

Germany

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M&A ACTIVITY

1. Please give a brief overview of the public M&A market in your jurisdiction.

After a small recovery in 2009, the M&A volume in Germany increased again slightly in 2010 but remained at a moderate level, although the transaction market is becoming more stable. In total, 2010 saw a 2% increase in M&A transactions involving German companies from 1,240 transactions in 2009 to 1,280 in 2010 (*Thomson Financial*).

The positive German economic outlook has led to increasing M&A activity and major German industries being the focus of M&A activity. The optimistic start to 2010 was enhanced by some successful IPOs (for example, Kabel Deutschland). Corporate buyers whose business models had proven robust during the crisis and who had a larger variety of financing options returned to the market. The reason why many transactions failed was due mainly to differing purchase price expectations, indicating a strong market for sellers.

However, M&A activity in Germany during the crisis has largely consisted of transactions triggered by restructuring in bankruptcy cases, such as Arcandor, Märklin or Schiesser. Liquidity and bad debt problems have also forced a number of institutions to seek assistance from the Government-backed Special Fund for Financial Markets Stabilisation (SoFFin).

The largest transactions in 2010 involving a German-listed target, seller or bidder were (*Mergermarket*):

- RWE's acquisition of Essent for US\$9.93 billion (as at 1 March 2011, US\$1 was about EURO.7).
- ACS' acquisition of Hochtief for US\$7.89 billion.
- Merck's acquisition of Millipore Corporation for US\$6.75 billion.
- Deutsche Bank's acquisition of Deutsche Postbank for US\$5.28 billion.
- Teva Pharmaceutical's acquisition of Ratiopharm for US\$4.94 billion.
- Volkswagen's acquisition of Porsche Holding Austria for US\$4.49 billion.
- Deutsche Bahn's acquisition of Arriva for US\$3.84 billion.
- The acquisition of Cognis by BASF for US\$3.28 billion.

- Renault/Nissan Motor acquisition of a 3.1% stake in Daimler for US\$1.45 billion.
- OJSC Rosneft Oil acquisition of a 50% stake in Ruhr Oel for US\$1.6 billion.
- Intel's acquisition of Infineon Technologies (wireless solutions business) for US\$1.5 billion.

2. What are the main means of obtaining control of a public company?

There are two ways to obtain control of a public company:

- Acquisition of shares.
- Statutory merger.

Cross-border statutory mergers are possible, following the EU Directive 2005/56/EC on cross-border mergers of limited liability companies (Cross-border Mergers Directive), as adopted by the German Reorganisation Act (*Umwandlungsgesetz*). They apply to:

- *Societas Europaea* (SEs).
- Stock corporations (AGs).
- Partnerships limited by shares (KGaAs).

However, statutory mergers are often procedurally difficult and are more suitable for intra-group mergers or where taking over one party would be controversial.

If a party seeks to obtain control of a public company (as defined by the German Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*)), a takeover offer (*Übernahmeangebot*) is mandatory (*see Question 4*). This requirement should be considered if an investor seeks to acquire a substantial participation.

HOSTILE BIDS

3. Are hostile bids allowed? If so, are they common? If they are not common, why not?

Hostile bids are allowed but are not common. The main reasons for the low level of hostile takeovers in Germany include:

- German banks' large shareholdings and extensive cross-shareholdings (often referred to in the past as the *Deutschland AG*), although these shareholdings have been decreasing considerably over the last several years.

- Stakeholders other than shareholders having legally entrenched interests.
- Manager and not shareholder dominance.
- A culture of consensus that is still deeply rooted in German society.

However, hostile bids may increase in the future due to factors such as:

- Changes in the composition of shareholders due to:
 - changes in the shareholder base following a reduction of reciprocal participations (a movement away from the former *Deutschland AG*);
 - reductions in state-owned shares through privatisation and deregulation;
 - diversified and wider-spread free float share ownership (*Streubesitz*).
- The increasing importance of institutional investors and of private equity, resulting in investors with higher returns in shorter investment periods.
- The increased consideration of shareholders' interests due to more stringent corporate governance regulation under the Corporate Governance Codex.
- The adaptation of the legal framework to international standards, for example:
 - the introduction of the Takeover Law;
 - the exemption of capital gains from transfers tax;
 - limitations on proxy-voting powers;
 - the possibility of squeeze-outs (see *Question 20*).

However, the target's management can, with the consent of the supervisory board, generally frustrate hostile bids (*Takeover Act*) (see *Question 23, Takeover Act*) and a takeover cannot occur without the major shareholders' willingness to sell. In particular, it may be in active institutional investors' or competitors' interests to block takeovers, including hostile bids.

REGULATION AND REGULATORY BODIES

4. How are public takeovers and mergers regulated, and by whom?

Public takeovers are regulated by:

- The Takeover Act.
- The Offer Ordinance (*WpÜG Angebotsverordnung*) and other statutory ordinances.
- The Risk Limitation Act (*Risikobegrenzungsgesetz*).
- Other legislation not specific to public takeovers, in particular the rules of the German Stock Corporation Act (*Aktiengesetz*).

Compliance with the Takeover Act is regulated by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) (BaFin) (see *box, The regulatory*

authority). In particular, the BaFin's powers include:

- Prohibiting the exercise of voting rights in shares.
- Preventing the bidder from making a proposed offer that does not comply with statutory requirements, and for making any subsequent offers for one year.
- Imposing fines of up to EUR1 million.

Takeover Act

Offers. The Takeover Act regulates any public offer (*öffentliches Angebot*) to acquire shares of stock corporations and partnerships limited by shares that have:

- Their seat in Germany.
- Their seat in another European Economic Area (EEA) member state but that have shares carrying voting rights that are either:
 - admitted to trading only on a German authorised market;
 - admitted to trading on a German authorised market and in another EEA member state, but that are:
 - not admitted to trading in the state where the corporate seat is located; and
 - first admitted to trading in Germany.
 - simultaneously admitted to a German and another EEA member state's market but where BaFin is chosen as supervisor.

