



Public takeovers in Germany

Your essential guide to how takeovers are conducted and regulated in Germany



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This booklet is a guide to the regulations governing public takeovers in Germany. It forms part of a series covering countries where Freshfields Bruckhaus Deringer has an established M&A practice. The series is aimed at those with an interest in acquiring or advising on an acquisition of a public company in different jurisdictions.

The information and opinions contained in this booklet are not intended to be a comprehensive study nor to provide legal advice and should not be relied on or treated as a substitute for specific advice concerning individual situations.

German Legal Advisor of the Year
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'Public Takeovers have also become a flourishing aspect of the Freshfields team's business and it acted on the six most recent high-profile proceedings in the country.'
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The takeover landscape

Germany has a relatively short history of public takeovers, both recommended and hostile. It is only since the German Takeover Act came into force on 1 January 2002 that the German market has experienced an increasing number of public bids. This increase was also partially fuelled by the new tax legislation on tax-free disposals of corporate shareholdings by corporates, as well as the fact that – together with the German Takeover Act – squeeze-out legislation was implemented, providing the possibility of squeezing out minority shareholders if the bidder holds at least 95 per cent of the target's share capital. There have also been an increasing number of take-private offers made with the backing of US or European private equity funds.

To date, very few public offers have been hostile. However, nearly all offers that were initially hostile (eg Vodafone/Mannesmann, Barilla/Kamps, Merck/Schering and Schaeffler/Continental) were eventually recommended at least (or not opposed anymore) by the target's management.

The Federal Agency for Financial Services Supervision (*Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin); the Federal Agency) is the competent supervisory authority and has been responsible for regulating more than 500 publicly announced takeover and merger transactions since the German Takeover Act came into force in 2002, and a number of other matters that have not reached the stage of formal announcement. The rules of the Takeover Act have evolved (as has takeover practice since then), but the fundamental principles remain unchanged – such as the requirement to treat all target shareholders equally and fairly.

We have advised on numerous takeover and merger transactions in Germany and have formed close links with many of the market participants. Our experience of takeover practice in Germany includes an in-depth understanding of how the Federal Agency operates and applies the rules of the German Takeover Act.

The purpose of this guide is to give an overview of how takeovers are conducted and regulated in Germany. For more information, or if you want to discuss a particular subject in more detail, please contact us.

The takeover regime

Are public takeovers regulated?

Takeovers in Germany are governed by the Securities Acquisition and Takeover Act (the Takeover Act or WpÜG). Following implementation of the European Takeover Directive (2004/25/EC) it now applies to public offers for German targets whose shares are listed in Germany or on another European Economic Area (EEA)-regulated stock exchange. In certain circumstances, certain provisions of the Takeover Act also apply to offers for non-German companies incorporated within the EEA that are listed in Germany but not in their home jurisdictions.

The Takeover Act consists of five general principles and detailed rules on the conduct of public offers. The most fundamental principle is the obligation of the bidder to treat all target shareholders of the same class equally.

The Takeover Act is supplemented by a number of ordinances. Of particular importance is the WpÜG offer ordinance.¹ This contains rules on the provision of supplementary information in the offer document, pricing rules for takeover offers and mandatory offers, as well as details of the circumstances in which exemptions from the mandatory offer obligation may be granted.

A number of other statutory rules are relevant to German takeovers, including certain provisions of the German Stock Corporation Act (*Aktiengesetz*) and the insider dealing prohibitions and disclosure requirements of the German Securities Trading Act (*Wertpapierhandelsgesetz*).

German stock exchange rules and legislation are generally relevant only if the bidder's shares are listed on a German stock exchange or if the bidder is offering securities that are (or will be) listed on a German stock exchange.

Is litigation becoming a feature of takeovers?

The introduction of the Takeover Act has resulted in a more litigious environment. All decisions of the Federal Agency as the competent supervisory authority are – as a matter of rule – subject to court review. However, the courts have on a number of occasions decided that, generally, neither aggrieved target shareholders nor competing bidders have a right to challenge decisions of the Federal Agency in the context of takeover procedures. Nevertheless, bidders (as well as parties having allegedly acquired control over a company subject to the Takeover Act) still run the risk of being sued. In addition, the minority shareholders of the target company have the right to file an action against shareholder resolutions, alleging non-compliance with applicable legislation. This right is widely used by minority shareholders to exert pressure on majority shareholders.

Barriers to acquiring control

Are shares in public companies freely transferable?

Shares in listed German stock corporations may be in the form of registered shares (*Namensaktien*) but are more commonly bearer shares (*Inhaberaktien*). The transfer of registered shares must be notified to the stock corporation and the transfer must be registered in the stock corporation's share register before the acquirer may exercise any rights as the owner of the shares. There has been an increase in the use of registered

¹ Freshfields Bruckhaus Deringer has published English translations of the Takeover Act and the related ordinances. These are available from our German offices.

shares by listed companies seeking to obtain information about their shareholders and direct access to them.

Bearer shares can be transferred without requiring third party consent. By contrast, the articles of association of some stock corporations with registered shares require the consent of the company to the transfer of registered shares. Such transfer restrictions are common in certain industry sectors, such as insurance or airlines. As a rule, the company has the power to grant or refuse such consent.

Are there any company law provisions or common provisions in constitutional documents that make takeovers difficult?

The two-tier board system and employee co-determination in German stock corporations give rise to some (by no means insurmountable) practical hurdles for a bidder gaining control of a German stock corporation not recommended by the target's management.

