A Guide to Takeovers in Germany
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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 making and implementing of a takeover (sections 5 and 6).

This Guide also covers further integration steps through 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 the 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 July 2012.

This Guide has been produced by the German Corporate Practice and substantially written by Thomas Stohlmeier and Christian Vogel.

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1. Principal Elements of Takeover Law

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1.1 Control

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 shares of the target 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 the attribution of the corresponding voting rights.

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

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. This entails, in particular, notification and publication duties on the part of the bidder vis-à-vis the BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht, the supervisory authority, c.f. 1.5), the stock exchanges where the shares are traded, 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 after the offer proceedings, and circumstances surrounding the acquisition of these holdings.
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 for understanding 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 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 stock exchange, 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 FSA 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 be relevant in 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.
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 9.6.4

**ADS** – American depositary shares, see section 9.6.4

**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 4.8

**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

**EUMR** – Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

**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 9.4.1

FSA – Financial Services 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 – Übernahmeangebot, see section 5.2

Tier I / Tier II exemptions – see section 9.4

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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