There are three classes of public offers:

- An acquisition offer (*sonstiges Erwerbsangebot*) aimed at buying less than 30% of the target's voting rights (together with any other target shares attributed to the bidder) or aimed at buying non-voting preference shares only.
- A takeover offer (*Übernahmeangebot*), that is, a takeover bid aimed at obtaining control of the target. Control means the power to exert at least 30% of the target's voting rights, individually or on a joint basis acting in concert with others.
- A mandatory offer (*Pflichtangebot*), which must be made if and when control has been obtained other than by means of a takeover offer and no exemption applies.

Since the Takeover Act entered into force in 2002 more than 300 takeover offers have been made.

Bidders' obligations. The bidder must:

- Treat the same class of shareholders equally.
- Enable the target's shareholders to make a sound decision.
- Not delay the takeover offer to the target's detriment.
- Not take any measures that may distort the market regarding shares of any listed companies affected by the offer.

Officers' duties. The target's officers (the members of its management board (*Vorstand*) or its supervisory board (*Aufsichtsrat*)) must:

- Always act in the target's best interest (which may differ from the shareholders' interests).



- Refrain in principle from frustrating actions.
- Not obstruct the offer process unreasonably.
- Not accept any unjustified benefits.
- Publish a reasoned opinion on the offer.
- Provide the offer document, including any subsequent amendments and the boards' comment, to:
 - the target's economic committee (*Wirtschaftsausschuss*), if any; and
 - the works council (*Betriebsrat*) or, where there is no works council, the target's employees.

Risk Limitation Act

The German Risk Limitation Act took effect in 2008 and aims to increase market transparency without decreasing efficiency to prevent investors engaging in undesirable activities. The major changes provided by the Risk Limitation Act include:

- A modified definition of acting in concert (*see Question 16*).
- Increased notification requirements, including extended information duties if a shareholding passes the 10% or any higher threshold (*see Question 8, Disclosure requirements*).
- Considering both shares and options when calculating notification requirements.
- Tougher sanctions for culpably failing to meet notification obligations.

Other legislation

Stock Corporation Act. The Stock Corporation Act (and its extensive case law) is the main complementary source of rules for targets, its officers and shareholders. Its provisions are partially superseded or reiterated by the Takeover Act. Importantly, a German stock corporation's management board must always act in the company's best interests, which are not necessarily in the shareholders' best interests. This focus of fiduciary duties on the company's best interest may give rise to numerous issues during a takeover (*see Questions 6, 10 and 14*). Various defence measures against hostile takeovers are also governed by the Stock Corporation Act and the target's articles of association (articles) (*see Question 23*). The Stock Corporation Act also contains rules on squeeze-out (*see Question 20*).

Reorganisation Act (*Umwandlungsgesetz*). This allows statutory mergers by transferring one entity's assets to another pre-existing entity or transferring two existing entities' assets to a new entity. It also provides a legal framework for demergers (*Spaltungen*) and changes of legal form (*Formwechsel*), for example from a corporation to a partnership. Statutory mergers under the Reorganisation Act combine the selective approach of an asset deal with the universal succession of a share deal. The Act also provides for public-to-private transactions (*see Question 22*).

Securities Trading Act (*Wertpapierhandelsgesetz*). This regulates:

- **Insider trading.** The target's officers cannot pass any information regarding a public takeover that is not in the public domain, unless the disclosure is justified by the target's operational interest or is legally required. This also applies where the acquisition of target shares is designed as a defence measure against a hostile takeover (warehousing).

They must also take appropriate measures to ensure that the distribution of insider information is restricted internally in accordance with the target's operational interests.

- **Ad hoc disclosure.** The bidder must publicly disclose its intention to take over the target (*Takeover Act*). However, the target can be obliged to publish an ad hoc announcement, regulating the takeover under the Securities Trading Act.
- **Directors' dealings.** The officers of the target and its parent entity (and their spouses and close relatives) must notify the target and the BaFin of any personal acquisitions and disposals of target shares exceeding a *de minimis* threshold of EUR5,000 per annum.
- **Voting rights.** Before announcing a public takeover offer, the bidder may acquire target shares through the capital market or by package sales. However, the bidder must notify the target and the BaFin of any acquisition of shares through which its aggregate voting rights reach or exceed certain thresholds.

Directive 2004/109/EC on transparency requirements for securities admitted to trading on a regulated market (Transparency Directive). The Securities Trade Act was amended by the implementation of the Transparency Directive. This introduced the following requirements:

- Certain facts subject to publication in all European countries must be transferred to the electronic register of companies (in particular, ad-hoc-notifications and director's dealings).
- New additional notification thresholds of 3%, 15%, 20% and 30% have been introduced.
- The disclosure period after receipt of the information has been reduced to:
 - four trading days for shareholders;
 - three trading days for the company.
- The holding of other financial instruments entitling their owner to acquire arbitrarily the issuer's already existing shares and grant a voting right (for example, stock options) is also subject to the disclosure requirement (although the new notification threshold of 3% does not apply).

Stock Exchange Act (*Börsengesetz*) and Stock Exchange Ordinances (*Börsenordnungen*). The rules relating to the stock exchanges affect the target's regular de-listing (*see Question 22*). Following a public-to-private transaction, the investor may seek an initial public offering (IPO) as an exit route. Various statutory provisions apply, including the Stock Exchange Act and the relevant Ordinances.

Merger control. *See Question 25.*

Insolvency Act (*Insolvenzordnung*) and Voidance Act (*Anfechtungsgesetz*). Any bidder intending to make a public offer for a target which is insolvent (or close to insolvency) to restructure it must consider the Insolvency Act and the Voidance Act. The Insolvency Act allows the restructuring of a target through proceedings similar to those under the US chapter 11 rules. Under the Voidance Act, transfers of assets from the target to another entity to the detriment of the target's creditors may be voidable.