German stock corporations have a two-tier board system consisting of a management board (*Vorstand*) and a supervisory board (*Aufsichtsrat*). The management board is appointed and supervised by the supervisory board and not by the stock corporation's shareholders. The shareholders have no direct control or influence over the management board. Members of the management board are normally appointed for a period of three to five years (five years being the maximum term) by majority vote of the supervisory board.

Decision-making by the supervisory boards of most listed stock corporations is subject to co-determination by employee representatives. German co-determination legislation provides for either parity or one-third employee representation on supervisory boards, depending on the number of German employees of the entity and the industry sector in which it operates.

The shareholders' representatives on the supervisory board are appointed and removed by shareholder resolutions, and the removal often requires a qualified majority vote of 75 per cent of votes casted. The employee representatives are elected by the employees in a special procedure set out in the co-determination legislation.

The shareholders' representatives generally have effective control – even of supervisory boards composed with parity employee representation – because they appoint the chairman, who has a casting vote.

Ordinary shares (*Stammaktien*) in a stock corporation always carry full voting rights but preference shares (*Vorzugsaktien*) can be structured in such a way that they do not carry any voting rights. Otherwise, the principle of one share, one vote applies. Multiple voting rights or restrictions on voting rights are not permissible with respect to listed companies.

Even if a bidder acquires a majority of the shares in a partnership limited by shares (*Kommanditgesellschaft auf Aktien*) and gains control over the

supervisory board, it will not be able to secure the removal of the general partners who manage the company's affairs. This is because the general partners of a partnership limited by shares (*persönlich haftende Gesellschafter*) are not appointed by the company's supervisory board.

At what level of shareholding can a bidder replace the management board or supervisory board of a target company and control shareholder resolutions?

The shareholders' representatives on the supervisory board may be removed by shareholders' resolutions. The resolution requires a majority of no less than three-quarters of the votes cast at the shareholders' meeting (or such other majority as the articles of association provide – the articles of numerous listed companies provide for a simple majority only).

The management board of a German stock corporation is appointed and may only be dismissed by resolution of the supervisory board, not of the shareholders. The supervisory board may only remove members of the management board for good cause, which specifically includes a vote of no confidence passed by the company's shareholders' meeting (requiring a simple majority). A shareholder (or more than one of them jointly) who has owned 5 per cent or more of the shares in a stock corporation for at least three months can require the management board to convene a shareholders' meeting and propose resolutions to:

- replace the shareholders' representatives on the supervisory board; and
- declare no confidence in the management board (or certain of its members).

If these resolutions are passed (with the former requiring a 75 per cent vote, subject to the articles, and the latter a simple majority vote), the shareholder will gain effective control of the supervisory board and can push through a supervisory board resolution to replace the management board.

Most shareholders' resolutions require a simple majority. However, a number of important resolutions, especially those likely to be necessary to implement post-acquisition restructuring measures, will require a 75 per cent majority.

Can public companies in Germany make themselves bid-proof?

While the two-tier board structure described above does to an extent constitute a structural impediment to a bidder gaining immediate control of the target's management board, this is not insurmountable. However, if the company takes the corporate form of a partnership limited by shares (*Kommanditgesellschaft auf Aktien*), then it is not possible to achieve unwelcome control over the management.

As a matter of law, it is possible for German stock corporations to build certain takeover defence mechanisms into their constitutional documents.

- Some German listed stock corporations have issued non-voting preference shares and/or registered shares: placing the former with investors has proved increasingly difficult, but registered shares have proved to be quite a useful tool in following closely changes in the shareholder base of a listed company.
- Asset lock-ups may also deter bidders to some extent.
- The Takeover Act expressly permits the general meeting to authorise the management board to take certain frustrating actions (very few German listed companies have so far made use of this).
- Authorised capital stipulated in the articles – allowing the target’s management to issue new share capital against cash or in-kind contributions and without subscription rights – has been used to build up a shareholder block close to the management.

Preliminary issues

Negotiation

Is a bidder required to negotiate before announcing an offer and, if so, with whom?

There is no requirement for a bidder to approach or even negotiate with the target before announcing an offer. However, in practice, a potential bidder will approach the target’s management board some time before the transaction is formally announced.

Will a merger agreement be used?

It is unusual for there to be an agreement between a bidder and the target over the conduct of a bid (contrary to standard US practice). Merger agreements are required where two companies merge by way of statutory merger (*Verschmelzung* – see page 14) and it is now not unusual to have so-called investment agreements on a recommended bid on such matters as board composition, company strategy, the location of the head office and the new name of the merged group (and for this information to be included in the offer document).

Can the bidder expect contractual representations or warranties?

A bidder may seek representations and warranties from shareholders who sell shares outside the offer, but otherwise representations and warranties are unlikely to be given. Terms guaranteeing that the bidder will acquire good title to the shares are implied by statute.

What liabilities can arise for misstatements or omissions during negotiations? Is there a requirement to negotiate in good faith?

Under German law, entering into negotiations imposes certain legal obligations on the parties involved. In particular, there is a general requirement to negotiate in good faith and an obligation not to make false or misleading statements or to withhold material information on the basis of which the other party decides whether or not to enter into the transaction. A breach of such obligations may result in a claim for damages,

which would generally be restricted to the frustrated costs of the innocent party but in certain circumstances may also include the costs of lost opportunities.

Confidentiality

Will the bidder be expected to sign a confidentiality agreement?

