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This Guide provides an overview of takeovers of public companies in Germany, including the acquisition of a stake in a German public company and launching (or defending) a formal takeover offer.

It considers, from both a legal and regulatory perspective, the various stages of a takeover from planning an offer through to achieving effective control. It offers clear explanations on key issues including pre-offer planning and stake building (sections 3 and 4) and the process and implementing of a takeover (sections 5 and 6).

This Guide also covers further integration steps leading to a complete taking private (section 7).

It does not, however, consider in detail any tax or accounting implications of a takeover or the impact of securities laws of other jurisdictions where a target has shareholders residing abroad.

Definitions of words and expressions used are contained in the Glossary at the end of the Guide.

This Guide does not purport to be comprehensive or to render legal advice. The position stated is as of 1 October 2017.

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# 1. PRINCIPAL ELEMENTS OF TAKEOVER LAW

1.1 Control and Offer Types  
1.2 Transparency  
1.3 Further Principles  
1.4 Scope of Offer Regulation  
1.5 Regulator
1.1 Control and Offer Types

German takeover law assumes for takeover purposes that a shareholder holding at least 30 per cent of the voting rights has “control” over a listed company. This mirrors similar thresholds in other European countries. As a factual matter, 30 per cent of the voting rights constitute the majority of votes represented at most general meetings of publicly traded companies.

In calculating the control threshold, voting rights from any target shares held by a person other than the bidder will be attributed to the bidder if the bidder has sufficient influence over these voting rights. If several parties coordinate their conduct in relation to the target, this may be qualified as “acting in concert” with the consequence of reciprocal attribution of the corresponding voting rights to each party involved.

Moreover, a shareholding of more than 25 per cent of a company’s voting rights normally constitutes a blocking minority for certain structural decisions.

As soon as one or more persons acquire control, they must launch a mandatory offer. If an offer is made voluntarily in order to obtain control, it qualifies as so-called takeover offer - as opposed to a simple offer made by a bidder that already has control or wants to stay below the control threshold.*

1.2 Transparency

Takeovers in Germany are governed by the Takeover Act (Wertpapiererwerbs- und Übernahmegesetz, WpÜG) and the respective regulations. A primary goal of the Takeover Act is to improve the transparency of the takeover procedure for all parties involved, thereby creating a so-called level playing field. This entails, in particular, notification and publication duties of the bidder vis-à-vis the BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht, the supervisory authority, cf. 1.5), the stock exchanges where the shares are admitted to trading the target and, of course, the public at large. These notification duties are not limited to the technical details of the offer; rather, they extend to:

- the anticipated consequences of a successful offer for the target,
- the bidder’s intention with regard to the future operations of the target, and
- the bidder’s shareholding in the target prior to, during and immediately after the offer proceedings, and circumstances surrounding the acquisition of these holdings.

* Average percentage of votes present in 2017 for German DAX companies was at 62.9% (Source: www.barkowconsulting.com).
1.3 Further Principles

The Takeover Act sets forth certain general principles:

- holders of the same class of shares must be treated equally,
- shareholders of the target must be given sufficient information and time to make an informed decision about an offer,
- both the bidder and the target must carry out the offer proceedings expeditiously and the regular business operations of the target may not be unreasonably hindered, and
- the procedure must endeavour to eliminate any market distortions created by speculative trading in shares of the target, the bidder, or other companies affected by the offer.

Whilst these general provisions do not call for any concrete sanctions, they are important to understand the process and the legal implications of public takeovers in Germany.

1.4 Scope of Offer Regulation

German takeover law applies with regard to publicly-held stock corporations listed on a regulated market in the EU or EEA which either have a registered office in Germany (i.e. Aktiengesellschaft (AG), Kommanditgesellschaft auf Aktien (KGaA) and Societas Europaea (SE)) or are listed on a German regulated market, irrespective of their legal form. The detailed scope of application is illustrated in the flow chart in Annex 1.

1.5 Regulator

The supervisory authority in Germany is the BaFin, comparable to the FCA in the UK or the SEC in the USA. German takeover law contains detailed rules of conflict to determine the competent supervisory authority in cases where a transaction might touch several jurisdictions (e.g. in case of listings in several European member states). An overview over these rules of conflict is also provided in the flow chart in Annex 1.
2. EMPIRIC ANALYSIS

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2.1 Number of Offers, Offer Types and Investor Motivation

Between 1 January 2002 and 31 August 2017, a total of 487 offers were announced under the Takeover Act. Of these 487 offers, takeover offers constitute the majority (253 offers) with mandatory offers following (148 offers) and simple offers only amounting to roughly 14 per cent (69 offers) (see chart 1) (see sections 3.2 and 5.2 for more details on offer types). 13 offers were prohibited by BaFin and 3 offers were announced but not submitted.

Roughly three quarters (74.5 per cent) of the offers were launched by strategic investors, leaving 25.5 per cent of the offers to financial investors.

Chart 2 shows the different offer types over time (2002 until 31 August 2017), highlighting the peak in offers in 2007, leading to a steep decline in 2009 and 2010 and a come back in 2011. In 2012 the numbers slightly dropped again but remained relatively stable thereafter.
2.2 Acceptance Period, Acceptance Threshold

The vast majority of offers contain an acceptance period that is slightly longer than the statutory minimum acceptance period of 4 weeks (see chart 3 for more details).

Chart 3: Acceptance Period

Chart 4 shows the average acceptance period (in days) per offer type.
Chart 5 shows the minimum acceptance thresholds included in the offers. Where such an acceptance threshold was used (121 offers out of a total of 486 offers), roughly 75 per cent of the bidders used acceptance thresholds between 50 per cent and 89 per cent, whereas only 16.5 per cent strived for an acceptance threshold of 90 per cent or even 95 per cent which would, if successful, have allowed for a squeeze-out of the remaining minority shareholders.

2.3 Pricing
Based on publicly available information, limited empirical data concerning the average pricing of the offers can be analysed (see chart 6 for the average offer premium and chart 7 for the premium over the three-month value weighted average price (VWAP) per share for all offers (simple offers, takeover offers and mandatory offers)).

Chart 6: Average Offer Premium over 3-Month-VWAP

Chart 7: Premiums over 3-Month-VWAP
3. OVERVIEW

3.1 Introduction

3.2 Defining the Goal

3.3 Defining the Bidder

3.4 Key Steps and Timing
3.1 Introduction
Once the bidder has made the decision to launch an offer, a sequence of mandatory notifications and publications is triggered which ultimately leads to the preparation and publication of the offer document, the offer itself and its settlement.

3.2 Defining the Goal
If the bidder intends to acquire control through the offer, the bidder will need to launch a takeover offer.

In some strategic scenarios, it might also be favourable for the bidder to acquire control first and then launch a mandatory offer.

If the bidder intends to acquire a stake of less than 30 per cent by way of public offer, or intends to extend an existing control position by taking out free float, a less regulated “simple” offer (Erwerbsangebot) is available (see section 5.2 for more details on offer types).

3.3 Defining the Bidder
In principle, any German or foreign legal entity or even any natural person may act as a bidder. The choice between the various alternatives will often depend on tax and financing considerations and should also include considerations on envisaged post-settlement activities such as a merger squeeze-out (see section 7.3 for more details).

3.4 Key Steps and Timing
Any takeover offer will include the key steps set out in the table on the following page.

The duration of an offer from the publication of the decision to make a public offer to the settlement will thus vary from approximately 10 weeks (minimum offer period, fully prepared documentation, no counter-offers) to 21 weeks (maximum offer period, documentation to be prepared following the decision to make a public offer, no counter-offers).

The graph on page 14 compares minimum and maximum offer durations.
<table>
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<tr>
<th>Calendar Days</th>
<th>Step</th>
<th>Remarks</th>
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| 1            | Decision of bidder to make an offer (or, in the case of a mandatory offer, acquisition of control) | • Must be published  
• Locks in statutory minimum consideration |
| + 28         | Submission of offer document to BaFin | • Submission within 4 weeks of Day 1  
• Deadline can be extended by BaFin |
| + 12         | BaFin approval | • BaFin may extend deadline by up to 5 business days |
| + 2          | Publication of offer document | • Acceptance period starts (4 - 10 weeks, typically around 4 weeks) |
| + 28 – 70    | End of acceptance period |  |
| + 3 – 5      | Publication of offer result | • Additional acceptance period starts (2 weeks) (does not apply to mandatory offers and simple offers) |
| + 14         | End of additional acceptance period |  |
| + 3 – 8      | Publication of offer result, settlement | • Settlement may be further delayed pending antitrust clearance or other regulatory conditions  
• Some offers have two settlements (after each publication of results) |
Minimum and maximum timetable for a takeover in Germany

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4. PRE-BID PHASE

4.1 Negotiated Versus Unsolicited Takeover
4.2 Ad hoc Disclosure
4.3 Insider Trading
4.4 Stake Building and Approaching Key Shareholders
4.5 Block Purchases and Irrevocable Undertakings
4.6 Notification of Significant Interests in Shares
4.7 Disclosure of Intentions and Sources of Funds
4.8 Quasi Auction Processes
4.9 Business Combination Agreement
4.10 Due Diligence
4.1 Negotiated Versus Unsolicited Takeover

The vast majority of public offers in Germany were negotiated, i.e. the bidder coordinated its approach with the target’s management. It has become common that the bidder and the target enter into an investment or business combination agreement (see section 4.9 below).

A non-disclosure agreement needs to be in place to allow the bidder to access non-public information about the target.

However, there have also been several notable unsolicited offers.

4.2 Ad hoc Disclosure

In principle, all information about an issuer of securities which has not yet been disclosed and which is price-sensitive is inside information.

The target is obligated to issue an ad hoc announcement regarding all inside information as soon as possible.

The fact that the bidder is contemplating an offer constitutes inside information as soon as it is sufficiently likely that the bidder will launch the offer. However, in a friendly takeover scenario, the target may usually justify delaying the disclosure of ongoing talks with the bidder.

The target may delay disclosure to the public on its own responsibility if:

- immediate disclosure is likely to prejudice the legitimate interests of the target,
- delay of disclosure is not likely to mislead the public, and
- the target is able to ensure the confidentiality of the non-disclosed information.

4.3 Insider Dealing

Even if the intention to launch an offer has become concrete enough to qualify as inside information, the bidder is not hindered from pursuing its intention to build a stake or prepare a takeover offer by pre-bid purchases, as long as this is the only inside information. However, the bidder must comply with its disclosure obligations for major shareholdings.

Conversely, if the bidder receives non-disclosed information about the target which constitutes inside information, the bidder may be barred from purchasing shares in the market.

4.4 Stake Building and Approaching Key Shareholders

It may be advantageous to the bidder to acquire a significant stake in the target before launching an offer. This can help to reduce the average purchase price and demonstrates the bidder’s commitment to the transaction in its negotiations with the target’s management.