Commercial Code (*Handelsgesetzbuch*) and Civil Code (*Bürgerliches Gesetzbuch*). The Civil Code governs any legal relationships between private individuals and entities. The Commercial Code adds rules specific to entities (corporations and partnerships) and businesses of sole proprietors. The offer to buy or exchange shares and its acceptance, among other things, are governed by the Civil Code.

PRE-BID

Due diligence

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

Due diligence in public takeovers is usually subject to legal and timing constraints.

Even a co-operative target is restricted in the information it can provide to the bidder. The management can only disclose information where it is in the company's best interests to do so. It is in the shareholders' interest to fill any informational gaps if the bidder raises the offer price. However, it is not in the shareholders' interest to supply competitors with business secrets, which would make it less attractive for the bidder to buy secrets through the public offer. In practice, a management that is willing to co-operate provides the bidder with increasingly sensitive information. The management must consider whether to supply information to competing bidders it does not favour. Currently, there is no clear legal obligation for the management to provide due diligence information equally to bidders.

The bidder usually focuses its due diligence on the target's most relevant commercial, operational, financial, legal, tax, environmental, actuarial and insurance aspects. The key issues include:

- The bidder's ability to incentivise the target's shareholders to accept the bid. Financial investors, strategists and free float all have different objectives, therefore knowledge of the target's shareholder composition is essential.
- The bidder should anticipate which frustrating actions the target may take before approaching the management.
- Potential regulatory difficulties (for example, merger control) should be analysed well in advance.
- The bidder must also obtain information required to draw up the offer document (*Angebotsunterlage*).

Hostile bid

The scope of due diligence enquiries is the same as in a recommended bid. However, the bidder must rely on sources other than the target. In practice, the management is free not to co-operate with the bidder.

Public domain

There are various third party sources of due diligence information, including the sources listed below. Due to recent changes in the law, information can now be gathered much more easily and quickly.

Electronic business register. Information can be obtained (in German) from the Electronic business register at www.unternehmensregister.de, including information:

- Entered into the relevant registers, such as the commercial register (*Handelsregister*).
- Contained in mandatory filings or announcements to the relevant authorities, such as the BaFin.
- Published in the electronic *Federal Gazette* (*Bundesanzeiger*) under the Takeover Act, the Securities Trading Act, the Stock Exchange Ordinances, the Investment Act (*Investmentgesetz*) and the Investment Tax Act (*Investmentsteuergesetz*).

Electronic commercial register. Information filed at the relevant commercial register, is available (in German) at www.handelsregister.de, including:

- Financial statements.
- Core legal corporate information, including:
 - name;
 - seat;
 - object;
 - amount of registered share capital;
 - representation;
 - incorporation documents;
 - changes to the articles;
 - a list of shareholders.

Land register. Information on real property, including legal ownership and encumbrances, can be obtained at the local land register (*Grundbuch*). Information on public law encumbrances which are not entered into the local land register is available at the local register of public encumbrances (*Baulastenverzeichnis*).

IP register. Information on domestically registered IP rights (patents, utility models, trade marks and design models) can be retrieved online from the database of the Patent and Trade mark Office (*Deutsches Patent- und Markenamt*) at www.dpinfo.dpma.de.

Annual financial statements. The annual report of any German-listed company must contain information on defence structures in the management report (*Lagebericht*). The supervisory board must comment on this information in its report for the shareholders' meeting (see *Question 23*). In future, the reports will be available on the electronic business register (see *above*).

Shareholders' forum. Shareholders can exchange information and, in particular, co-ordinate the exercise of their voting rights in an online shareholders' forum (to register, see www.publikations-serviceplattform.de/sp/account?page.navid=to_reg_shareholder_start).



Secrecy

6. Are there any rules on maintaining secrecy until the bid is made?

There are statutory rules for maintaining secrecy, in addition to contractual rules that may be agreed in, for instance:

- Confidentiality undertakings.
- Non-disclosure agreements.
- Letters of intent.
- Service agreements and employment agreements.

Generally, any information concerning the bid that is not in the public domain and which may have an impact on the target's quoted share price, may require secrecy as insider information (*Securities Trading Act*).

Bidder

The bidder must announce its decision to make a bid without delay (*Takeover Act*). Insider trading rules may apply before this decision. However, usually a bidder that has not yet decided to make a bid can inform others that such a decision may be made. The same applies to officers acting on behalf and on account of a bidder who is not an individual. A bidder's officers and employees providing information on an envisaged offer on their own account may, however, be held liable under the insider trading rules. The bidder can only publish the offer document subject to the BaFin's (actual or implied) consent (*Takeover Act*).

Target

Before the bidder's announcement of its decision to launch a public offer, the target and its officers and employees who the bidder informs of an imminent offer are subject to insider trading rules. However, they may forward this information to obtain advice.

The target may also take other defence measures before the bidder's announcement. It may seek to secure a competing bid (white knight), and, for that purpose, can inform potential competing bidders of the imminent offer and provide them with information on the target, subject to the target's best interests. Recipients can then only acquire target shares on the basis of such information in pursuit of a plan to make a competing offer (see *Questions 4 and 5*).

Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

It is common for potential bidders to seek undertakings from key shareholders to sell their shares. Shareholders and, unless a public offer is made or is mandatory, bidders are generally free to agree on the terms or nature of any agreement. The shareholders generally require the right to accept a better offer and the shareholders' management board must ensure that this is not restricted, unless it is in the shareholders' best interest.