Confidentiality agreements are common. Due diligence exercises (high-level or detailed) usually start with an exchange of confidentiality agreements. These will tend to cover the fact that a transaction is being discussed and the confidentiality of the information exchanged. It must be noted that under relevant disclosure rules, issuers must disclose to the public without undue delay all inside information that 'directly' concerns the issuer, unless certain exemptions apply. The rules require careful planning of public transactions to avoid disclosure obligations being triggered too early or being banned from dealings in the target's shares. One of the prerequisites may be the conclusion of a confidentiality agreement as soon as an approach is made.

Will the bidder be expected to agree to a 'standstill' restricting the acquisition of shares or making a hostile bid?

Confidentiality agreements often include standstill agreements restricting the acquisition of target-company shares, typically for between six months and one year, after discussions have broken down. There are no hard-and-fast rules and it is a matter for negotiation on each occasion. Care is needed if the bidder already holds shares in the target and the target seeks to prevent the bidder from accepting a third party bid.

Due diligence

What is the usual level of due diligence?

Practice varies widely over both the scope of due diligence and the way it is carried out. As a general rule, any bidder is advised to carry out as much due diligence as possible because the opportunities to withdraw after announcing a bid are extremely limited.

The bidder's enthusiasm for a detailed due diligence exercise will be tempered by the target's own sensitivities and the need to preserve secrecy. Target companies often have a natural inclination towards a quick process with minimal due diligence. They will claim market practice supports them, but there are no hard-and-fast rules.

Under German law, the management board of a stock corporation has a general duty to keep sensitive information confidential. In practice, the management board will (on the basis of a letter of interest) formally resolve that a potential offer would be in the best interests of the company and that the due diligence is a necessary prerequisite for the transaction. Such a formal resolution enables due diligence to take place and the transaction to move forward while protecting the members of the target's management board from potential liability. However, if – in the course of due diligence – the bidder obtains inside information about the target, the bidder may be prevented from dealing in target shares or proceeding with the offer until

the relevant information has been made public or ceases to be price-sensitive (see page 11).

In the case of share-for-share offers, the target will normally insist on reciprocal due diligence on the bidder to verify the assumptions underlying the valuation of the bidder's shares.

Is there an obligation to publish details of any information exchanged between the bidder and the target?

No. But the target may be required to answer shareholders' questions in its shareholders' meeting regarding the exchanged information. Furthermore, in the case of share-for-share offers, the level of information of the bidder and the target's shareholders must be equal in material terms.

Will the receipt of information affect the bidder's ability to make a bid?

The receipt of unpublished inside information on the target or its shares may prevent the bidder from purchasing target shares. If the information continues to be unpublished and price-sensitive, the bidder may even be prevented from launching the offer or purchasing shares after the offer is announced. The bidder's own intention to make the bid is usually price-sensitive information but does not prevent the bidder from purchasing shares.

Will the information have to be disclosed to a rival bidder?

In principle, German stock corporation law provides that a company must provide all shareholders with the same information. However, in practice it would prove very difficult to enforce this right to information through court proceedings. In any case, a competing bidder cannot necessarily expect to receive the same level of information as the other bidder from the management board of the target.

What information about the target will be publicly available?

The company register (*Unternehmensregister*) is the main source of legal information for a listed stock corporation. This is open to the public for inspection (on the internet) and provides the following information in particular:

- information registered in or published by the commercial register (*Handelsregister*), such as the names of members of the management and supervisory boards, their respective authorities, and the company's issued and authorised and/or conditional capital;
- documents submitted to the commercial register, including the stock corporation's articles of association, minutes of shareholder meetings (including lists of attendee shareholders, but not shareholders represented by banks or other nominees) and the company's annual financial statements;
- publications by the stock corporation in the electronic Federal Gazette (*elektronischer Bundesanzeiger*), which are required for, among other

things, general meetings (and the agendas thereof) and dividend distributions; and

- all disclosures made by the stock corporation under the Securities Trading Act about (among other things):
 - insider information (ad hoc disclosure, see page 12);
 - transactions by members of the senior management or the supervisory board in shares of the stock corporation or related financial investments;
 - shareholders exceeding or falling below certain thresholds of voting rights (see below); and
 - changes in the number of existing votes.

How can the bidder obtain information on the target shareholders?

There is no general requirement for stock corporations to maintain a register of known holders of bearer shares. Stock corporations with registered shares are not permitted to make the shareholder register available to the public.

However, any person whose voting interest (directly or indirectly by way of attribution in certain circumstances) reaches, exceeds or falls below 3 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent or 75 per cent of the voting rights in a German listed company has to inform the company and the Federal Agency in writing when it has reached, exceeded or fallen below the relevant threshold. Call options, forward purchases and similar instruments need to be disclosed if the aggregate amount of such instruments – together with the voting rights held or attributed to the investor, with regard to the target – reaches or exceeds 5 per cent of the voting rights. In addition, persons whose voting interest reaches or exceeds 10 per cent in the company must disclose, inter alia, the aims pursued with its investment, whether it plans to acquire further voting rights within the next 12 months and to exert influence on the management's composition (see also page 12). The company must publish this information and the Federal Agency maintains a database on its website at www.bafin.de/cln_109/nn_724100/SharedDocs/Artikel/DE/Verbraucher/Recherche/db__Stimmrechte.html.

Members of the management board or supervisory board of a German listed company, other members of senior management and their spouses, certain relatives and any entities controlled by any of the above are obliged to notify the company and the Federal Agency of all dealings in the company's shares (including derivatives). Certain *de minimis* and other exemptions apply. The company is required to publish any such information immediately.