Stake building may be performed by way of approaching key shareholders or via open market purchases. In this context, top-up clauses are permissible that give the selling shareholder the right to receive any better offer price paid by the bidder in subsequent share purchases.
4.5 Block Purchases and Irrevocable Undertakings
The bidder may acquire the share block subject to the condition precedent that a subsequent takeover offer is successful.

The bidder may also enter into an agreement with the block owner, obligating the latter to tender its shares in a subsequent takeover offer (so-called “irrevocable undertaking” or “tendering agreement”). The parties to this agreement may limit the number of shares tendered to a certain predefined percentage or may also agree that the block owner tenders the number of shares required by the bidder to exceed certain shareholding thresholds.

The party entitled to acquire shares through an irrevocable undertaking must publish this instrument and the number of shares secured as if it had immediately acquired such shares; irrevocable undertakings must therefore be structured and timed very carefully. Therefore, irrevocable undertakings are usually entered into simultaneously with the offer announcement.

4.6 Notification of Significant Interests in Shares
In a takeover process, the prospective bidder often intends to silently accumulate substantial stakes in the target (“creeping in”). It is possible for a potential bidder to gradually build up a shareholding in the target, particularly by acquiring shares on the stock exchange or directly from known shareholders.

Every shareholder who, through purchase, sale or otherwise, reaches, exceeds or falls below 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent of the voting rights of a listed company must, without undue delay, and no later than within four trading days, notify the BaFin and the respective company of the acquisition or divestiture of voting rights. The respective company must itself inform the public at large.

To determine whether a threshold has been met, exceeded or undercut, the Securities Trading Act (Wertpapierhandelsgesetz, WpHG) contains various rules intended to ensure the attribution of the shareholdings to those who actually control the voting rights of such shares or who control them from an abstract point of view. For example:

- Shares held by a controlled company are attributed to the controlling company.
- Shares held by one party for the account of a second party will be attributed to the second party.
- Shares in relation to which two parties have agreed to exercise the voting rights in a mutually coordinated way in more than a single instance or to coordinate over a certain period of time and in matters of certain importance their influence on the company outside the scope of the coordinated exercise of voting rights are attributed to both parties.

The notification duty (except for the 3 per cent threshold) also extends to physically settled and cash settled derivatives. It also encompasses the direct or indirect holding of instruments which give the bearer the right or a de facto position, unilaterally or under a legally binding agreement, to purchase issued shares which grant voting rights of an issuer. For example, the following instruments have to be notified with regard to the underlying (existing) shares:

- call options, even if conditioned,
- contracts for difference,
• cash settled equity swaps,
• the position as the seller of a put option,
• the position as the purchaser of a share sale that is settled more than 3 trading days after signing, even if conditional,
• convertible and exchangeable bonds, or
• claims under securities lending transactions.

Such instruments have to be taken into account when calculating the relevant notification thresholds.

German issuers must publish any notification of changes in voting rights which they receive without undue delay and no later than three trading days after having received the information.

Non-compliance with the disclosure requirements results in the preclusion from exercising any rights associated with the respective shares until proper notice has been given (including voting rights and the right to dividends). The preclusion to exercise the voting rights may be extended by six months if the breach has been committed wilfully or with gross negligence. Further, the BaFin can impose a fine for non-compliance.

4.7 Disclosure of Intentions and Sources of Funds
Upon reaching or exceeding the level of 10 per cent of the voting rights in the target, a shareholder must publish a statement as to its intentions and sources of funds utilised for the purchase of the shares. These statements are usually very short. The Securities Trading Act does not contain sanctions in case of non-compliance.

4.8 Quasi Auction Processes
In recent quasi-auction processes transactions with more than one potential bidder, target management initiated structured discussions with all potential bidders to define the conditions of the offer prior to the announcement of the decision to launch an offer, with the objective to avoid competing offers (see section 5.14 for further details on competing offers). Having identified the (potential) bidder who proposes the most attractive conditions from the target’s perspective, duly taking into account the shareholders’ interests offer, target management and the (potential) bidder’s commitment then typically execute a business combination agreement to document the binding commitment to reflect these conditions in the offer.

4.9 Business Combination Agreement
In a negotiated takeover scenario, a (potential) bidder may conclude a business combination agreement or investment agreement with the target prior to the offer or even during the offer process. The principal goal of this is to secure support for the offer by the target’s management board, for instance in the form of a limited due diligence and a supportive recommendation to accept the offer. In general, a business combination or investment agreement stipulates:

• certain rights and obligations of both parties in respect of the takeover process,
• certain agreements regarding the reorganisation of the target once the takeover process is successfully completed,
• the permission to conduct a due diligence by the bidder,
• the commitment of the bidder to refrain from making an offer that is not regarded favourably by the target’s boards, and
• the target board’s commitment or intention to recommend acceptance of the offer, subject to its fiduciary duties.

Lately, business combination agreements have been subject to heightened judicial scrutiny and seemingly harmless provisions may have significant adverse effects during the offer or the post-offer restructuring.
4.9.1 Representation and Warranties
Under German law representations and warranties in a business combination or investment agreement between the bidder and the target may raise issues around a forbidden repayment of capital to a shareholder. In any case, they are hardly ever seen in practice. Management representations are likewise very rare.

4.9.2 Exclusivity
The target can grant exclusivity for a certain period of time if this is in the target’s best interest. With regard to their duty to act in the best interests of the company, the members of the management board of the target should avoid overly restrictive exclusivity agreements and the exclusivity period should be reasonable not to negatively impact the target, e.g. when preventing the negotiation of a more beneficial offer from a third party.

4.9.3 Break Fees
While still not a common feature, break fees have become more frequent in the German market. Targets agree to pay a break fee to a potential bidder to provide an incentive to make an offer. While the preconditions for paying a break fee vary, typically a regulatory condition must fail or a competitive bid for the target must be successfully launched in order for break fee obligations to arise.

In the absence of reliable legal authority, one per cent of the transaction value is regarded as the upper limit for a break fee in practice. The break fee shall not be so high that it effectively forces the boards to support the offer. The management board of the target needs to ensure that the break fee is (and remains) in the best interest of the target. It should not limit management’s discretion or create a prohibitive barrier to an alternative transaction that would be in the target’s best interest.

4.10 Due Diligence
4.10.1 Introduction
The management of the target can allow the bidder to perform a due diligence review if the following requirements are met:

- disclosure is in the target’s best interest in the view of the management board (which will pass a resolution in this regard),
- a confidentiality agreement is in place, and
- the bidder’s interest has been manifested to be serious (e.g. by a letter of intent, by concluding a business combination agreement or submitting an offer in the target’s self-auction).

Preliminary discussions and exchange of non-confidential information are possible without any management board resolution.

4.10.2 Liability
Liability of the target for information provided during a due diligence is very limited per se and, as a matter of fact, will be specifically excluded in the terms agreed with the bidder before information is disclosed.

4.10.3 Competing Offers
There is good reason to argue that in case of a competing bid, the management of the target has to assess whether disclosure of the same information is in the best interest of the target or whether any exclusivity arrangement has to be observed.

According to the prevailing view in legal literature, the target’s management must upon request provide to a competing bidder the same information it has disclosed to the first bidder. However, absent any court precedents, there is a widespread reluctance among management boards to allow any such far-reaching due diligence exercise.
5. BID PHASE

5.1 Announcements
5.2 Types of Offer
5.3 Type of Consideration
5.4 Minimum Consideration
5.5 Choice of Offer Type
5.6 Content of Offer Document
5.7 Financing of Cash Offers
5.8 Offer Conditions
5.9 BaFin Approval Procedure
5.10 Publication of the Offer Document
5.11 Reasoned Statement of Management Board and Supervisory Board
5.12 Publications during the Offer
5.13 Amendments to the Offer
5.14 Competing Offers
5.15 Additional Acceptance Period
5.16 Settlement
5.17 Consequences of an Unsuccessful Offer
5.1 Announcements

5.1.1 Bidder
Once the bidder has made the decision to launch an offer, the bidder must promptly publish this intention in a specific manner. A similar notification relating to a mandatory offer must be made once the bidder has obtained control, i.e. holds or is attributed 30 per cent of the voting rights in the target.

The publication may be limited to the mere information that an offer will be made for the target’s shares. The bidder is under no obligation at this stage to give any other information concerning the offer but may, of course, include such information to avoid speculation based on yet undisclosed details of the offer.

Immediately before any publication, the bidder must notify:
• the BaFin,
• the management of the (German) regulated markets on which the shares of the bidder, of the target and of other companies directly affected by the offer are admitted to trading, as well as
• the management of the (German) regulated markets on which derivatives of the shares are traded.

The decision must be published in the German language on the internet and via an electronic data dissemination system widely used by market participants. The bidder must also promptly notify the management board of the target and submit copies of the publication to the management of the (German) regulated market and to the BaFin without undue delay.

5.1.2 Target
The fact that an offer is going to be made constitutes inside information and the target is obligated to disclose it by way of an ad hoc notification (see section 4.3 for further details).

The target’s management board must inform the competent works councils, or the employees directly, if the decision to launch an offer has been published. The target’s management board must also promptly inform the chairman of the target’s supervisory board who then must inform the entire supervisory board.

5.2 Types of Offer
The law provides for three types of public offers:
• Takeover offers aimed at the acquisition of control,
• Mandatory offers fulfilling the statutory obligation to make an offer upon acquisition of control over the target,
• Simple public tender offers which do not aim at or result from an acquisition of a controlling stake. Simple public tender offers follow largely the same procedure and content as takeover offers and mandatory offers. However, the minimum consideration rules do not apply and partial offers not directed at all shares are possible. Since simple public tender offers are rare, the following sections will only discuss takeover offers and mandatory offers.
5.3 Type of Consideration
The bidder may offer cash or shares listed on an exchange in the European Economic Area or a combination of cash and shares in its offer. Where the bidder (or anyone acting jointly) acquires at least 5 per cent of the shares against cash consideration in a period beginning six months before the announcement of an offer and ending at the end of the acceptance period, the consideration must be in cash.

5.4 Minimum Consideration
The cash consideration or the value of the share consideration offered by the bidder may not be lower than the higher of:

- any share price paid by the bidder (or anyone acting jointly with it) for target shares acquired in the period starting six months before the publication of the offer and ending with the publication of the results of the offer following the acceptance period; and
- the VWAP of target shares during the three months period before the announcement of an offer.

In share for share offers, the shares offered will be valued as per their 3 month VWAP in order to determine whether the minimum price is reached.

The cash offer price is an amount per share in Euros. Anti-dilution protection clauses (e.g. with regard to a capital increase of the target during the acceptance period) or adjustments for dividends paid during the acceptance period are not possible if such adjustment would result in a consideration below the minimum price. However, the offer could be conditioned on the absence of such measures (see section 5.8 for further details).