Key shareholders typically ask for what is known as a "drop-dead" date for the announcement of the potential bidder's decision to launch a public offer. After this date any undertaking ceases to be binding on them. In addition to any contractual disclosure requirements, ad hoc disclosure under the Securities Trading Act may be required.

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives), before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there circumstances in which shareholdings, or derivative holdings, of associates could be aggregated for these purposes?

Disclosure requirements

A company must notify the target and the BaFin once it obtains 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50%, and 75% of the target's voting rights. Voting rights resulting from shares and voting rights resulting from other comparable financial instruments, such as options or swaps, must be aggregated to determine whether or not a notification obligation is triggered. If the shareholder fails to do this it faces individual fines of up to EUR200,000.

Of major practical importance is the fact that the shareholder's rights (particularly voting rights) are suspended for at least six months and until the disclosure requirements are satisfied. Therefore, basic restructuring measures taken by the shareholders' meeting may not receive the required majority. If the disclosure requirements are not met, legal action is possible by professional claimants (*Berufskläger*).

Under changes introduced by the Risk Limitation Act investors reaching 10% of the voting rights in a listed company must inform the target company within 20 trading days of their intended objectives and the source of their funding. The investor must specify if it intends to:

- Pursue strategic goals or returns from investing.
- Acquire additional voting stock in the next 12 months.
- Exert influence on the company's management or supervisory board.
- Substantially modify the capital structure of the company.

The company must publish this notification immediately on receipt from the investor or, in the event that the investor does not disclose the requested information, notify the public of the fact that the information was not given. The company can opt-out of this requirement by stipulating this in its articles of association.

Once the bidder reaches 30% of the voting rights, a takeover offer is mandatory (*Takeover Act*) (see *Question 4*). The target's directors must disclose any disposals to the bidder under the directors' dealings rules.

Restrictions

The bidder can disclose its decision to build, or that it is in the process of building, a stake in the target. Therefore, third parties can pass on this information. The bidder can negotiate

the purchase conditions, but they may affect the mandatory conditions of a subsequent public offer. In particular, the price per security offered in the public offer cannot be lower than the price per security paid within six months before the publication of the public offer document.

Timetables

No specific timetables apply to private acquisitions. If the bidder has decided to make a public offer, the decision must be announced in accordance with the timetable set by the Takeover Act (see *Question 12*).

Aggregation

Shareholdings of certain associates and third parties must be aggregated when calculating levels of voting rights. The following must be included:

- Shares held by a subsidiary.
- Shares held by the bidder on the account of a third party or entrusted to the bidder by a third party.
- Shares transferred to a third party as security.
- Shares which are subject to a usufruct right or the bidder's purchase option (including obligatory options, that is, options whose exercise is not sufficient to acquire legal ownership of the shares).
- Shares held by third parties co-ordinating the voting with the bidder.

Voting rights from shares held by a subsidiary of the bidder and/or by a third party are aggregated to the bidder if they are acting in concert, that is, their co-ordinated actions are intended to permanently and significantly influence the target's strategic direction (*Risk Limitation Act*) (see *Question 16*).

Derivatives, such as cash-settled equity swaps (which were used to build stakes in the controversial Schaeffler/Continental and Porsche/Volkswagen transactions) are, in principle, not yet subject to disclosure requirements, but there is legislative activity on this (see *Question 29*).

Agreements in recommended bids

9. **If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?**

It is not uncommon to have a formal agreement setting out the terms of the merger, that is, a Business Combination Agreement (BCA) in a takeover or merger of two strategic companies. Deal protection agreements are also a common instrument. In particular, the target may agree a break fee (see *Question 10*) or an obligation not actively to seek an alternative bidder (no-shop obligation). The management board cannot, however, rule out any discussions with competing bidders, or exert any commercial pressure on the shareholders to accept a certain bidder's offer.

Break fees

10. **Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful? If so, please explain the circumstances in which the fee is likely to be payable, and any restrictions on the size of the payment.**

Break fees are increasing in frequency. The target's ability to pay a break fee is restricted by statute and it must be in the target's best interest to agree to a break fee. The benefits to the target of a completed takeover and the risk that an offer will not be made without a break fee must be weighed against the restrictions and financial burden imposed. If the break fee is in the target's best interest, it must obey capital maintenance and financial assistance rules.

The fee is payable if either:

- The management board does not recommend the offer in order to pursue a competing bidder's offer.
- The target's shareholders' meeting does not pass the resolutions required to implement a statutory merger (*Verschmelzung*).

It is in the target's best interest to agree a size of payment that is proportionate to the benefits expected from the takeover and that which does not jeopardise its financial soundness. Generally, a fee not exceeding 1% to 2% of the transaction value is considered proportionate.

Committed funding

11. **Is committed funding required before announcing an offer?**

Before publishing the offer document, the bidder must ensure that sufficient means (cash or paper) are available when due. When a cash offer is made, an independent financial services institution, such as an investment bank, must confirm this in writing. The bank may be held liable if the bidder is then unable to pay for the shares obtained under the offer.

ANNOUNCING AND MAKING THE OFFER

Making the bid public

12. **Please explain how (and when) the bid is made public (highlighting any relevant regulatory requirements), and set out brief details of the offer timetable. (Consider both recommended and hostile bids.) Is the timetable altered if there is a competing bid?**

The Takeover Act distinguishes between acquisition bids, voluntary takeover bids and mandatory takeover bids (see *Question 3*). While acquisition bids are not subject to specific timetable rules, takeover bids and mandatory takeover bids are.



Takeover announcement

The bidder must notify and publish its decision to make a public offer (for takeover bids) or that it obtained control of the target (for mandatory takeover bids) without undue delay (called a takeover announcement in both cases). Notifications must be made to:

- The managers of all stock exchanges on which the target's shares or derivatives that are part of the bid are listed.
- The BaFin.

The subsequent publication must be made in German on both:

- The internet.
- An electronic system for distributing information that is widely available to financial institutions (for example, Reuters and VWD Bloomberg).