Can the bidder rely on the target's accounts?

German law restricts shareholders' rights to claim direct remedies against a company for inaccurate information included in its accounts – except when the information is included in a prospectus. Similarly, auditors will not generally be liable to shareholders or a bidder for auditing a company's

accounts, unless they know that specific reliance is being placed upon the audited accounts. The auditors are generally liable only to the company.

Approaching target shareholders

Are there any restrictions on the bidder's approaching target company shareholders?

The Takeover Act does not prevent a potential bidder from approaching target shareholders, although individuals may only be made aware of the bidder's intentions on a need-to-know basis. Disclosing to a target shareholder that an offer may be made would normally bring that shareholder within the category of insiders.

Deal protection

What can the bidder do to deter other bidders from coming in?

There are no restrictions on stakebuilding before making an offer, subject to compliance with the relevant disclosure requirements (see page 12) and the rules on insider dealing. However, dealings in shares (including the acquisition of call options etc) during the six-month period before the launch of an offer, or during the offer period, may affect the minimum offer price and the type of consideration to be offered.

The most common and straightforward method of trying to keep other bidders out of the fray is to tie up as many shares in the target as possible before the offer is announced. This could be through outright purchases of target shares (subject to the rules that restrict market purchases, see page 11) or by persuading shareholders to commit to accepting the offer when it is made. These commitments, known as irrevocable undertakings, mean that the relevant shareholder is able to benefit from any increase in the offer price that the bidder is forced to offer to secure control. Institutional shareholders have become increasingly willing to give these undertakings but usually insist that they fall away if a competing offer is made at more than a specified price.

The target's management board may agree deal protection measures (such as no shop obligations) only to the extent that such measures would be in the best interests of the target and not in breach of the rules of the Takeover Act on frustrating actions (see page 26).

Can the target agree to pay a break fee?

Break fees payable for a failed offer due to third party intervention have been agreed in a number of German takeovers and are becoming more common, particularly where non-German companies are involved in the deal. Nevertheless, the enforceability of break fees remains questionable: the prevailing view is that a break fee payable by a German target does not amount to financial assistance for the acquisition of shares as prohibited by German stock corporation law.

Offer announcements and their implications

At what point must the bidder announce its interest or offer?

Under the Takeover Act, once a bidder has decided to make an offer it must publish this decision without undue delay. The existence of a mere market rumour about a possible offer will not trigger an announcement obligation or a duty to formally decide on an offer. In its announcement, the bidder must disclose its decision to make an offer for the target shares and whether the bid is a full or a partial offer. Other details (for example the offer price and closing conditions) need to be disclosed only if they have already been determined and constitute price-sensitive information about the bidder's securities.

Before publicly announcing its decision to launch an offer, the bidder must notify the Federal Agency and all relevant German stock exchanges.

Does a target have to make an announcement if it has received a bid approach?

The fact that a bid approach has been made could substantially affect the target's share price. Under the German ad hoc publicity rules, listed companies must disclose to the public without undue delay all inside information that 'directly' concerns the issuer (see page 12). However, a company is exempted from the obligation to publish inside information for as long as is necessary to protect its legitimate interests if there is no risk of the markets being misled and it takes all steps necessary to ensure the confidentiality of the inside information. Usually, a target should be able to rely on this exemption until the bid is announced by the bidder.

Timing

Is there a prescribed timetable once a bid has been announced?

The Takeover Act sets a strict timetable in which the bidder and the target have to publish certain documents. The rules are aimed at preventing both target management from being subjected indefinitely to the distraction of dealing with a bid and prolonged market uncertainty about the fate of the target. The bidder has four weeks from announcing its decision to make an offer (or, in the case of a mandatory offer, after disclosure of the controlling interest) to submit the offer document to the Federal Agency. The four-week period may be extended by the Federal Agency up to a total of eight weeks if the bidder cannot meet this deadline because of the cross-border nature of the offer or the need for a share capital increase.

Following submission of the offer document, the Federal Agency has 10 business days to review it. The offer document must then be published immediately or as soon as it is cleared by the Federal Agency.

The acceptance period must not be less than four weeks or more than 10 weeks. The target company has to publish its comments on the offer no later than two weeks after publication of the offer document.

An outline timetable for a bid under the Takeover Act is set out on page 30.

Do target shareholders have withdrawal rights?

Target shareholders may only withdraw their acceptances in limited circumstances and therefore tend to accept offers very late in the acceptance period. To overcome this problem, the bidder can (as a term of the offer) grant accepting shareholders the specific right to withdraw their acceptances before the end of the acceptance period. However, in practice, the Federal Agency insists that a special withdrawal right in favour of accepting shareholders is included in the offer, in case the relevant clearances have not been obtained after a certain period following the end of the acceptance period. This is because the merger control process can take longer than the acceptance period and the offer does not automatically lapse if the clearance condition is not satisfied during the acceptance period,

Target shareholders may withdraw their acceptance if the bidder revises the offer. However, bidders often provide further withdrawal rights to encourage early acceptance of an offer. On the other hand, there are structuring alternatives in place to increase the consideration without formally revising the offer and thereby triggering withdrawal rights of the target's shareholders.

Additional withdrawal rights arise in the case of competing offers. In such cases, target shareholders who accepted the initial offer before the launch of the competing offer may withdraw their acceptances before the acceptance period for the initial offer expires.