A bidder can increase its stake in the target both during and following the offer, observing the following rules:

- During the offer, any price paid or agreed for target shares above the offer price will result in an immediate increase of the offer price.
- Off-market purchases within one year following the publication of the offer results need to be publicly disclosed. If the consideration is higher than the offer price, the bidder must top up the offer price for shareholders who accepted the offer to match the consideration of the off-market purchase.
- Share purchases at the stock exchange after such date do not lead to a top up requirement even if the purchase price exceeds the offer price.

5.5 Choice of Offer Type
It is often preferable for a bidder to avoid a mandatory offer as it has two distinct drawbacks compared to a takeover offer:

- In a mandatory offer, the three month VWAP relates to the period ending with the acquisition of control. The stakebuilding to arrive at a 30 per cent stake, however, will usually drive the share price (and thus the three months VWAP) up. In addition, the stakebuilding will often not go unnoticed - because of mandatory major holding notifications (as described in section 4.6) or because of merger control filings that become public - and so provoke speculative trading in anticipation of an offer. In a takeover offer, the three month VWAP is locked in with the announcement of an offer.
- A mandatory offer cannot include conditions other than those relating to statutory obligations such as merger control clearance, whereas a takeover offer may be conditioned upon
various circumstances. Takeover offers therefore provide a much greater flexibility to the bidder.

5.6 Content of Offer Document
The offer document must contain all particulars necessary to facilitate an informed decision regarding the offer. All information must be true and complete. The document must be written in the German language and in a manner that facilitates its comprehensibility and evaluation. Many bidders provide an English translation of the offer document in order to approach shareholders outside Germany. The offer document must, amongst other things, specify:

- the bidder,
- persons acting jointly with the bidder,
- the target,
- the shares which are the subject of the offer,
- the number of shares and the voting right portion already held by the bidder, persons acting jointly with it or their subsidiaries,
- the type and amount of the consideration offered,
- the conditions upon which the validity of the offer is contingent,
- the commencement and end of the acceptance period and the further acceptance period,
- a statement on the expected effects of a successful takeover offer on the bidder’s assets and financial and earnings position,
- particulars concerning the bidder’s intention regarding the future business of the target as well as the bidder’s own future business, particularly with respect to the use of the target’s assets, its future obligations, the employees and their representation(s), the members of its management bodies and material changes to employment conditions including arrangements already contemplated, e.g. measures to change the structure of the company, and
- the particulars of the persons or companies assuming responsibility for the contents of the offer document.

5.7 Financing of Cash Offers
Where the bidder offers a cash consideration, the bidder has to secure the availability of funds, meeting a certain funds standard. It is not possible to condition the offer upon successful financing. The financing agreements need to be in place, and this must be confirmed by the bidder in the offer document.

To document the bidder’s capacity to fund a cash offer, the bidder needs to obtain a financing confirmation from an independent financial institution. Such financial institution must be satisfied that the bidder has taken the necessary steps to fully fund the acquisition of all target shares at settlement. The financing confirmation must be furnished to the BaFin together with the draft offer document for approval.

The financing confirmation is not a bank guarantee. However, an institution issuing an incorrect financing confirmation in a grossly negligent manner can be held liable for damages by shareholders that have tendered their shares but have not
received the offer consideration. Therefore, the issuers of financing confirmations mostly do not rely on commitments by the bidder but require measures that safeguard de facto the payment of the offer price at settlement. Where the offer is financed by credit facilities, the issuers will require provisions according to which the possibility of the bidder to draw down under the facilities is only qualified by conditions that are under the bidder’s control (certainty of funds). In order to obtain such financing confirmation, the bidder will usually enter into a cash confirmation agreement with an independent financial institution.

5.8 Offer Conditions

Except for mandatory offers (see clause 5.5 above) the offer can be contingent upon the fulfilment of conditions. Conditions are permissible if their fulfilment:

• is not impossible or highly unlikely when the offer is published,
• can be ascertained in an objective manner, and
• is not in the bidder’s sphere of influence.

Hence, inter alia, the following conditions are possible:

• absence of a defined material adverse change in the markets (e.g. performance of a stock index or currency exchange rate), or
• absence of a defined material adverse change in the target’s business that has been disclosed by the target in an ad hoc notification or has been objectively ascertained by an independent expert appointed by the bidder.

As an exception to the rule that the bidder must not have any influence on the fulfilment of the conditions, the bidder can make the offer contingent upon the bidder’s shareholders approving the offer.

All conditions except antitrust and other regulatory clearance must be fulfilled by the end of the offer period.

The following conditions would not be permissible:

• absence of any rescission or withdrawal by the bidder (public tender offers, once announced, cannot be withdrawn by the bidder),
• continued financing of the offer,
• completion of a parallel transaction that is subject to conditions that would not be permissible for the offer, or
• recommendation of the offer by the target boards (as this would make the offer contingent on the target boards' positioning).
5.9 BaFin Approval Procedure
After announcement of an offer, the bidder has to submit the offer document to the BaFin within four weeks.

Under very limited circumstances the deadline can be extended by up to four additional weeks. Non-compliance with the deadlines results in the prohibition of the offer.

The bidder has to publish the offer document upon BaFin approval, or if the BaFin has not prohibited the offer, within 10 business days from its submission to the BaFin. This period may be extended by 5 business days if the offer is incomplete or includes other deficiencies that may be corrected during this period.

The offer will be prohibited if the offer document does not contain certain required information or if it obviously violates the Takeover Act or any other law or regulation. The bidder may seek legal protection against the prohibition through objection proceedings and remedies before the competent courts of Frankfurt/Main.

After the prohibition of the offer, the bidder, without the target’s consent, cannot launch a subsequent offer for the same target for one year except with the target’s and BaFin’s consent.

5.10 Publication of the Offer Document
Upon approval of the offer, the bidder must publish the offer document on the internet and (i) either in the Federal Gazette or (ii) making copies available in a physical location (in which case the internet address and such location must be published in the Federal Gazette), in each case without undue delay. Non-compliance with the publication duty leads to the prohibition of the offer by the BaFin. Design and additional content of the website can to some extent also support general awareness and acceptance of the offer. However, the bidder should ensure that the BaFin does not object to any unusual advertising or marketing activities.

5.11 Reasoned Statement of Management Board and Supervisory Board
The management board and the supervisory board of the target must prepare and publish without undue delay a reasoned statement on the offer. If the competent works council or, where none exists, the employees of the target, submit a statement regarding the offer to the management board of the target, then this statement must be attached to the boards’ statement.

If both boards come to the same conclusion or recommendation concerning the offer, the law permits the publication of a joint statement.

If the boards disagree on the assessment of the takeover offer, neither board can veto or override an opposing statement from the other. Both boards have to resolve on their recommendations as corporate bodies, with the relevant majority within these bodies, i.e. usually with simple majority unless the boards’ by-laws provide for other majority requirements. The statement has to disclose whether it represents the boards’ unanimous opinion or whether members dissented.

In their reasoned statement(s), the target’s management board and supervisory board must address the key elements of the offer, in particular the type and amount of the offered
consideration, the consequences of a successful takeover offer for the target, its employees and their representations. Further, the boards must comment on the bidder’s goals pursued by the offer and, lastly, must address whether members of the boards holding shares in the target intend to accept the offer. With regard to the adequacy of consideration offered, the management board and the supervisory board may, if in doubt, obtain an independent fairness opinion rendered by one or more investment banks. The request for a fairness opinion has become established practice which reduces any liability risk for the management board and the supervisory board.

The boards’ statements may be neutral, against or in favour of accepting the offer. A recommendation to the target’s shareholders should be included, but is not mandatory.

5.12 Publications during the Offer
Both during and after the acceptance period, the bidder is required to fulfil additional, extensive publication duties, all of which must be fulfilled by publication on the internet and the Federal Gazette. Specifically, the bidder must publish, and inform the BaFin of:

- the number of shares and the respective stake that belong to the bidder, persons acting jointly, and their subsidiaries,
- the portion of voting rights belonging or attributed to the bidder, and
- the number of shares for which acceptance of the offer has been declared including the respective stake, i.e. the percentage of shares and voting rights.

The bidder must publish updates of this information:
- weekly, following the publication of the offer document,
- daily, in the final week prior to the expiry of the acceptance period,
- without undue delay, after the expiry of the acceptance period, and
- without undue delay, after the expiry of the further acceptance period.

If the bidder has acquired shares in parallel to the offer, it must notify the BaFin and publish in the same manner as described above disclosing the exact type and amount of consideration rendered.

The same applies to off-market purchases within one year following the publication of results after the expiry of the acceptance period. These purchases may result in a retroactive increase of the original offer price (see section 5.4 for further details).

These publication duties do not replace other applicable publication or notification duties. For instance, the bidder remains obligated to notify the BaFin and the target of the attainment of certain voting right thresholds (3, 5, 10, 15, 20, 25, 30, 50 and 75 per cent, see section 4.6 for further details). However, these thresholds will only be triggered in case of additional purchases outside of the offer and at the time of the settlement of the offer, when the shares for which the offer has been accepted are transferred to the bidder.
5.13 Amendments to the Offer
The bidder may modify, or, more specifically, improve the terms of the offer by

- increasing the consideration,
- offering another optional type of consideration,
- waiving conditions, or
- waiving or reducing the acceptance threshold.

In the view of the BaFin, an offer condition that can no longer be satisfied cannot be waived. For example, if the offer is contingent upon the absence of a dividend payment, the bidder cannot wait until the dividend has been paid and then waive the condition.

The amendments must be published latest one business day before the expiry of the acceptance period.

If the bidder publishes the amendment within the last two weeks of the acceptance period, the period is automatically extended by two additional weeks. During this two-week extension period, further amendments are impermissible.

The bidder cannot otherwise extend the offer period. Neither is it possible to “re-open” the acceptance period after its expiry.

Upon amendment of the offer, those shareholders who have already accepted the offer may rescind their acceptance until the expiry of the – possibly extended – acceptance period. The bidder must publish the amendment without undue delay and notify the BaFin in the same manner as applicable to the offer.

5.14 Competing Offers
Competing offers are offers by a third party published during the acceptance period of an ongoing offer. A competing offer essentially has two consequences for the procedure of the original offer:

- If the acceptance period for the initial offer expires before the acceptance period of the competing offer, the duration of the original offer is prolonged to coincide with the acceptance period of the competing offer. This also applies if the competing offer is prolonged as a consequence of an amendment, in which case the original offer is prolonged accordingly, or is prohibited or violates legal provisions, in which case the original offer still is prolonged until the proposed end of the competing offer. An amendment extending the acceptance period of the competing offer therefore results in an extension of the acceptance period of the original offer as well.

- After a competing offer has been published, shareholders who have accepted the initial offer before the publication of the competing offer document may rescind their agreement in order to accept the competing offer. Shareholders who accept the original offer afterwards cannot rescind.