After publication of the takeover announcement, the bidder must inform the target's management board in writing without undue delay. Both the target and the bidder may have to make ad hoc disclosures to the financial markets regarding a takeover bid at the time of announcement (*Securities Trading Act*). The details are complex and a case-by-case analysis is required well in advance of making the takeover announcement.

Other than the above, there are no legal requirements as to the content of the announcement. However, in practice the bidder almost invariably includes at least the offer price to curb speculations in its own and in the target's shares.

Offer document and offer period

Any bidder must prepare and publish an offer document. This must be filed with the BaFin within four weeks from the takeover announcement. The BaFin may grant an extension of up to four weeks in certain limited circumstances (such as, for example, complexity owing to a cross-border transaction involving various regulators or the need to seek shareholders' approval for funding). After filing the offer document the BaFin has ten working days to review it, after which it can:

- Allow the offer's publication.
- Prohibit the offer's publication.
- Grant an extension of five working days to correct mistakes.
- Let the review period lapse without taking action.

Once the offer document has been approved or the review period has expired without action by the BaFin the offer document must be published immediately and sent to the target. Publication must be either:

- On the internet.
- In the electronic *Federal Gazette*.

Instead of publication in the electronic *Federal Gazette*, the bidder can hold the offer document ready for inspection at suitable places in Germany (usually German banks and their branches) while publishing a note in the electronic *Federal Gazette* giving details.

The offer period can be fixed by the bidder as between four and ten weeks from the publication of the offer document. Special rules apply if:

- The original offer is amended.
- The target convenes a shareholders' meeting to vote on defensive action.
- A competing bid is made.

Amendments to the offer. The bidder can at any time (and repeatedly) until one working day before the offer period expires:

- Improve its consideration.
- Offer alternative consideration.
- Lower the required level of acceptances (in a takeover bid).
- Waive conditions for the bid.

If the offer is amended within the last two weeks of the offer period, the offer period is extended for another two weeks. There can be no further changes to the offer in these additional two weeks.

Any changes to the offer (in particular a higher consideration) must be offered to all shareholders who had already accepted the offer before it was changed. Any shareholders who had accepted the offer before it was changed can withdraw their acceptances until the offer period expires.

Competing bids. If competing bids are made during the offer period, the bidder can either:

- Pursue its original offer.
- Improve the initial offer.

In any event the offer period for the first bid is extended until the competing bid expires. The target's shareholders may withdraw their acceptance of the first bid made before the announcement of the competing bid until the offer period of the first bid expires.

Defensive action by the target. If the target convenes a shareholders' meeting to vote on defensive action, the offer period is automatically extended to ten weeks.

Target's response

The target's management and supervisory board must publish a reasoned opinion to the offer without undue delay after receiving the offer document (*see Question 14*). The BaFin requires a speedy response and considers up to two weeks as a normal response time (depending on the complexity of the case).

Extended offer period and takeover-related put option

Following the end of the offer period, the target's shareholders can tender their shares within another two weeks from the publication of the results of the offer (the extended offer period). Under certain circumstances they may also tender their shares within three months of the end of the offer period under the takeover-related put option (*see Question 20*).

Offer conditions

13. What conditions are usually attached to a takeover offer (in particular, is there a regulatory requirement that a certain percentage of the target's shares must be offered/bid)? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

Takeover bids can be made subject to any conditions that are beyond the bidder's control. Typical conditions that are required include:

- Merger clearance.
- A certain level of acceptance for the offer. Due to the corporate majority requirements for fundamental decisions in the target, the bidder generally requires acceptance levels of 95%, 75% or 50%.

The bid cannot be made conditional on:

- Obtaining sufficient financing for the transaction (except for approval by the bidders' shareholders to create shares to be exchanged as part of the offered consideration (restrictions apply to this)).
- Achieving a maximum acquisition quota (any takeover bid must be for all shares of the target).

Material adverse change conditions and conditions referring to a satisfactory due diligence are difficult areas and care must be taken to link such conditions to objective criteria.

As a rule, mandatory takeover bids must not be subject to conditions, other than those relating to meeting the legal conditions for the bid.

Bid documents

14. What documents do the target's shareholders receive on a recommended and hostile bid?

There is no difference between the documents for a recommended and a hostile bid although the depth of information provided may differ. The documents consist of:

- The bidder's offer document.
- The target's response consisting of the reasoned opinion of the target's management and executive board (often including a statement by the target's works council).
- Regular updates by the bidder on the number of shares held.

Offer document

The offer document is intended as the one exhaustive statement containing all information the target's shareholders need to evaluate the offer. The details are specified in the Offer Ordinance (*WpÜG-AngVO*). In addition to the essential details of the offer

(such as price, conditions and offer period), the offer document must contain information on:

- The bidder's intentions with regard to the target and the possible effects of a successful bid on, in particular, the financial position of the bidder and the target.
- The bidder's intentions with regard to his own business after the takeover.
- Information about bonus packages that have been granted or promised to the target's management and supervisory board members.
- If a cash offer is made, a statement by a financial services provider confirming that the bidder has taken measures to ensure that finance will be available if and when the offer is accepted (*see Question 11*).
- The competent courts for any dispute between the bidder and the target's shareholders.

The bidder is responsible for the offer document and liable for its correctness and completeness. Any shareholder of the target who accepts the offer can claim damages resulting from errors or omissions in the offer document, unless the bidder can prove that he did not know of such an error or omission and was not grossly negligent in not knowing. Claims are time barred after one year from the moment the shareholder ought to have had knowledge of the error or omission and in any event after three years from the publication of the offer document.