Can a bidder make another bid if the first one fails?

If an offer has been prohibited by the Federal Agency, the bidder may not launch a renewed offer for one year. The same applies if a bid has failed because the acceptance level specified in the offer document is not achieved. However, the Federal Agency may grant an exemption from this cooling-off restriction upon application by the bidder, with the consent of the target.

Stakebuilding

Are there any insider dealing or other restrictions on share dealings either before the offer is announced or during the offer period?

Under the applicable insider dealing rules, no person may deal in insider securities using inside information, irrespective of whether he acts on his own account or for the account of a third party. Violation of the insider dealing provisions is a criminal offence punishable by fines or imprisonment.

The fact that the bidder intends to make a bid usually constitutes inside information. Accordingly, the bidder, its employees and its advisers are not allowed to deal in target shares until the bid and all other relevant price-sensitive information of which they are aware have become public. However, a potential bidder itself may acquire target shares if the only

relevant inside information of which it is aware is its own intention to launch a bid. In practice, it is advisable for a bidder to refrain from market purchases once it has conducted due diligence on the target.

Otherwise, a bidder is free to deal in shares both before the offer is announced and during the offer period. Share acquisitions that have the effect of giving the shareholder control over a target (ie the aggregated voting rights of the target amount to or exceed 30 per cent of the target's voting rights) will trigger an obligation to make a mandatory offer (see page 23).

What disclosure obligations apply to share dealings?

In principle, share acquisitions need only be disclosed if the voting interest in the target company (including voting rights attributed to the purchaser) reaches or exceeds 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent. Call options, forward purchases and similar instruments need only be disclosed if the aggregate amount of such instruments (together with the voting rights held or attributed to the investor with regard to the target) reaches or exceeds 5 per cent of the voting rights.

Unlike the situation in a number of other jurisdictions, interests in cash-settled derivatives (such as contracts for differences (CFDs)) are, in general, not taken into account when calculating the relevant percentage interest in the target. This would only be the case where it can be shown that the holder of the instrument can at least de facto control the exercise of any voting rights attaching to any shares in the target held by the counterparty.

The offer document must contain details of all target shares already held by the bidder, or by persons acting in concert with the bidder, as well as the proportion of voting rights held by them. Acquisitions of target shares by any of the aforementioned persons during the six-month period before the publication of the offer document must also be disclosed.

During an offer period, the bidder must disclose any share purchase made, the number of target shares tendered and the aggregate number of target shares already held on an ongoing basis.

If the bidder buys shares, does it have to state its intentions for the target?

As from 1 June 2009, any party that acquires an interest of at least 10 per cent in a target company is obliged to disclose certain information about its future intentions regarding the target and the financing of its share acquisitions. In particular, it has to inform the public about intended future increases of its shareholding in the company, the strategic goals (if any) pursued with the acquisition and whether the share acquisition was financed through debt or equity.

Will share dealings affect the terms of the bid?

Share dealings can affect the terms of a public offer aimed at the acquisition of control over the target, ie a holding of 30 per cent or more of the voting

rights in the target (a takeover offer) or any mandatory offer (see page 24). In these cases, the offer price must not be lower than the highest price paid by the bidder (or any person acting in concert with it) in the six-month period before the launch of the offer. In addition, if the bidder or any party acting in concert with it purchases shares at above the offer price during the offer or during the one-year period after the expiry of the acceptance period (but only through off-market transactions), the bidder will have to increase the price offered to all shareholders.

A bidder will also have to offer cash if it or any of its concert parties acquires in aggregate 5 per cent or more of the target shares or voting rights for cash in the six-month period before the announcement of the offer (or, as the case may be, acquisition of control of the target), or during the offer period.

These restrictions do not apply to bids that are neither takeover offers nor mandatory offer. Dealings in derivatives that are cash settled will not affect the terms of the bid.

Are there any rules preventing market manipulation?

It is a criminal offence to make a misleading statement or to create an impression that proves to be false or misleading about the market in (or value of) any investments, with a view to influencing dealings in those investments. Accordingly, attempts to artificially influence the market value of the target or bidder's shares are outlawed. There are additional prohibitions on manipulating transactions and disseminating false or misleading information in the Securities Trading Act.

Offer structure

What is the usual form of a takeover offer?

To date, most takeover offers for German companies have been cash offers. Non-German bidders often avoid share-for-share offers because of their relative complexity in terms of documentation and potential obligations to prepare separate prospectuses in other jurisdictions. Takeover offers and mandatory offers must be for all of the target shares (voting and non-voting), including unlisted shares. The offer procedure starts with an announcement by the bidder of its decision to make an offer.

Does Germany have a statutory merger alternative?

It is possible to merge (*verschmelzen*) companies incorporated in Germany, or even in different member states of the EEA, by way of a collective transfer of assets, liabilities, contracts etc. In the case of a merger, the shareholders of the entity that is merged (the merged company) receive shares in the surviving company (the acquirer). The merger agreement must provide for an appropriate exchange ratio, which must be confirmed by a court-appointed auditor. However, after the merger has taken effect, each shareholder of the merged company may challenge the exchange ratio in a

special court procedure with the aim of achieving a top-up payment made to all shareholders of the merged company.