5.15 Additional Acceptance Period
After the lapse of the acceptance period, the bidder publishes a notification as to the acceptance level and the fulfilment of conditions, if any. In case of a takeover offer, the additional acceptance period of two weeks commences with this notification. It allows those shareholders who did not accept the offer during the acceptance period to do so in view of the outcome of the offer.
Section 5: BID PHASE

5.16 Settlement
To facilitate the settlement of the offer, the bidder will appoint a
bank as the central settlement agent.

Shareholders who wish to accept the offer will declare the
acceptance towards their custodian bank and instruct the
custodian bank to rebook the shares under a new ISIN before
the end of the acceptance period (or further acceptance period,
as the case may be). Acceptance of the offer constitutes a
contract for the sale of the tendered shares between the
accepting shareholder and the bidder, subject to the terms of
the offer.

Completion will take place after all conditions to completion have
been fulfilled or waived (including anti-trust clearance). Payment of
the consideration will be made simultaneously with the transfer of
the tendered shares from the shareholder to the bidder.

In general, the acceptance of the offer is free of costs and
expenses for the shareholder (except for the transmission of the
acceptance of the shareholder towards the custodian bank
where customary bank commissions apply). If for whatever
reason, additional costs are levied on the transfer of shares,
these costs have to be borne by the shareholder.

5.17 Consequences of an Unsuccessful
Offer
If the offer fails because an acceptance threshold is not
achieved, the bidder is barred from making a subsequent offer
for the same target for one year. This rule is designed to protect
the interests of the target in keeping its business activities
undisturbed. Upon written request of the bidder, the BaFin may
exempt the bidder from this prohibition, but only with the
approval of the target.
6. DEFENCE

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6.2 Neutrality of Target Boards 30
6.3 Convening an Extraordinary General Meeting 32
6.4 Defence Measures 32
6.1 Preparedness
Ahead of any bid approach, many listed companies have carried out a project to prepare the boards and second level management for a potential offer or stake building. Part of such a project is the development of a preparedness manual, i.e. an information pack to assist the target and its advisers in reacting to an unsolicited bid situation. Having a preparedness manual and carrying out appropriate housekeeping work should allow the target to react quickly to events while avoiding delays or mistakes due to lack of coordination.

6.2 Neutrality of Target boards
Before the announcement of an offer, the target’s management board is under no neutrality obligation towards the success of a potential bid, even if it has reason to believe that it may be imminent. However, once such announcement has been made, the target’s management board may not take any actions by which the success of the offer could be jeopardised.

There are four exceptions to this rule of neutrality:

- actions that a diligent and conscientious manager would also have taken irrespective of any imminent takeover. Any such measures planned or commenced can be continued,
- searching for a white knight,
- actions that fall within the responsibility of the management board and for which the supervisory board has granted special approval in light of the actions’ defensive character. However, supervisory boards are very reluctant to grant such approval,
- actions for which the general meeting has granted special approval before the announcement of an offer. This option has not gained practical importance.

Only the first two exceptions of the rule of neutrality become relevant in practice. The chart on the next page shows the decision tree.
Admissibility of defensive measures by the Target

**Actions taken before** the publication of the decision to launch a takeover offer or before the announcement of the acquisition of control triggering mandatory offers

Management board may basically – within the scope of its powers – prepare, initiate or take measures having a defensive effect

Based upon a prior (general) authorising resolution of the General Meeting

Based upon a specific resolution of the General Meeting

Based upon a specific resolution of the General Meeting

**Actions taken by the management of a target that may prevent the success of the offer**

Based upon a prior (general) authorising resolution of the General Meeting

Based upon a specific resolution of the General Meeting

Taken by the management board without further approval requirements

Defensive measures which fall within the powers of the General Meeting

Defensive measures which do not need the approval by the General Meeting

Search for a white knight

Continuation of daily business and of strategic planning

**Admissibility according to general principles of stock corporation law**

- Statutory allocation of powers within a stock corporation/approval requirements
- Duty to treat all shareholders equally
- Duty to ensure continuity and profitability of the company
- Acting in the interest of the company

**Resolutions of the General Meeting taken before the publication of the decision to launch a takeover offer before the announcement of the acquisition of control triggering mandatory offers**

- Maximum 18 months validity
- At least 3/4 majority of the share capital represented at the meeting
- Description of types of admissible measures, but no “blanket” authorisations and
- Approval by the supervisory board

**Actions taken after** the publication of the decision to launch a takeover offer or after the announcement of the acquisition of control triggering mandatory offers up to publication of the results of the offer
The European Takeover Directive provides for a stricter neutrality of the boards but allows member states to “opt out” of this rule. Germany made use of the possibility to opt out. By adopting a provision in the articles of association, listed companies can “opt in” back to the strict neutrality requirement. However, this option is generally not used in practice.

### 6.3 Convening an Extraordinary General Meeting

The target can convene an extraordinary general meeting (EGM) with an agenda relating to the offer. The Takeover Directive makes this option more practicable by

- reducing the notice period for convening the EGM to 2 weeks, and
- extending the offer period to 10 weeks by operation of law.

Nonetheless, offer-related EGMs are not generally held.

### 6.4 Defence Measures

The limited rule of neutrality does not mean that building a defence for a German listed company has become easier. German company law prohibits or makes impractical most structural measures that can be used as a defence:

- Shares with multiple voting rights are prohibited,
- There are no “golden shares” in listed companies, i.e. shareholder positions that allow for far-reaching special rights.
- “Poison pills”, where all shareholders except the bidder obtain a multitude of shares at a marginal price, cannot be implemented. A rights issue from authorised capital is nonetheless one of the few measures that can have a deterring effect.
- Staggered boards are rather useless given that, in most companies, supervisory board members can be removed at any time without cause (and thus control can be implemented rather easily) by shareholder vote with the simple majority of the votes cast.
- The rules on executive compensation prohibit excessive payments to board members in case of a takeover that could be regarded as “golden handshakes” or “golden parachutes”.

Certain business defences remain available, e.g. depleting the target’s cash reserves by funding a contractual trust arrangement to move pensions off-balance sheet. As a tactical defence, the target board can trade its willingness to allow due diligence against a standstill that bars the bidder from making an offer without having entered into an investment agreement with the target.

The target may try to frustrate an offer seen as undesirable by seeking a competing offer made by a bidder that is more welcome (white knight). Introducing a competing bidder is usually in the best interest of the shareholders as it increases the likelihood of a more favourable offer.
7. POST-BID PHASE

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7.4. Domination and Profit and Loss Transfer Agreement 38
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7.6. Delisting/taking private 38
7.1 Corporate Governance in German Stock Corporations

Since all post-transaction measures are required to remain within the boundaries of the corporate law framework of listed German stock corporations, it is essential for the bidder to be familiar with these rules when aiming at certain post-bid structural measures following successful completion of the takeover process. This is particularly true with regard to the general corporate governance provisions applicable to the target’s boards.

7.1.1 Board Structure

A German stock corporation has a two-tier board structure consisting of the management board (Vorstand) and the supervisory board (Aufsichtsrat) with very distinct functions: The management board has exclusive authority to manage and represent the stock corporation. It is subject to the permanent supervision by the supervisory board. The supervisory board appoints and dismisses the management board members. However, the supervisory board is not involved in the day-to-day business of the company.

Simultaneous membership in both bodies is not permissible. The general meeting has no direct influence on the management board since the general meeting’s influence is limited to the appointment of the supervisory board which will appoint the management board.

The composition of a supervisory board is subject to co-determination provisions if the company has more than 500 employees in Germany. Under the co-determination rules, employee representatives are entitled to join the supervisory board.

The employee representatives of the supervisory board are elected by the employees of the company, whereas the shareholder representatives are elected by the general meeting upon the proposal of the supervisory board. The maximum appointment period for the shareholder representatives on the supervisory board is five years. Usually, the employee representatives are elected for the same period. Shareholder representatives on the supervisory board may be dismissed at any time by a shareholders’ resolution with a majority of more than 50 per cent (or, in very rare cases where no such relaxation of voting thresholds is contained in the articles of the target, 75 per cent). The employee representatives on the supervisory board may only be dismissed by the employees under special rules.

The management board reports to the supervisory board which has the right to independently inspect the books, records and assets of the company and also reviews and approves the financial statements of the company. Certain defined business decisions are subject to the prior consent of the supervisory board.

7.1.2 Shareholder Influence

The shareholders act through the general meeting (Hauptversammlung). They elect the shareholders’ representatives on the supervisory board and the company’s auditors and they resolve upon the annual distribution of profits. The general meeting also has the exclusive right to amend the articles of association and to change the financial and legal structure of the corporation as well as its share capital. The general meeting also decides whether to enter into certain intercompany agreements with other companies (Unternehmensverträge) as well as restructuring measures, such as merger, spin-off or transformation and the liquidation of the stock corporation and other exceptional structural measures.
However, the general meeting may not instruct the management board and, therefore, has no direct influence or control over the management board. If a shareholder holds the majority of the voting rights, this position does not result in direct control over the management board in the absence of other specific instruments of control.

7.1.3 Shareholder Rights

In general, the Stock Corporation Act provides for the principle of majority rule in stock corporations. However, even one single share entitles the holder to the right to participate in general meetings and to exercise information rights, and of course to vote the share(s).

### Major shareholder rights in German stock corporations

<table>
<thead>
<tr>
<th>Percentage</th>
<th>Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>90% or 95%*</td>
<td>Squeeze-out (see section 7.3 for further details)</td>
</tr>
<tr>
<td>75%**</td>
<td>Qualified majority to approve important corporate measures; key threshold for capital measures and/or major restructurings (e.g. mergers, domination and profit and loss transfer agreement)</td>
</tr>
<tr>
<td>&gt;50%**</td>
<td>Operational control of the company: dividends, election of shareholder representatives to the supervisory board and auditors; for almost all companies also resolutions on rights issues and authorised capital observing the shareholders’ pre-emption right, most changes to the articles of association and dismissal of supervisory board members.</td>
</tr>
<tr>
<td>&gt;25%**</td>
<td>Blocking minority to veto any major decisions (domination/merger agreement or certain changes to the share capital)</td>
</tr>
<tr>
<td>10%*** or €1m nominal</td>
<td>Demand individual discharge of board member</td>
</tr>
<tr>
<td>5%***</td>
<td>Request an EGM to which any agenda could be proposed</td>
</tr>
<tr>
<td>5%*** or €500 k nominal</td>
<td>Supplementation of AGM agenda</td>
</tr>
<tr>
<td>1%*** or €100 k nominal</td>
<td>Apply to a court to (i) authorize the shareholder to raise claims in the name of the company against members of the management board or supervisory board as well as against controlling entity; and (ii) appoint a special auditor regarding capital measures, annual financial statements and compensation for group-internal detriments</td>
</tr>
</tbody>
</table>

* Squeeze-out requires shareholder that owns 90% or 95% of the entire share capital and a resolution with simple majority of the share capital (voting shares) present in the general meeting.