Target's reasoned opinion

In response to the offer document the target's management board and supervisory board must each publish statements evaluating the offer. These statements must, as a minimum, comment (giving reasons for each statement) on:

- The type and amount of consideration.
- The potential consequences of a successful offer for the company and its employees.
- The bidder's objectives.
- Whether those board members who are also shareholders in the target intend to accept or reject the offer.

The role of the target's management is often difficult. While they normally only owe their duty of care to the target's corporate interests (*see Question 4*), this arguably changes when making the reasoned statement as the management could be said to become a custodian of its shareholders' financial interest. The response should therefore provide the shareholders with all additional information regarding the target which they need to evaluate the offer and decide whether or not to sell (basically removing any information gap between the target's management and the target's shareholders). While some years ago response statements tended to be short and superficial, at least in large takeover bids, elaborate statements that rival the offer document in length have become market practice. In particular, in all but the most obvious cases the target's management will seek a fairness opinion and publish its results or even the whole opinion (in critical cases giving a fair offer price).

Regular statements by the bidder

The bidder must publish (slightly simplifying the content of the notification):

- The number of shares and voting rights tendered in response to the bid as well as the number of shares and voting rights in total, on a weekly basis (daily during the last week of the offer period).
- The result of the offer without undue delay after the end of the offer period.
- The final result of the offer without undue delay after the end of the extended offer period.
- When it reaches the 95% shareholding required for a takeover-related squeeze-out.

Employee consultation

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

The target's management board must, without undue delay, inform the target's works council or, if there is no works council, the target's workforce directly of the takeover announcement and must forward them the offer document. However, there is no obligation to consult the works council (or workforce, where there is no works council) on the bid. The works council can comment on the offer document in writing. Its comments must be attached to and published with the target's management board's reasoned opinion.

Mandatory offers

16. Is there a requirement to make a mandatory offer? If so, when does it arise?

Any person acquiring, directly or indirectly, 30% or more of a stock corporation's voting rights, must make a mandatory offer to the remaining shareholders of the target to acquire their shares. This also applies when the acquiring shareholder's holding exceeds 30% together with any other shareholder with which it is acting in concert, that is, it or its subsidiaries have agreed:

- To jointly exercise the voting rights attaching to their shares.
- To co-operate in any other manner with a view to lastingly and significantly changing the business strategy of the target company.

Although there is still uncertainty as to what degree or duration of co-operation between the parties will qualify as acting in concert, the consequences of failing to comply are severe.

The BaFin may give exemptions from the mandatory public offer requirement under certain circumstances, examples of which are given in the Offer Ordinance. For instance, exemptions may apply to a financial rehabilitation of the target company or where voting rights are acquired following a change in the target's legal form.

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

In principle, the consideration for a takeover bid may be in cash, shares or a mix of both. All shareholders of the target must receive the same consideration for each share belonging to the same class. Shareholders of different classes of shares may be treated differently. In practice, public takeovers by German bidders are almost exclusively made for cash consideration. Foreign bidders are more likely to opt for shares or a mix of a cash and share consideration.

Shares which are part of the consideration must have voting rights if the target's shares are voting shares and admitted to trading on an organised market in the EEA. The bidder must offer a cash consideration (at least as an alternative to a share offer) to all shareholders of the target if it acquires over a period beginning six months before the takeover announcement 5% or more of the target's shares for cash consideration.

18. Are there any regulations that provide for a minimum level of consideration?

When making a public takeover bid or mandatory takeover bid the consideration offered by the bidder is subject to the minimum pricing rules of the Takeover Act and the Offer Ordinance. The offer price must be at least equal to both:

- The value of the highest consideration paid or agreed by the bidder, a person acting in concert with the bidder or any of their subsidiary undertakings for the acquisition of shares in the target within the six months before the takeover announcement.
- The weighted average price of such shares on the stock exchange during the last three months before the takeover announcement.

An exception to these pricing rules applies if, during the three months before the takeover announcement, stock exchange prices for the target's shares were fixed on less than one-third of all trading days and if the stock exchange prices fixed on a number of successive occasions differ from one another by more than 5%. In these cases the consideration must correspond to the value of the business calculated on the basis of a valuation of the target.

If the bidder acquires shares or options in shares in the target for a higher price than the offer price either during the course of the public bid or within one year from the end of the offer period, all shareholders who tendered their shares can claim the difference.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

The bidder can only offer shares as consideration if the shares are admitted for trading on a regulated market in the EEA.

POST-BID

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

The bidder can compulsorily buy the shares of the remaining minority shareholders under three separate legal procedures.

Takeover-related squeeze-out

The takeover-related squeeze-out procedure allows a bidder holding at least 95% of the target's voting share capital to purchase the remaining voting shares within three months from the end of the offer period by filing an application to the Regional Court in Frankfurt. In addition, the bidder may also compulsorily purchase any remaining non-voting shares if he holds at least 95% of the registered share capital of the target. If the public takeover bid was accepted by 90% or more of the registered share capital subject to the offer, the offer price of the takeover is deemed to also be the squeeze-out. However, it is not entirely clear whether this presumption is refundable. The squeeze-out becomes effective once the court decision becomes final (*rechtskräftig*).

If the acceptance quota is lower, the squeeze-out consideration is not specified by law and is currently uncertain, due to lack of case law. If the bidder made a share offer only the minority shareholders can opt for an equivalent cash payment instead. By its decision adopted on 30 May 2007, the Federal Constitutional Court (*Bundesverfassungsgericht*) has approved the constitutionality of this procedure. According to this decision, the squeeze-out procedure is also compatible with the legislature's aim of protecting minority shareholders.

General corporate squeeze-out

The bidder can use the general corporate squeeze-out procedure at any time following the bid if he owns at least 95% of the target's registered share capital (including non-voting preference shares). However, a corporate squeeze-out requires registration into the commercial register of the target, based on a shareholders' resolution (which the minority shareholders may challenge thereby blocking registration of the squeeze-out) and a fair market valuation of the company (which is subject to judicial review) in a separate appraisal proceeding following registration of the squeeze-out. There is a fast trade process (*Freigabeverfahren*) to overcome the adverse effect of court challenges of the squeeze-out, which typically lasts three to six months.