A merger would entail the following principal steps:

- the acquirer and the merged company enter into a merger agreement (in notarial form) or adopt a plan of merger under which all of the merged company's assets, contracts and liabilities are to be transferred to the acquirer;
- the merger is effected by reference to the final accounts (*Schlussbilanz*) of the merged company, which may be its last annual accounts (provided that the accounting date is not more than eight months before the date of filing the merger documentation with the commercial register);
- shareholders' consent (at least 75 per cent of the share capital present) to the merger agreement or plan of merger is obtained from the shareholders of both companies;
- the merger takes formal legal effect once it is registered in the commercial registers of the merged company and the acquirer. It will take practical and economic effect (including for tax purposes) from the specified merger date;
- the works council(s) of the merged company and acquirer must be informed at least one month before approval of the merger agreement by the shareholders; and
- in certain circumstances (eg where the acquirer is incorporated outside Germany), dissenting shareholders of the merged company must be granted the right to be bought out in return for 'adequate compensation' (this is calculated on the basis of the intrinsic value of the merged company and may, therefore, be higher than the value of the relevant shares as calculated on the basis of the current share price).

There is no prescribed timetable for a statutory merger by law. However, some of the issues mentioned above will have an important bearing on the timetable.

The following documentation will be required:

- notarised merger agreement or merger plan;
- final accounts of the merged company(ies);
- management report on the merger by each of the merged company(ies) and the acquirer (*Verschmelzungsbericht*); and
- auditors' reports on the merger (*Verschmelzungsprüfungen*).

Timing issues and the possibility of dissenting shareholders make it highly unusual to use a statutory merger to effect a takeover. However, a statutory merger may be the preferred route in certain circumstances, for example, where substantial amounts of property transfer tax can be avoided or where

it facilitates the continuing use of certain licences or regulatory approvals that could fall away in the case of a takeover.

Where control over the surviving entity is acquired by a shareholder of the merged entity as a result of the merger, this may trigger the obligation for such shareholder to launch a mandatory offer for the shares of the shareholders of the surviving entity.

What experience do German companies have with dual-headed structures?

There are no examples of dual-headed merger structures involving German listed companies.

Do German companies have a procedure for requiring minority shareholders to accept an offer?

Following the implementation of the Takeover Directive, there are now a number of possible ways to compulsorily acquire all target shares that have not been tendered in the offer. They require that the bidder holds (directly or indirectly) at least 95 per cent of the target's share capital and pays adequate cash compensation to the minority shareholders concerned.

Under the Takeover Act, the transfer of the shares is effected by a court decision if the bidder so requests within three months of the expiry of the acceptance period. Minority shareholders are entitled to the same compensation as that paid under the offer (but may insist on being paid in cash). The compensation will be deemed to be adequate if at least 90 per cent of the shares that have been the subject of the offer have been tendered thereunder. Otherwise, the court will have to review the adequacy of the compensation before deciding on the bidder's request. Minority shareholders can launch an appeal against the court's decision. As a result, a squeeze-out under the rules of the Takeover Act may be unacceptably delayed unless the aforementioned 90 per cent acceptance quorum has been reached.

Under the Stock Corporation Act, if a shareholder holds at least 95 per cent of the share capital, it can request a shareholders' resolution to be passed to transfer all of the remaining shareholders' shares to itself, in return for cash compensation. The amount of the cash compensation must reflect the fair value of the target shares at the time the resolution is passed. The majority shareholder must prepare a written report on the proposed squeeze-out and provide a bank guarantee to secure the minority shareholders' claim for the payment of the cash compensation. The amount of the proposed cash compensation is subject to review by a court-appointed auditor and, in the event of a dispute, by the relevant court. It is important to note that dissenting shareholders may take legal action against the squeeze-out resolution and delay the date on which the squeeze-out becomes effective. There is a special court procedure available (in contrast to proceedings under the Takeover Act) and this generally allows the squeeze-out to become effective within nine months of the date of the shareholders'

meeting. Disputes over the amount of the compensation to be paid are dealt with in a separate procedure, which may take substantially more than one year.

What other options are available to a bidder to allow for effective control over the target?

A number of options are available to a successful bidder seeking to exercise effective control over the target without having acquired at least 95 per cent of the target's share capital.

- A domination and/or profit-and-loss absorption agreement could be entered into by the bidder and the target. A domination agreement enables the bidder to issue legally binding instructions to the management board of the German stock corporation. In return, the bidder has to compensate any annual loss of the target that occurs during the term of the domination agreement. In addition, the bidder must guarantee a certain minimum dividend to minority shareholders of the target. Any domination agreement must include an offer to acquire the shares of minority shareholders at a fair market value. Where the dominating party is not German, the consideration offered must always be cash. A domination and/or profit-and-loss pooling agreement could even be entered into on a cross-border basis but would only be recognised for German tax purposes if the foreign company had a domestic branch to which the shares of the German subsidiary belonged. Foreign parent companies therefore tend to enter into domination agreements without providing for a profit-and-loss absorption. The conclusion of a domination and/or profit-and-loss pooling agreement requires a 75 per cent vote by the target's shareholder meeting.
- If the bidder is incorporated in Germany or in another EEA member state, a further option is a merger of the bidder and the target company. Such a merger requires a 75 per cent vote of the shareholders of the merged entity. The effect is that the target company ceases to exist, with target shareholders receiving shares in the bidder as the surviving entity. If the target company is merged with an entity that has a different corporate form (such as a limited partnership (KG) or limited liability company (GmbH)) or is a stock corporation (AG) but not listed, target shareholders have the right to be bought out for cash at a fair market value. The same is true if the surviving entity is incorporated in another EEA member state.
- If the bidder controls at least 75 per cent of the voting rights of the target, it could resolve to change the corporate form of the target (for instance into a limited partnership or a limited liability company). In this case, minority shareholders may elect to give up their shares in exchange for cash or to remain shareholders in the relevant entity. Such a change of corporate form would result in an automatic delisting of the target, because only stock corporations and partnerships limited by shares may be listed on a stock exchange.