** Percentage of the (voting) share capital present in the general meeting.

*** Percentage of the nominal share capital (voting and non-voting shares).
In order to protect reasonable minority shareholder interests, the law grants specific rights to shareholders holding a minimum percentage or defined amount of the nominal share capital or representing a certain percentage of voting rights.

7.2 Implementing Control
Supervisory board members elected by the shareholders can be replaced in the next general meeting. The bidder can demand that an extraordinary general meeting is convened for this purpose.

One prerequisite for this right to convene an extraordinary general meeting is the ownership of at least 5 per cent of the shares of the target company for a period of 90 days at the time when the request is made. Hence, depending on the structuring of the takeover, the bidder may have to wait for more than four months before it can replace the supervisory board members elected by the shareholders.

Given that the replacement is only a matter of time, supervisory board members elected by the shareholders will usually resign voluntarily when asked by the bidder. New board members can be appointed by court order for the period until the next general meeting.

In theory, management board members can only be removed by majority resolution of the supervisory board if there is good cause, such as a gross violation of obligations. But because "good cause" can also be brought about by holding a no-confidence vote in the general meeting, as a practical matter most members of the management board would usually resign voluntarily if they are adequately compensated for the remaining term of their service agreement.

7.3 Squeeze-out
German company law provides for an elaborate system to protect the legal and financial integrity of the company as well as minority shareholder rights. It is potentially burdensome to exercise control over a stock corporation. Minority shareholders who disagree with the policies and plans of the new majority shareholder may contest shareholders’ resolutions in court, often on frivolous arguments in order to gain undeserved monetary benefits. Therefore, the elimination of minority shareholders or, at least, the reduction of their influence is advantageous for most bidders. In addition, the bidder does not have to comply with the extensive formal requirements regarding the invitation and operation of general meetings once there are no remaining minority shareholders.

If the offer results in a sufficient shareholding, the bidder may squeeze-out the minority shareholders. German law provides three distinct squeeze-out procedures. While the Takeover Act squeeze-out procedure has become practically irrelevant following 5 cases from 2006 to 2015, the Stock Corporation Act squeeze-out procedure has been frequently used both after takeovers and otherwise (more than 500 cases from 2002 to 2014). With the Transformation Act squeeze-out procedure introduced in 2011, a squeeze-out is now possible when a shareholder that is a stock corporation (or partnership limited by shares) holds a majority of 90 per cent of the share capital while both squeeze-outs under the Takeover Act and under the Stock Corporation Act require a majority of 95%. Since the Transformation Act squeeze-out is available at a lower threshold, this should be taken into consideration when determining the ideal legal form for the bidder.

The following table provides for a comparison between the Stock Corporation Act squeeze-out, the Takeover Act squeeze-out and the Transformation Act squeeze-out.
### Three types of a squeeze-out under German law

<table>
<thead>
<tr>
<th>Stock Corporation Act squeeze-out</th>
<th>Takeover Act squeeze-out</th>
<th>Transformation Act squeeze-out</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Shareholding of at least 95 per cent of share capital</td>
<td>• Shareholding of at least 95 per cent of share capital</td>
<td>• Shareholding of at least 90 per cent of share capital</td>
</tr>
<tr>
<td>• Applies to listed and non-listed stock corporations and partnerships limited by shares</td>
<td>• Prior takeover or mandatory offer and application within 3 months after expiry of (extended) acceptance period</td>
<td>• Must be combined with merger of target into bidder and bidder must be a stock corporation, partnership limited by shares or European stock corporation</td>
</tr>
<tr>
<td>• Resolution of general meeting</td>
<td>• Application to court to transfer remaining shares to bidder</td>
<td>• Resolution of general meeting within 3 months after conclusion of a merger agreement</td>
</tr>
<tr>
<td>• Squeeze-out becomes effective and shares are transferred upon registration with commercial register</td>
<td>• Squeeze-out becomes effective and shares are transferred upon court order</td>
<td>• Squeeze-out becomes effective and shares are transferred upon registration of merger</td>
</tr>
<tr>
<td>• Minority shareholders may challenge transfer resolution and adequacy of cash compensation</td>
<td>• Presumption of adequacy of compensation if offer was accepted for at least 90 per cent of the share capital it was addressed to; minority shareholders may challenge court order</td>
<td>• Minority shareholders may challenge transfer resolution and adequacy of cash compensation</td>
</tr>
<tr>
<td>• Registration may be delayed if transfer resolution is challenged</td>
<td>• Transfer of shares may be delayed if court order is challenged</td>
<td>• Registration may be delayed if transfer resolution is challenged. Then merger will also be delayed</td>
</tr>
</tbody>
</table>
7.4 Domination and Profit and Loss Transfer Agreement
If no squeeze-out is possible, direct influence on the target’s management board can be achieved through conclusion of so-called enterprise agreements of which the most common form is the domination and profit and loss transfer agreement (DPLTA). Under a DPLTA, the bidder can control and instruct the dominated target’s management without the general restrictions of corporate governance and capital maintenance. The bidder receives the entire annual profits of the target and, in turn, has to cover any annual losses. In addition, minority shareholders are entitled to receive a guaranteed dividend or, at their choice, can demand to be bought out against fair compensation.

A DPLTA must be approved by a vote in the general meeting with at least 75 per cent of the (voting) share capital represented at the general meeting.

If a DPLTA is in place, it is also possible for the bidder to use the target’s assets to finance its own debt. However, statutory reserve requirements have to be observed and the bidder is required to compensate the target for any losses.

7.5 Leveraged Recapitalisation
In many cases, a bidder or the banks financing the offer wish to access the cash flow and the assets of the target in order to finance or secure the purchase price and respective credit facilities. As a general rule, this is not possible, in particular, a debt push down, where the debt incurred by the acquirer to finance the acquisition is transferred to the target (without merging the bidder and the target), is not permissible without a domination and/or profit and loss transfer agreement. However, the target’s cash flow can be used, in principle, in the form of loans from the target to the bidder as a new shareholder, provided the arm’s-length principle is observed in all transactions between the shareholder and the company.

If, after the squeeze-out, the bidder has become the sole shareholder of the target, the target can be converted into a private company (GmbH) that has a much less regulated regime of asset protection. Also, the bidder and the target can be merged.

In any event, it can enter into a leveraged recapitalisation: By way of tax-free step-up, the hidden reserves of the target have to be turned into corporate profit.

The profit is then distributed to the bidder (and the free float shareholders) as dividend. The target may finance the dividend payment by credit facilities.

7.6 Delisting/taking private
After a public takeover, the listed target company concerned may no longer require a listing of its shares, for instance because compliance with the listing-related rules and regulations is cumbersome and costly, or because the bidder itself is listed so that the target company does not depend on access to the capital markets any longer. Certain institutional shareholders must not be invested in non-listed companies, and some other shareholders may lose interest in a company whose shares cannot be traded in a liquid market. Target companies and their
new majority shareholders should, however, be aware that despite the loss of liquidity, there will always be minority shareholders left in the target.

Two options for a delisting of the target, in the sense of a complete revocation of the admission to trading on a regulated stock exchange, are of practical importance: (i) a delisting based on the issuer’s application to delist or (ii) a so called “cold delisting” through conversion into, or merger with, a non-listed entity.

Short of a complete delisting, a target company may also consider a downlisting from a highly regulated to a less regulated market segment.

7.6.1 Delisting upon issuer’s application to delist
A delisting upon the issuer’s initiative must be combined with a share acquisition offer which essentially follows the rules of a simple offer under the Takeover Act, subject to certain special features. This offer could in principle be launched by the issuer itself, however, a stock corporation can buy only up to 10 per cent of its own shares, and only if the general meeting has granted a corresponding authorization. It is therefore more practical that the largest shareholder launches the offer in coordination with the issuer.

The offer must be made to all shareholders. It must not contain any conditions, according to BaFin not even antitrust clearance. The offer price has to be a consideration expressed in Euro, and to be deemed fair and adequate it must correspond at least to the average stock market price of the last six months (not three months as in a regular offer scenario). If there is no liquid market for the issuer shares or if the share price has been significantly distorted through market manipulation, the adequate price must be determined on the basis of a company valuation. In any event, there is no compensation review procedure available to shareholders.

The general meeting will not be involved in the delisting procedure, the shareholders are protected through the offer requirement. The offer needs to refer to the issuer’s delisting intention, and the delisting application will be successful only if the offer has effectively been launched, which requires in the first place that the BaFin has approved of the offer.

As an alternative, the target may deem a so called downgrading or downlisting of its shares as being the most beneficial choice for the target. In both cases, the target shares remain publicly traded, but in a different trading segment imposing less ongoing obligations and, thus, reducing the burden of the listing.

7.6.2 Cold Delisting
Alternatively, the bidder may use its acquired majority in the target to effect a conversion of the target’s legal form into, or its merger onto, a company that is not and cannot be publicly listed. Most commonly, this is a German limited liability company. As a consequence, the target would be delisted as soon as the change of legal form has become effective. Both alternatives require a 75 per cent majority vote in the general meeting and an offer by the company to dissenting shareholders to acquire their shares against adequate consideration. However, as the value of the target shares is likely to reduce due to the loss of liquidity, shareholder action challenging the resolution are likely.
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8.5 Specific Sectors 46
8.1 Antitrust
The acquisition of shares in any company may require the purchaser (and in some cases also the seller) to seek approval of the competent European, German or other national merger control authorities before consummating the transaction.

Depending on the structure of the transaction and the turnover of the participating parties, the European Merger Regulation (EUMR) may apply. In this case, the national merger control agencies of the EU member states are precluded from applying their national merger control laws ("one-stop shop") unless the European Commission refers the matter back to the national level.

Additional merger-control hurdles may exist on a non-European national level, for instance under the US Hart-Scott-Rodino Antitrust Improvements Act of 1976. Accordingly, any such regulatory approval should be stated in the offer document as a condition precedent. Bidders and their advisors must therefore determine at an early stage whether pre-merger approval must be sought.

Since the EUMR process (or any other merger control proceeding) may significantly delay the timing of the transaction, an antitrust assessment should be performed in the initial phase of the transaction. In addition, the respective condition in the offer should be drafted openly in case clearance is only granted under further conditions (e.g. the divestiture of certain assets), if this is acceptable for the bidder.

8.2 EU Merger Regulation
8.2.1 Introduction
Takeovers falling within the EUMR require pre-notification to the European Commission. While public bids are exempted from the usual prohibition on completing a transaction before EUMR clearance, in practice, clearance is usually obtained in advance of completion. The procedures under the EUMR (and the German) regime involve a preliminary evaluation, followed by a detailed investigation in cases where it is thought that there may be serious competition issues.

It is important to be aware that where submissions are made to the European Commission (and/or other merger control authorities, the parties to the transaction are required to supply a large number of documents connected with the transaction. These documents are likely to include minutes of board and shareholder meetings, presentations to the board and shareholders and reports and studies prepared for the board, including reports and any other documents prepared by any third party, such as accountants, financial advisers and consultants.