Takeover-related put option

Corresponding to the introduction of the takeover-related squeeze-out the remaining minority shareholders can tender their shares on the terms of the public offer within three months from the end of the offer period.

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

The bidder must not make a voluntary public offer for the same target within one year if:

- Its initial offer was conditional on achieving a certain level of acceptances and the bidder:
 - failed to reach this; and
 - did not waive the condition.
- The BaFin prohibited the publication of the offer document.

If the target consents in writing, the BaFin may exempt the bidder from the restriction not to make a new offer within a year. The restriction does not prohibit the acquisition of a shareholding which triggers a mandatory takeover bid.

De-listing

22. What action is required to de-list a company?

The de-listing of stock corporations is largely unregulated. Generally, a de-listing can take two forms:

- Regular de-listing.
- Cold de-listing.

Regular de-listing

This requires:

- A resolution passed by a three-quarters majority (arguably, a simple majority may suffice) at the company's general meeting.
- A mandatory offer to purchase the outstanding stock at full value.
- An application to the German stock exchanges on which the company's shares are listed to revoke the listing.

The decision on the application is at the exchange's discretion (the rules differ between the regional exchanges). The most common requirement in practice is that the company submits an offer to its shareholders to purchase their shares. If a de-listing is granted it may take up to two years until the de-listing becomes effective.

Cold de-listing

This is achieved by converting the company into another legal form or by merging it into another company of a form which cannot be listed on a stock exchange. This requires shareholders' approval and may be subject to numerous difficulties regarding the details. The stock exchanges do not influence this decision and must automatically de-list the company.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

Three distinct regulatory frameworks run side by side:

- The traditional rules of the Takeover Act.
- The rules on frustrating action under Directive 2004/25/EC on takeover bids (Takeover Directive).
- The breakthrough regime under the Takeover Directive.

Takeover Act

In the absence of any specific action or provisions in the target's articles, the Takeover Act (as in force before the implementation of the Takeover Directive) applies. This means, in particular:

- **Pre-bid defences.** The target's shareholders' meeting can authorise the management board to take action to prevent the success of any takeover bid, subject to approval of defensive action (if and when taken) by the supervisory board. This authorisation is valid for 18 months and requires a qualified majority (75% of the share capital represented at the general meeting).

The shareholders' meeting can decide on capital measures. The shareholders' meeting can authorise the board to acquire the company's own shares and/or to issue convertible bonds.

Change of control clauses contained in managing directors' employment contracts can be used as poison pills. However, these are undesirable and are not necessarily in the company's best interests.

- **Post-bid defences.** After the takeover announcement the management board must maintain neutrality and refrain, in principle, from any frustrating action. However, the management board can:
 - seek alternative bids (white knight defence);
 - take actions which a prudent and conscientious director of a company not subject to a public takeover bid would have taken;
 - take defensive actions approved by the target's supervisory board;
 - take defensive actions approved by the shareholders' meeting before the takeover announcement and approved by the supervisory board before being implemented.

The target can call a shareholders' meeting following the takeover announcement to vote on defensive action. The notice periods are significantly shorter than ordinary shareholders' meetings. If this meeting is convened the offer period is extended to ten weeks to allow the shareholders' meeting to take place before the offer expires.

In addition, the board of managing directors and the supervisory board of the target company must give their reasoned opinion on the takeover bid and as to each of its amendments. In particular, they must give their opinion on:

- the type and amount of the offered consideration;
- the expected consequences of a successful bid for the target company;
- the buyer's purposes in making the offer, as well as on their own intention to accept the offer in their capacity as shareholder.

When giving their reasoned opinions the boards can influence the shareholders to refuse a hostile takeover bid. Therefore, the board of managing directors and the supervisory board must consider the transparency principle and avoid misleading statements.

European opt-in

A German listed company can opt out of the German rules for defensive action (*see above, Takeover Act*) and opt in to the rules set out in the Takeover Directive by amending the company's articles. In this case, the target's management can only:

- Seek alternative bids (white knight defence).
- Take actions falling within the normal business operations of the company.
- Take actions not falling within the normal business operations of the company but intended to implement decisions taken before the publication of the takeover announcement.
- Take defensive actions approved by the shareholders' meeting post-bid.

However, the target can disapply the opt-in if both:

- The bidder or any person controlling the bidder is not subject to equivalent provisions.
- The target's shareholders' meeting authorises the disapplication (which may be granted for up to 18 months by shareholders' resolution).

By disapplying the opt-in, the target is automatically subject to the rules of the Takeover Act on defensive actions (*see above, Takeover Act*).

Breakthrough

The articles of a German listed company may apply the breakthrough clause of the Takeover Directive under which:

- Transfer restrictions in the target's articles or agreed between the target and any of the target's shareholders after 21 April 2004 are ineffective during the acceptance period of a takeover bid in relation to the bidder.
- Restrictions on exercising voting rights in contracts entered into after 21 April 2004 are ineffective during the acceptance period of a takeover bid for any shareholders' meeting convened to vote on defensive action.
- If the bidder holds at least 75% of the target's voting rights following a bid, restrictions on voting rights provided for in contracts and extraordinary rights concerning the appointment or removal of members of the supervisory board do not apply for the first shareholders' meeting of the target post-bid convened by the bidder to vote on new members of the target's supervisory board.



Publication of defence mechanics

All listed German stock corporations must give detailed information on all existing defence mechanics in the management report (*Lagebericht*) which forms part of the company's annual financial statements. The supervisory board must comment on this information in its own statement for the annual general meeting (*Bericht des Aufsichtsrats*).