The effect of a squeeze-out may also be achieved to some extent through a sale of the business of the target in an arm's-length transaction to the majority shareholder (which would require a 75 per cent vote of the target's shareholders), leaving the minority shareholders effectively with a shell company. The majority shareholder would have to extract from the target its pro rated share of the consideration paid, but both this and the transfer may have adverse tax consequences.

Terms of the offer

What control do the authorities have over the price and other terms?

Before publication, the offer document must be submitted to the Federal Agency for review. The Federal Agency has 10 business days to review the offer document and may prohibit the offer if the document does not comply with the provisions of the Takeover Act and the WpÜG offer ordinance. The period of 10 business days may be extended by up to five business days if the offer document is not complete or otherwise fails to comply with the applicable provisions.

Is there a minimum price requirement?

The minimum price to be offered by a bidder depends on the type of offer. If completion of the offer cannot result in the acquisition of control by the bidder over the target (eg because the offer is a partial offer), the bidder may freely determine the nature and amount of the consideration provided all holders of target securities of the same class are treated equally. There are no further restrictions.

If the offer is a takeover offer or a mandatory offer (see page 23), the consideration must be at least equal to the weighted average stock exchange price of the target shares during the three months leading up to the announcement of the offer or, as the case may be, disclosure of the acquisition of control. If the bidder (or any party acting in concert with it) has purchased (or agreed to purchase) target shares before the launch of the offer, the consideration must in any case be at least equal to the value of the highest consideration provided or agreed within the six months before publication of the offer document. In the case of share-for-share offers, the value of the shares offered is determined by reference to the average stock exchange price of the shares offered during the three-month period before announcement of the offer.

The minimum offer price must be determined separately for each class of shares of the target company. For instance, in its bid for Volkswagen, Porsche offered a substantially higher price for Volkswagen's ordinary shares than for its non-voting preference shares.

What conditions are permitted or required?

The Takeover Act does not prescribe any mandatory conditions, such as the achievement of a minimum level of acceptances. On the contrary, the bidder has a relatively wide discretion over offer conditions. An offer will usually

be subject to relevant antitrust conditions and, where relevant, regulatory approvals. The Federal Agency also accepts the inclusion of certain (though fairly limited) 'material adverse change' conditions. The Federal Agency expects the offer either to lapse or become unconditional (with the exception of regulatory consents such as merger control clearances) at the end of the acceptance period.

However, conditions must not be subjective and must be clearly drafted and sufficiently specific. In practice, many bidders set the acceptance condition at 75 per cent of the target's share capital (though the percentage at which the bidder has the right to compulsorily acquire the shares of minority shareholders is 95 per cent of the target's share capital, see page 15). The bidder may reduce the acceptance level before the end of the acceptance period. If it does this during the last two weeks of the acceptance period, the acceptance period is automatically extended by a further two weeks. In addition, if the bidder reduces or waives the acceptance condition(s), target shareholders who have already accepted the offer will have the right to withdraw their acceptances.

If the offer is a mandatory offer following the acquisition of control, only regulatory approvals are permitted as conditions.

How easy is it for a bidder to walk away?

Once a bidder has announced its decision to make an offer, it is obliged to proceed with it. Once launched, an offer may lapse only if a condition is not fulfilled.

Is there a requirement to treat all shareholders equally?

One of the general principles of the Takeover Act is the requirement to treat all holders of target securities of the same class equally. This principle underpins many of the provisions of the Takeover Act, such as the requirement to extend any higher price paid for target securities before or during the offer period to all other shareholders. However, shareholders holding different classes of target shares may be paid different prices for their shares (see page 17).

Can a bidder revise its offer?

The bidder can only revise certain terms of its offer once it has been launched. It may only increase the consideration, offer an additional form of consideration, waive conditions, or reduce the acceptance level. It may not, for instance, extend the acceptance period.

Financing

Can a bid be conditional on financing?

No. The bidder must have appropriate arrangements in place to finance the offer when it is formally launched. The bidder must describe in the offer document how it will finance the offer. It is important to ensure that credit facilities put in place for this do not contain terms and conditions that:

- do not match the offer conditions (in particular, any ‘material adverse change’ condition beyond those provided in the offer document (to the extent these are permitted, see page 17)); or
- are not within the control of the bidder.

If the offer is for cash or includes a cash element, a securities services enterprise independent of the bidder must confirm in the offer document that the bidder has taken the steps necessary to ensure that it will be able to pay the offer price to the accepting shareholders when due. Accordingly, the enterprise giving this confirmation will carefully review the bidder’s financial arrangements and may insist on the bidder making a cash deposit to secure its payment obligation under the offer.

It may be possible, although this is not entirely clear, to make a pre-conditional announcement of an intended offer that indicates that the bidder intends to bid as soon as financing is secured.

Can the target’s cash or assets be used to refinance borrowings incurred to finance the bid?

Under the German Stock Corporation Act, the target and its subsidiaries are prohibited from giving (directly or indirectly) any financial assistance for acquiring shares in the target. Usually, transactions concluded after the acquisition of the target shares that relate to the financing of the acquisition would similarly be void, because a stock corporation may not grant any benefit to its shareholders except by way of the payment of dividends. This rule may restrict financial restructuring after a bid unless the corporation is first converted into a different corporate form (eg a limited company or limited partnership) or a domination agreement (see page 16) is put in place.