For this reason, care is needed in the preparation of all documents relating to the takeover. Whilst the inclusion of information highlighting the benefits of a transaction cannot be avoided, care should be taken to ensure that documents do not contain material which could prejudice the prospects of the transaction being cleared by the relevant competition authorities such as statements which suggest that the merged entity will have pricing power or a dominant position. In any event, any relevant documents should not be held back or destroyed since severe penalties can be imposed for such actions.
The EUMR applies to “concentrations” having an “EU dimension”. The definition of concentration is broad and catches cases where companies merge or one company acquires the ability to exercise “decisive influence” over the strategic commercial decisions of another company. This may occur on the acquisition of a minority shareholding or even of veto rights over strategic decisions alone. For example, acquiring a 25 per cent shareholding is likely to confer decisive influence over a German target if fewer than half of all shareholders’ votes are typically cast at shareholders’ meetings, as in those circumstances a 25 per cent shareholding will represent the majority of votes actually cast.

Parties are able to notify a takeover as soon as they have publicly announced a firm intention to make an offer, and the European Commission positively encourages notifying parties to begin communicating with it at the earliest possible stage after they have decided to make such an announcement. However, obligations of confidentiality should always be considered before approaching any competition authority.

8.2.2 Thresholds
A “concentration” will have an “EU dimension” where:

- the combined aggregate worldwide turnover of all the parties exceeds EUR 5 billion (this is intended to exclude mergers between small and medium sized companies), and
- the aggregate EU-wide turnover of each of at least two of the parties is more than EUR 250 million (this is intended to exclude relatively minor acquisitions by large companies or acquisitions with only a minor European dimension), unless
- each of the parties achieves more than two-thirds of its aggregate EU-wide turnover within one and the same EU member state (this is intended to exclude cases where the effects of the merger are felt primarily within a single EU member state where it is more appropriate for the national competition authorities to deal with it).

In addition, a concentration that does not meet the above thresholds will nevertheless have an “EU dimension” if:

- the combined aggregate worldwide turnover of all the parties exceeds EUR 2.5 billion and
- the aggregate EU-wide turnover of at least two of the parties is more than EUR 100 million and
- in each of at least three member states, the combined aggregate turnover of all the parties is more than EUR 100 million and
- in each of the three member states included above, the aggregate turnover of each of at least two of the parties is more than EUR 25 million unless
- each of the parties achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.

8.2.3 European Commission Reference to National Competition Authorities and vice versa
In advance of notifying a merger to the European Commission, the parties can request the European Commission to refer the whole or part of the merger back for investigation by the
competition authority of an EU member state, if the competition effects are felt most in that member state and it is best placed to examine the transaction. After notification, member states can also ask the European Commission to refer a merger back to them in similar circumstances, for consideration by their competition authorities.

The opposite is also possible. The parties to a merger that does not meet the EUMR thresholds, but is capable of being reviewed under the competition laws of at least three member states, can request the European Commission to examine the merger.

Member states can also refer cases to the European Commission where the EUMR thresholds are not met but the merger would affect trade between member states. Note that in this last case, the European Commission would not have exclusive reviewing authority, such that there may be parallel reviews with the European Commission assessing the impact of the merger on some EU countries and national competition authorities examining the impact on their own. Moreover, member states can request this type of referral even if they would have no jurisdiction to review the transaction under their domestic merger control laws.

Referrals to and from the European Commission, whether initiated by the parties or a member state (as described above) will lengthen the overall review timetable.

There are advantages and disadvantages in each case, in trying to shift jurisdiction and an approach applied in one takeover cannot automatically be applied in another.

8.2.4 Calculation of thresholds
The threshold figures need to be calculated by reference to the parties’ most recent financial year and official exchange rates (obtained from the European Central Bank and/or the European Commission) must be used to convert national currencies to euros.

8.2.5 Timing of Notification
Takeovers within the applicability of the EUMR must be notified to the European Commission for approval. Most acquisitions are subject to a prohibition on implementation before clearance, but there is an exception to this in the case of public bids. Such bids can proceed to closing, but only on the basis that the transaction is notified to the Commission without delay (for example, as soon as possible after public announcement). In addition, the bidder must either not exercise the voting rights attached to the securities in question before clearance or do so only to maintain the full value of those investments and following an express derogation granted by the Commission before such implementation. In practice, however, it is often not possible to close an offer before the European Commission has decided whether to open a Phase II investigation or issue a Phase I clearance. Also, in the event that closing does take place before clearance, the bidder will assume the risk of any remedies that are subsequently imposed by the Commission to address competition concerns, and the cost of interim “hold separate” obligations that are typically imposed pending the implementation of remedies. Given these factors, it is common for offers to be made conditional on competition clearance. Assuming the offer is conditional on EUMR clearance, there are no fixed time periods within which notification must be made.
Section 8: REGULATORY APPROVALS

Application of EUMR

Combined worldwide turnover\(^1\) over €5 billion

- Yes

EU-wide turnover of each of at least two undertakings over €250 million

- Yes

- No

EU-wide turnover of each of at least two undertakings over €100 million

- Yes

- No

Combined turnover\(^1\) in each of at least three Member States over €100 million

- Yes

- No

In each of at least three of these Member States turnover of each of at least two undertakings over €25 million

- Yes

- No

2/3 rule met\(^2\)

- Yes

- No

EUMR applies

- Yes

- No

EUMR does not apply

---

1 All undertakings concerned.

2 Each of the undertakings achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.
Notification cannot, however, be made before the announcement of a firm intention to make a bid. An announcement of a possible offer is usually not sufficient to demonstrate such an intention.

Notification should only be made once there is no risk associated with the transaction being made public, since the European Commission issues a public announcement soon after notification. However, as mentioned above, merging parties are encouraged to pre-notify confidentially as soon as possible after they have decided to announce a decision to make an offer. The notification must contain extensive information about the parties and the affected market(s).

8.2.6 Review period
The European Commission has 25 working days for an initial evaluation of the transaction. At the end of this "Phase I" review period, it must either approve the takeover (conditionally or unconditionally) or, if it decides that there are serious doubts as to a transaction's compatibility with the competition rules, initiate a detailed Phase II investigation. If it does open a Phase II investigation, the European Commission has further 90 working days to complete its review. Both the Phase I and Phase II periods are extended where commitments are offered and the Phase II investigation can be further extended in certain other limited circumstances.

8.2.7 Sanctions
The European Commission has the power to block a transaction or to impose conditions (including divestiture) if it concludes that the transaction is likely to significantly impede competition in the EU, or a substantial part of it, and can impose significant fines in respect of, for example, failing to notify the takeover or supplying incorrect or misleading information.

8.3 German merger control
8.3.1 Introduction
If the European Commission is not competent, e.g. in case of the acquisition of a minority interest below control or because the EU turnover thresholds are not met, there may nevertheless be an obligation to notify the public offer to a national competition authority of an EU member state, e.g. to the German Federal Cartel Office. German merger control is governed by sections 35 et seq. of the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, “GWB”).

As on the EU level, public bids are exempted from the usual prohibition on completing a transaction before obtaining clearance from the German Federal Cartel Office.

8.3.2 Thresholds
A public offer is subject to German merger control if

- the combined aggregate worldwide turnover of the undertakings concerned amounted to more than EUR 500 million in the previous financial year and
- at least one undertaking involved achieved a turnover in Germany in the previous financial year of more than EUR 25 million and
- another undertaking involved achieved a turnover of more than EUR 5 million in the previous financial year.

The 9th Amendment to the GWB introduced an additional threshold based on the transaction size. A public offer is required if the following conditions are met:

- the combined aggregate worldwide turnover of the undertakings concerned exceeds EUR 500 million and
• at least one undertaking involved achieved a turnover in Germany in the previous financial year of more than EUR 25 million and
• neither the target nor another party had turnover in Germany of more than EUR 5 million and
• the value of the consideration for the transaction exceeds EUR 400 million and
• the target is active in Germany to a considerable extent.

8.3.3 Procedure
The German Federal Cartel Office has initially one month to assess a public offer (Phase I). The review period for Phase II is four months and can be further extended.

8.4 Foreign Investor Restrictions
In addition, further restrictions apply to foreign investments by non-EU residents if the transaction may impact public order or security. Under such circumstances, public offers aiming at certain targets, which operate “critical infrastructure” e.g. in the energy or telecommunication sectors may be scrutinized by the Federal Ministry for Economic Affairs and Energy. Under the Foreign Trade Regulation (Außenwirtschaftsverordnung), the Federal Ministry for Economic Affairs and Energy may prohibit (or impose conditions on) the direct or indirect acquisition of at least 25 per cent of the voting rights including attributable rights by a non-EU or a non-European Free Trade Association (EFTA) acquirer for reasons of public order or security.

To minimise uncertainty the bidder may apply to the Federal Ministry for Economic Affairs and Energy for a certificate of non-objection. If such a certificate is granted or scrutiny proceedings are not initiated within a period of two months from the date of the application, the transaction is no longer subject to any scrutiny by the Federal Ministry for Economic Affairs and Energy. If no application for a certificate of non-objection is filed, the government forfeits its right to prohibit the acquisition or impose restrictions if it does not initiate investigations within three months from obtaining knowledge of the publication of the decision to make a public offer or the acquisition of control. Even stricter rules apply if the target is active in defence-related industries, for example as a developer or manufacturer of military weapons or cryptographic systems.

8.5 Specific Sectors
In addition to specific rules on foreign investors, the financial sector contains a regulatory framework which will assess the reliability of new shareholders acquiring a significant stake (more than 10 per cent of the voting rights or the capital).
Thus, the intended acquisition of a significant share in:

- a German bank,
- financial services institution,
- investment company,
- operating institution of a stock exchange, or
- insurance company

must be notified to the BaFin or the competent stock exchange supervisory authority. Any proposed increase or reduction of a significant share beyond or below 20 per cent, 30 per cent or 50 per cent must be notified in the same way. The proposed acquisition may be prohibited or the thresholds may be increased if, for instance, the managing directors of the bidder are deemed unreliable.
9. APPLICATION OF US SECURITIES LAWS TO GERMAN TAKEOVERS

9.1 Regulatory Framework
9.2 US Tender Offer Rules
9.3 Bidder Consideration Securities
9.4 SEC Proxy Rules
9.5 Tier I and Tier II Exemptions
9.6 Avoiding the Application of US Securities Laws
9.7 Other Considerations
Often, foreign takeover regulations – such as securities regulation in the United States – apply when shareholders with residence, domicile or usual residence in that particular country are affected by the offer. Consequently, the bidder would have to comply with the rules of these countries which, in many cases, will conflict with the German takeover rules. As the bidder in this case cannot reasonably be expected to make an offer to all shareholders, the BaFin may, upon application, permit the bidder to exclude certain shareholders with residence, domicile or usual residence in other countries. The BaFin will however deny an exemption, if the bidder can seek exemption under foreign takeover regulation.

