issue its decision within four months from the date of the submission of a complete notification. However, this timeline can be extended.

Substantive test

A transaction may be prohibited by the Federal Cartel Office if it significantly impedes effective competition in the German market, in particular as a result of the creation or strengthening of a dominant position.
European merger control rules

The European Commission is the competent authority to review a transaction under the EC Merger Regulation (ECMR). Notification of a transaction to the European Commission is required if one of the following scenarios applies:

**Situation 1:**
- The combined aggregate worldwide turnover of the undertakings concerned exceeds EUR5bn; and
- The EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR250m.
- Provided that it is not the case that each of the undertakings concerned achieves more than two thirds of its EU-wide turnover in one and the same EU Member State.

**Situation 2:**
- The combined aggregate worldwide turnover of the undertakings concerned exceeds EUR2.5bn; and
- The EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR100m; and
- In each of at least three EU Member States, the combined aggregate turnover of the undertakings concerned exceeds EUR100m; and
- In each of those three EU Member States, the combined aggregate turnover of each of at least two of the undertakings concerned exceeds EUR25m.
- Provided that it is not the case that each of the undertakings concerned achieves more than two thirds of its EU-wide turnover in one and the same EU Member State.

Compulsory waiting period

As in the procedure before the Federal Cartel Office, a transaction must not be completed before clearance from the European Commission has been obtained. However, the ECMR does not prevent the implementation of a public bid that has been notified to the European Commission, provided that (i) the acquirer notifies the transaction immediately and (ii) does not exercise the voting rights attached to the securities in question or, exceptionally, does so only to maintain the full value of those investments and on the basis of a derogation granted by the European Commission.

Penalties

The European Commission may impose fines of up to 10% of the aggregate worldwide group turnover on companies for closing a transaction before clearance has been obtained. The European Commission may also order interim measures to restore or maintain conditions of effective competition.

Investigation period

Pre-notification discussions: Pre-notification discussions with the European Commission, which are not subject to any statutory time limits, are a standard part of all merger review processes (including simplified cases) and can be expected to take a minimum of two weeks. This period can be considerably extended in complex cases, in extreme cases lasting up to several months.
Phase I:
In most cases, the European Commission reaches a Phase I decision within 25 working days from formal notification. This period may be extended if the Commission receives a referral request from a member state or the parties submit commitments (remedies) to resolve competition issues.

Phase II:
Should the European Commission initiate a Phase II investigation because a transaction raises competitive concerns, the decision must be taken within 90 working days from the date on which the Phase II proceedings were initiated. This period may be extended (i) if the parties offer commitments, (ii) if the parties request a one-off extension of the investigation period and/or (iii) if the European Commission decides to extend the Phase II investigation period with the consent of the parties.

Substantive test
A transaction may be prohibited by the European Commission if it would significantly impede effective competition, in the EU or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

Does Germany have foreign exchange restrictions?
Germany is a country with a welcoming attitude towards foreign investors. It has no foreign exchange restrictions and exercises only limited control over foreign investments in public and private companies.

The sole restrictions apply to investments by
– Investors based outside the European Free Trade Association (EFTA) when acquiring businesses serving the common good so that the acquisition by a foreign investor may present a material danger affecting a fundamental interest of the German people as a whole, and
– Non-German investors in military businesses.

Investments in German banks, insurers and certain other financial institutions require clearance by the competent supervisory authorities, regardless of whether the investor is domestic or foreign. A prohibition may be based only on one or more reasons expressly set forth in the applicable legislation, including the investor’s lack of reliability or financial soundness, no effective regulatory supervision in the investor’s home country, or the risk of money laundering or terrorism finance. The authorities are prohibited from basing their decision on industrial policy considerations.