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in your jurisdiction? Can payment of transfer duties be avoided?

No stamp duty is payable on the sale of shares. However, the sale may trigger value added tax (VAT) in certain cases, although generally, the sale of shares is exempt from VAT.

If 95% (or more) of the shares of a company owning German real estate (including leasehold rights and buildings on third party property) are sold or transferred, directly or indirectly, to a new shareholder, real estate transfer tax (RETT) of 3.5% is payable. A specific tax value of the real estate (which is generally slightly less than the fair market value) is assessed by the tax authorities to establish the taxable base. Certain models designed to avoid RETT exist; however, in most cases an independent third party must be involved.

Under a recent change in German tax law, the use of loss carry-forwards (LCFs) for tax purposes could be (partially) extinguished in the case of a harmful acquisition of a participation in a company. A harmful acquisition is the direct or indirect purchase by a single shareholder in a five-year period of either:

- More than 25% of the shares in a company (the legal consequence being the partial loss of the LCFs).
- More than 50% of the shares (the legal consequence being the complete loss of the LCFs).

In addition, a group of acquirers with common interests is regarded as a single acquirer.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

Anti-trust Act (*Gesetz gegen Wettbewerbsbeschränkungen*)

Germany has a mandatory notification system. A filing is required for a concentration if both (unless certain exceptions such as *de minimis* and minor market clauses apply):

- The combined aggregate worldwide turnover of all companies involved is more than EUR500 million.
- Turnover in or into Germany of at least one party involved is more than EUR25 million.

THE REGULATORY AUTHORITY

Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) (BaFin)

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Main area of responsibility. The BaFin is the supervisory authority for banking, insurance, the securities market and asset management.

After formal notification, the Federal Cartel Office (FCO) (*Bundeskartellamt*) has one month for a preliminary examination. If the merger requires further examination, the FCA informs the parties of this requirement. The examination period may then be extended by three months. A proposed merger cannot be completed during this time.

EU law

Transactions that must be notified to the European Commission, cannot be cleared by the German cartel authorities. A takeover falls under European merger control if the bidder takes over control of the target or, in general, the target's business and the proposed merger has a community dimension (*Regulation (EC) No. 139/2004 on the control of concentrations between undertakings*).

26. Are there restrictions on foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

Under the Foreign Trade Act (*Aussenwirtschaftsgesetz*) and the relevant Ordinance (*Aussenwirtschaftsverordnung*) the acquisition of at least 25% of the voting rights in any German target by a bidder with its seat outside the EEA is subject to review by the Federal Ministry of Economics. There is no requirement to apply for approval of the transaction before signing or completion; however, bidders are entitled to seek clearance before signing.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies? If so, please give details.

There are no restrictions on repatriation of profits or exchange control rules for foreign companies.



28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

The offer document must disclose the number of shares either:

- That the bidder holds in the target.
- Already held by parties acting jointly with the bidder and their subsidiaries.

Once the offer document is published, the bidder must disclose all relevant shareholdings on a regular basis (see *Question 14*). The bidder may acquire further shares in the target outside the public offer after the offer has been announced, but the bidder must not increase the offer price by acquiring the target's shares for a higher price than the intended offer price.

REFORM

29. Please summarise any proposals for the reform of takeover regulation in your jurisdiction.

On 11 February 2011, the German Parliament adopted the Investor Protection and Functionality Improvement Act (*Anlegerschutz- und Funktionsverbesserungsgesetz*). This introduces, among other things,

new rules to increase transparency on the capital markets and to prevent hidden stakebuilding in publicly listed companies by acquiring complex financial instruments. The Act expands the existing notification duties (which only apply to shares carrying voting rights and to financial instruments that entitle their holders to acquire shares carrying voting rights) to complex financial instruments that factually or economically enable their holders to acquire shares with voting rights, such as cash-settled equity swaps or contracts for difference. The new notification duties are expected to enter into force at the beginning of 2012.

Under the Third Amendment Act to the German Transformation Act (*Drittes Gesetz zur Änderung des Umwandlungsgesetzes*), which is currently going through the legislative process, the required percentage of shareholding for effecting a squeeze-out is to be lowered from 95% to 90% of the stated share capital, provided that the squeeze-out is carried out in the context of an upstream merger, that is, if the resolution by the majority shareholder on the squeeze-out is adopted within three months after the conclusion of the merger agreement. On registration of the squeeze-out with the commercial register, and the majority shareholder becoming the sole shareholder of the company, the merger may be consummated without a further shareholders' resolution of the company being necessary. The proposed amendment is based on EU Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different member states and must be transposed into national law by 30 June 2011.

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Qualified. Austria, 1998; England and Wales, 2001

Areas of practice. M&A; private equity; corporate; restructuring.

Recent transactions

- Advised the management on the acquisition of CABB by Bridgepoint from AXA Private Equity.
- Advised Aragon on their co-operation with Citigroup and their acquisition of MLP Finanzdienstleistungen, Vienna, Austria.
- Advising HALDER on their bidding process in a mid-cap buyout auction.
- Advised South Light Investment on their co-investment in Springer Science and Business Media.
- Advised Continuum Capital on setting up their structure and on the investments by anchor investors.
- Advised Angermayer, Brumm & Lange on the sale of a strategic participation in Aragon to Axa Insurances.

Qualified. Germany, 1999

Areas of practice. Corporate; takeovers; corporate litigation.

Recent transactions

- Advising PUMA on its transformation into a European Corporation (SE).
- Advising WET Automotive Systems on the friendly takeover offer by Amerigon, and further corporate integration.
- Advising former board members of ARCANDOR and of Deutsche Apotheker und Ärztebank in defending damage claims.
- Advised Primondo Specialty Group on the sale of its specialised mail order and retail business to Carlyle.
- Advising various stock corporations on the preparation and executing of their AGMs.