Given that most German listed companies have shareholders that are resident in the US, it is likely that US securities laws apply to the transaction.

This chapter provides a broad overview of the potential application of the US federal securities laws to takeovers of German companies. It does not address US competition or foreign investment laws.

9.1 Regulatory Framework

9.1.1 Introduction
The principal US federal securities laws that may apply to takeovers of German companies are (i) the SEC’s tender offer rules, promulgated under the US Securities Exchange Act (Exchange Act) which potentially apply to any acquisition effected through a tender or exchange offer; (ii) the registration requirements of the US Securities Act (Securities Act), which potentially apply, if shares or other securities are offered as consideration to target shareholders; and (iii) the SEC’s proxy rules, also promulgated under the Exchange Act, which potentially apply, if shareholders vote on a takeover. In addition to the US federal securities laws, securities laws of individual states of the US may apply, if the offer consideration includes shares.

9.1.2 Application of US Federal Securities Laws
The application of the US federal securities laws to takeovers of German target companies can be summarised as follows:

- If the target has any US shareholders the US tender offer rules potentially will apply (but if the size of the US shareholding is small, the “Tier I” exemption may be available),
- if the consideration to be offered to target shareholders includes securities, the registration requirements of the Securities Act may apply (although where the size of the US shareholding is small, the Tier I exemption may be available),
- the general US anti-fraud rule, Rule 10b-5, may apply to any takeover transaction that affects US shareholders.

A route map summarising the application of US securities laws to a public tender offer is set out on page 51.
Section 9: APPLICATION OF US SECURITIES LAWS TO GERMAN TAKEOVERS

9.2 US tender offer rules

The tender offer rules apply to a tender offer, although exemptions are available. An offer for shares of a non-US company that are not registered with the SEC is subject at most to the (relatively limited) requirements imposed by Regulation 14E under the Exchange Act. By contrast, an offer for SEC registered shares, whether issued by a US or non-US company, is also subject to the more extensive procedural and disclosure requirements imposed by Regulation 14D under the Exchange Act (see section 9.2.2). In most cases, if a target has shares or ADRs listed on a US exchange, its shares will be required to be registered with the SEC.

An offer for shares of a “foreign private issuer” will generally be exempt from most of the tender offer rules (Regulations 14D and 14E) if US holders hold no more than 10 per cent of target shares, pursuant to the “Tier I” exemption. If US ownership exceeds 10 per cent but is no more than 40 per cent, a more limited set of exemptions, the “Tier II” exemptions, may apply.

This route map is designed to determine the application of the tender offer rules and the Securities Act registration requirements when a tender offer is used to effect a takeover of a German target.
Application of US Securities laws to German takeovers

Is the offer being made into the US?
- No
- Yes

Is the target a foreign private issuer?
- No
- Yes

What is % of US target share ownership?
- 10% or less: Tier I exemption applies
- 40% or less: Tier II exemptions apply
- >40%

Are target shares registered with the SEC?
- No
- Yes

Does consideration include bidder securities?
- No
- Yes

Securities Act does not apply
- Securities Act registration requirements apply
Section 9: APPLICATION OF US SECURITIES LAWS TO GERMAN TAKEOVERS

9.2.1 Regulation 14E
Regulation 14E applies to all takeover offers extended into the US, whether or not the target securities are SEC registered (but for the most part does not apply to a cross-border offer that qualifies for the Tier I exemption). The requirements imposed under Regulation 14E include the following:

Timing: The offer must remain open for at least 20 business days and must also remain open for at least 10 business days following a price change (or other change of comparable significance). Other material changes require the offer to remain open for at least five additional business days.

Prompt payment: Upon the termination or expiration of the offer, the bidder must promptly pay for or return all shares tendered under the offer.

Target obligations: Within 10 business days from the commencement of the offer, the target must send to its shareholders its recommendation regarding the offer and must promptly send to the shareholders any material change to this recommendation.

Purchases of target shares: After the first public announcement of the offer (which the SEC interprets quite broadly) and until the offer expires, the bidder, its affiliates and persons acting on their behalf are prohibited (subject to certain exceptions) from purchasing target shares outside of the offer.

9.2.2 Regulation 14D
If target shares are SEC registered shares, Regulation 14D, as well as Regulation 14E, will apply to the offer (but like Regulation 14E, Regulation 14D for the most part does not apply to a cross-border offer that qualifies for the Tier I exemption). If the Tier I exemption is not available, the partial Tier II exemptions may apply. The requirements imposed under Regulation 14D include the following:

SEC filings: For an all-cash offer, no pre-offer clearances are required from the SEC (as discussed below, if the consideration offered to target shareholders includes securities, the registration requirements of the Securities Act, which do require SEC preclearance, may apply). Whether or not pre-clearance is required, copies of all announcements and communications relating to the offer must be filed with the SEC on the date of first use and the SEC’s staff may request revisions to those documents. If this happens, the requested revisions usually are required to be made only in the electronic version of the document that is filed with the SEC (no physical re-circulation of documents is required). The offer document must contain specific information regarding the transaction, the bidder’s plans for the target’s business, sources of funding for the offer, the officers and directors of the bidder and its corporate parent, and any additional material non-public information the bidder holds regarding the target. If the consideration being offered to target shareholders includes shares, financial information regarding the bidder and the target as well as pro forma financial information giving effect to the proposed business combination may be required. This information is required to be included in the bid document by the Takeover Act (other than the pro forma financial information on a business combination).
Withdrawal rights: All target shareholders must have the right to withdraw acceptances as long as the offer remains open and at any time after 60 days following the commencement of the offer (if the offer has expired and the target shares tendered have not been purchased by the bidder). A bidder may provide for a subsequent offering period of at least three business days, during which no withdrawal rights apply and shares must be purchased when tendered in the offer.

All holders/best price rule: The offer must be open to all holders of the target shares and all holders must be paid the highest consideration paid to any other shareholder during the offer. The offer can, however, provide target shareholders with the right to choose between different forms of consideration, so long as all holders have the same choice.

Target obligations: Within 10 business days after commencement of the offer (whether the offer is unsolicited or recommended) the target must send to its shareholders, and file with the SEC, a statement that discloses the target’s board’s position with respect to the offer, together with the reasons for the position taken.

9.3 Bidder Consideration Securities
If the consideration being offered to target shareholders includes shares or other securities, the offer will be subject to the filing and pre-clearance procedures imposed by the Securities Act unless the Tier I exemption is available. The registration requirements of the Securities Act do not apply to all cash offers.

Under the Securities Act, unless an exemption is available, a sale of securities cannot close until a registration statement has been filed with the SEC and subsequently become effective (which, generally, means cleared by the SEC). Both before and after the registration statement is filed, there are limitations on the public announcements that the parties to the transaction are permitted to make. In addition, all written communications relating to the transaction must include specific cautionary language and must be filed with the SEC at the time of first use.

If an acquisition of a target is to be effected by means of a securities exchange offer, the transaction will be subject to the tender offer rules described above as well as the Securities Act requirements.

The Securities Act requires detailed transaction-related disclosure similar to the disclosure required by the tender offer rules discussed above. Audited historical financial information regarding the target and the bidder and, depending on the size of the target relative to the bidder, pro forma financial information giving effect to the transaction may be required.

The SEC’s legal and accounting staff will normally comment on a registration statement prior to declaring the statement effective. The process of preparing the registration statement and responding to the SEC’s comments typically takes at least six weeks, and sometimes much longer. Complying with these Securities Act registration requirements can be time-consuming and expensive, particularly for a non-US bidder whose shares are not already listed or registered in the US.
If the bidder is not already subject to the periodic reporting and other requirements of the Exchange Act, it will become subject to those requirements after the completion of a securities exchange offer registered under the Securities Act. For most non-US bidders, this will require filing annual reports on Form 20-F and interim reports on Form 6-K with the SEC. If the bidder’s shares are not subsequently listed on a US exchange, it may at a later date be able to de-register its shares and thereby end its obligation to comply with the SEC’s ongoing reporting requirements, depending on the level of US ownership of its shares.

9.4 SEC Proxy Rules
The SEC’s proxy rules apply only when SEC registered shares are to be voted. Foreign private issuers are exempt from the proxy rules. Accordingly, the proxy rules will not generally apply to an acquisition of a German target (the proxy rules could apply if a German target with SEC registered shares did not qualify as a “foreign private issuer” under the SEC’s rules because, for example, its directors, management and operations were primarily based in the US – see section 9.5.1).

The proxy rules impose detailed disclosure requirements that are similar in many respects to the Securities Act disclosure requirements described above. A proxy statement must be filed with the SEC and the SEC staff may provide comments which can delay when it can be sent to shareholders.

9.5 Tier I and Tier II Exemptions

9.5.1 “Foreign Private Issuer”
The Tier I and Tier II exemptions apply only when the target qualifies under the SEC’s rules as a “foreign private issuer”.

A foreign private issuer is an entity incorporated under the laws of any non-US jurisdiction unless (i) a majority of its voting shares are held in the US and (ii) either a majority of its executive officers and directors are US citizens or residents, or a majority of its assets are located in the US, or its business is principally administered in the US.

9.5.2 Tier I Exemption
Transactions that qualify for the Tier I exemption are exempt from almost all of the requirements of the tender offer rules and from the registration requirements of the Securities Act.

In general, the Tier I exemption is available if (i) the target is a foreign private issuer; (ii) US persons hold no more than 10 per cent of target shares; (iii) the target’s US shareholders are permitted to participate in the offer on terms at least as favourable as those offered to any other holder, subject to certain exceptions; (iv) the bidder provides information to US holders comparable to that provided in the target’s home jurisdiction; (v) in the case of offers for SEC registered shares, the bidder files with the SEC copies of all offer documentation that is provided to target shareholders and a consent to service of process in the US; and (vi) the target is not an investment company under the US Investment Company Act (other than a registered closed-end investment company).
9.5.3 Tier II Exemption

Tender offers that qualify for the Tier II exemptions have limited relief from a number of the tender offer rules. The Tier II exemptions do not provide any relief from the registration requirements of the Securities Act.

In general, the Tier II exemptions are available if the target is a foreign private issuer and US holders hold no more than 40 per cent of the target shares.

The bidder can use the Tier II exemptions, among other things, to:

- conduct separate US and non-US offers (provided the terms of the US offer are at least as favourable as the terms of the non-US offer), and
- follow procedures in accordance with home jurisdiction law or practice regarding, among other things, extending the offer, paying for shares and withdrawal rights.

9.5.4 Calculating US Ownership

The calculation of the Tier I and Tier II thresholds required under the SEC’s rules can be complicated.

Bidders seeking to calculate US share ownership of the target for purposes of the Tier I and Tier II thresholds are generally required to apply a “look-through” analysis as at any date between 60 days before the announcement of the firm intention regarding the offer and 30 days after that date. In limited circumstances, bidders unable to perform the look-through analysis are permitted to use an alternative analysis based on the relative levels of average daily trading volume in the target’s shares in markets inside and outside the US.

Shares held by the bidder are excluded from the calculation (numerator and denominator).

In the case of an unsolicited offer, a bidder is entitled to presume that the target is a foreign private issuer and that the US ownership percentage limits of the Tier I or Tier II exemptions are not exceeded unless: (i) the aggregate US trading volume exceeds 10 per cent (Tier I) or 40 per cent (Tier II) of the worldwide trading volume of the target shares over a specified 12-calendar month period; (ii) the most recent annual report of the target (or its shareholders) indicates that US holders hold more than 10 per cent (Tier I) or 40 per cent (Tier II) of the outstanding subject shares; or (iii) the bidder knows or has reason to know that the level of US holding exceeds the applicable threshold. If the bidder cannot rely on this presumption, it will need the co-operation of the target to determine if Tier I and Tier II exemptions apply.

9.5.5 No-action/Exemptive Relief

The SEC recognises that the Tier I and Tier II exemptions do not eliminate all conflicts in law or practice presented by cross-border takeovers that are subject to US jurisdiction and, therefore, it has granted and continues to grant “no action” relief on a case by case basis. Bidders contemplating a takeover of a German target that find themselves unable to comply with all the SEC rules applicable to their offer because of conflicts with the German legal or regulatory requirements may be able to obtain relief from those requirements by applying in advance to the SEC. The SEC has said it is less likely to grant relief where US share ownership in the target is high (i.e. in excess of 40 per cent). Since the process of obtaining SEC relief can take at least a few weeks, bidders should seek advice well in advance of the anticipated launch date of the offer to ascertain whether this kind of relief will be needed.
9.6 Avoiding the Application of US Securities Laws
In some circumstances, a bidder may wish to circumvent the application of US securities law by not making the offer in the US (whilst the offer is still made to all target shareholders, it is not communicated into the US). The SEC has provided guidance on the steps that must be taken in order to avoid making the offer in the US but has also indicated that it may view these steps as ineffective if there is a large US shareholding in the target. In any event, in practical terms on an acquisition of a larger German target, it will be unusual not to make the offer into the US because if US ownership is below 10 per cent the Tier I exemption should be available and if US ownership is above 10 per cent, acceptances from US holders will be needed if the bidder wishes to pursue a squeeze-out.

9.7 Other considerations
9.7.1 Anti-fraud Rules
The general US anti-fraud rule, Rule 10b-5, under the Exchange Act may apply to any takeover transaction that affects US shareholders. None of the exemptions discussed above provide any relief from the US anti-fraud rules.

9.7.2 Regulation M
Share buybacks by or on behalf of a bidder while a securities exchange offer is pending can have the effect of supporting the bidder’s share price, thereby enhancing the transaction’s chances of success and/or, in a fixed value deal, reducing the dilutive effect on the bidder (because in a fixed value deal, the higher the bidder’s share price, the lower the number of shares to be issued to target shareholders). This gives rise to the possibility of share price manipulation.

Regulation M prohibits certain trading activity regardless of whether the persons trading have an intent to manipulate prices from the date of the announcement of the firm intention of a takeover offer until its completion or lapse. The restrictions apply to “distribution participants” (including the bidder) and “affiliated purchasers”. A bidder’s financial adviser is potentially subject to these restrictions, although purchases on the other side of information barriers within an investment bank are permitted.

Deal-specific relief may be negotiated with the SEC and there is a line of no action letters providing relief from Regulation M, although the SEC has not codified class-wide Regulation M relief for cross-border transactions as it has done in other areas.
9.7.3 Rules Affecting Pre-bid Stakebuilding
A number of US securities laws rules need to be considered before a bidder embarks upon pre-bid stakebuilding, including:

• Anti-fraud rules: The bidder and those acting on its behalf are prohibited from trading in the target’s shares while in possession of material, non-public information if by doing so there would be a breach of a duty of trust or confidence that is owed to the target or its shareholders or to any other person who is the source of the information.

• SEC filings: If the bidder and/or parties acting in concert with it directly or indirectly acquire beneficial ownership of more than 5 per cent of a target company with SEC registered shares, the bidder will be required to provide certain prescribed information about its ownership/acquisition to the SEC in publicly available filings on Schedule 13D. The required disclosure would include any plans to acquire the target. The filing must be made within 10 days after the 5 per cent ownership threshold is crossed and must be amended “promptly” following any material change in the information provided in the filing.

9.7.4 American Depositary Shares
In some cases, shares of a German target are represented in the US by American depositary shares (ADSs). Each ADS represents a specific number of shares of the issuer, held by a depositary on behalf of the ADS holders. An American depositary receipt refers to the physical certificate that evidences an ADS.

ADSs offer a number of benefits for US investors such as a US transfer mechanism, an appropriate trading unit, the ability to obtain dividends and other distributions in US currency, and in some cases, the avoidance of home jurisdiction transfer taxes.

When calculating US ownership, shares underlying the ADSs must be counted in determining both the aggregate number of shares outstanding and the number of US holders.

Where a non-US target has an ADR programme, there are two ways a bidder can extend the offer to ADR holders. The bidder can require ADR holders to withdraw their ordinary shares from the ADR facility and then tender their ordinary shares into the offer. Alternatively, the bidder can appoint a US tender agent and establish special mechanics for ADR holders.
10. ANNEX

10.1 Table “Scope of Application” 59
10.2 Table “Competent Supervisory Authority” 60
10.3 Glossary 61
10.1 Table “Scope of Application”

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are the shares with voting rights of Target admitted to trading in Germany?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are the shares with voting rights of Target admitted to trading in another EEA state?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Acquisition offer</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Takeover or mandatory offer</td>
<td></td>
<td>No</td>
</tr>
<tr>
<td>European Offer: Offer for the acquisition of securities of Target with its seat within the EEA (but outside Germany), which is considered by the law of the state where Target has its seat as being a takeover or mandatory offer</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Are the securities granting voting rights admitted to trading only in Germany?</td>
<td></td>
<td>No</td>
</tr>
<tr>
<td>Were the securities of Target first admitted to trading on an organised market within Germany?</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Were the securities of Target simultaneously admitted to trading in Germany and in another EEA member state and Target has chosen BaFin as competent authority?</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

WpüG applies without limitation
- Control
- Obligations to submit an offer and related provisions
- Information of employees of Target and of Bidder
- Defensive measures
- Other corporate law issues

WpüG applies regarding
- Consideration
- Contents of offer document
- Procedure

WpüG not applicable

A Guide to Takeovers in Germany, Clifford Chance Deutschland LLP
10.2 Table “Competent Supervisory Authority”

Are the securities of Target admitted to trading in the Member State where the company has its registered office?

Yes

Competent authority: supervisory authority of the Member State where company has its registered office

No

Are the securities of Target admitted to trading only in one other Member State?

No

Are the securities of Target first admitted to trading only in one other Member State?

No

Were the securities of Target first admitted to trading in more than one Member State simultaneously?

Yes

If securities of Target were first admitted to trading in more than one Member State simultaneously

Competent authority: supervisory authority of the Member State where Target’s securities are (were first) admitted to trading

No

Competent authority: supervisory authority determined by Target

Attention!

Seat = State of admission to trading

• Seat state – relevant for supervision and applicable law in connection with all aspects of the offer

Seat ≠ State of admission to trading

• State of admission to trading – relevant for issues in connection with procedure and consideration

• Seat State – relevant for company law issues (i.e. definition of control thresholds, obligation to make an offer, defensive measures)
10.3 Glossary

acceptance period – period of time (minimum 4 weeks) within which the offer remains open and can be accepted by the shareholders, see section 2.2

acceptance threshold – offer condition (a certain percentage of shareholders must accept the offer) which is sometimes used to secure the execution of the bidder’s strategic plans in the target; the bidder may renounce this condition

acting in concert/concert parties – see section 1.1

ADR – American depositary receipt, see section 9.7.4

ADS – American depositary shares, see section 9.7.4

AGM – annual general meeting (ordentliche Hauptversammlung)

BaFin – Bundesanstalt für Finanzdienstleistungsaufsicht – German Federal Financial Supervisory Authority

bidder – see section 3.3

business combination agreement – see section 4.9

competing offer – see section 5.14

custodian bank – specialised financial institution which holds and manages securities or other financial assets on behalf of institutional investors, see section 5.16

DPLTA – domination and profit and loss transfer agreement (Beherrschungs- und Gewinnabführungsvertrag)

EEA – European Economic Area

EFTA – European Free Trade Association

EGM – extraordinary general meeting (außerordentliche Hauptversammlung)

Federal Gazette – official electronic publication medium (Bundesanzeiger), containing inter alia announcements and notices issued by companies, see sections 5.10 and 5.12

EU – European Union


European Offer – Offer for the acquisition of securities of the target with its seat within the EEA (but outside Germany), which is considered by the law of the state where the target has its seat as being a takeover or mandatory offer


financing confirmation – see section 5.7

foreign private issuer – see section 9.4 and 9.5.1
FCA – Financial Conduct Authority - supervisory authority in the UK

GmbH – Gesellschaft mit beschränkter Haftung – German limited liability company

ISIN – International Securities Identification Number

leveraged recapitalisation – see section 7.5

management board – Vorstand, see section 7.1.1

mandatory offer – Pflichtangebot, see section 5.2

offer document – Angebotsunterlage, see section 5.6

offer period – the period from the time an announcement is made of a proposed or possible offer (with or without terms) until the first closing date or, if this is later, the date when the offer becomes or is declared unconditional as to acceptances or lapses

Phase I clearance – see section 8.2.6

Phase II investigation – see section 8.2.6

Regulation M – SEC regulation governing the activities of underwriters, issuers, selling security holders, and others in connection with offerings of securities

SEC – United States Securities and Exchange Commission – supervisory authority in the US

SEC registered shares – shares which are registered with the US Securities and Exchange Commission under the Securities Act, see section 9.2

Securities Act – US Securities Act

Securities Trading Act – German Securities Trading Act (WpHG)

simple offer – Erwerbsangebot, see section 5.2

supervisory board – Aufsichtsrat, see section 7.1.1

Stock Corporation Act – German Stock Corporation Act (AktG)

Takeover Act – German Takeover Act (WpÜG)

takeover offer – Übernahmeangetbot, see section 5.2

Tier I / Tier II exemptions – see section 9.5

top-up clause – serves as risk protection by giving the selling shareholder the right to receive any better offer price paid by the bidder after acquisition of the stake, see section 4.4

Transformation Act – German Transformation Act (UmwG)

VWAP – value weighted average share price (Drei-Monats-Durchschnittskurs) – The volume weighted average stock exchange trading price of target shares during the three months period prior to the announcement of the offer

WpÜG – Wertpapiererwerbs- und Übernahmegesetz – see Takeover Act
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