Offering shares

How usual is it to offer new shares or securities as consideration for an offer?

A share-for-share offer by a German listed company may give rise to a number of technical difficulties. Therefore, any such offer will usually be made using shares from the bidder’s authorised capital, substantially reducing the risk of a shareholder challenge. Share-for-share offers by foreign bidders are not subject to these technical and legal challenges. UniCredito’s offer for HVB in 2005 (on which Freshfields Bruckhaus Deringer advised the bidder) was the largest share-for-share offer made in this way under the German Takeover Act.

If shares are issued, is a prospectus or listing particulars required?

In the case of takeover offers and mandatory offers, the Takeover Act requires that any shares offered as consideration must be liquid shares admitted to trading on a German or European regulated market. The admission of such shares (which may only take place shortly before closing

of the offer) will usually require the publication of a prospectus (although there are certain exemptions).

Are there any valuation requirements?

The offer document must include:

- a description of the valuation methods used to determine the consideration offered for the target shares; and
- the reasons the methods used are appropriate.

It must also contain a statement on which offer price or exchange ratio is calculated under each method, but there is no requirement for a third party opinion on the fairness of the valuation.

Additional valuation requirements arise if a bidder offers shares that have not (yet) been admitted to trading on an EEA stock exchange. Equally, if a German listed company offers new shares to be issued to target shareholders on the basis of a shareholders' resolution, a valuation of the target shares may be required for the purposes of the bidder's own share capital increase. The valuation must contain financial projections for the target as a matter of German law and practice.

Antitrust and regulatory matters

What is the relevant legislation and who enforces it?

Merger control in Germany is regulated by the Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen* - GWB) in cases not governed by the EC Merger Regulation. This legislation is enforced by the Federal Cartel Office (*Bundeskartellamt*). It applies and therefore conveys jurisdiction to the Federal Cartel Office where:

- the combined aggregate worldwide group turnover of all the parties amounts to more than €500m;
- the turnover in Germany of at least one of the parties involved amounts to more than €25m;
- the turnover in Germany of another party involved amounts to more than €5m,

and no de-minimis exemption applies.

Merger control under European antitrust law is regulated by the EC Merger Regulation (ECMR) which is enforced by the European Commission (Commission). A merger is subject to notification if:

- the combined aggregate worldwide group turnover of all the parties is more than €5bn and the aggregate Community-wide turnover of each of at least two of the parties is more than €250m; or
- the combined aggregate worldwide group turnover of all the parties is more than €2.5bn, their combined turnover is more than €100m in each

of at least three member states; in each of those three member states, the turnover of each of at least two of the merging parties is more than €25m and the Community-wide turnover of each of at least two of the merging parties is more than € 100m; and

- each party does not generate more than two-thirds of its Community-wide turnover within one member state.

What are the waiting periods and must the takeover's implementation be suspended?

Under the GWB, a notifiable transaction may not be completed for one month after notification unless the Federal Cartel Office notifies the parties that the transaction may be completed. This one-month waiting period may be extended to four months or even more, following consent of the notifying party. The GWB does not explicitly waive the prohibition of putting a concentration into effect for public takeovers (unlike the ECMR), so the acquirer can only evade the stand-still obligation by obtaining approval quickly during the acceptance period or requesting a waiver from the Federal Cartel Office (in practice, this is only rarely granted). Public offers are therefore generally made conditional on receiving the clearance decision under the GWB (and all other relevant regulatory clearances).

In contrast, the ECMR waives the prohibition of putting a concentration into effect, provided that the acquirer notifies the public bid without delay and does not exercise the voting rights attached to the securities in question (or does so only to maintain the full value of its investments based on a derogation granted by the Commission). In practice, this shifts the 'antitrust risk' to the acquirer, who will bear the risk of having to unwind the transaction if the Commission prohibits the takeover. Therefore, despite the waiver, the acquirer will typically make the offer conditional on receiving all relevant regulatory clearances in order to leave the 'antitrust risk' with the target shareholders. The waiting period is typically 25 working days from the notification and can be extended by a further 6-7 months if the Commission opens an in-depth Phase II investigation.

Both the German GWB and the EU ECMR merger control process may therefore significantly delay the public takeover process. If competition issues cannot be ruled out, the antitrust process should be addressed from the very beginning of the public takeover process.

In any event, the Federal Agency insists that a special withdrawal right is included in the offer (in favour of accepting shareholders) in case the relevant merger control clearances have not been obtained after a certain period following the end of the acceptance period (see page 11).

What must be taken into account in case of expected divestments?

Where the acquirer has made the offer conditional on receiving an unconditional clearance from the relevant antitrust authority – and the clearance is granted on the condition of divestments or other conditions – the legal situation is somewhat unclear. In theory, the conditional offer

becomes void once the condition (of unconditional clearance) is not satisfied. However, the acquirer arguably has an option to waive the condition of its initial offer in its entirety (thereby making the offer unconditional), provided the relevant competition authority issues the clearance decision *before* the acceptance period expires. If the relevant competition authority issues the clearance decision *after* the acceptance period has expired, the option of a waiver no longer exists. The only way of dealing with this risk is to draft the clearance condition in the initial offer in such a way that it covers both an unconditional and a conditional merger clearance. To date, the Federal Agency has accepted a general reference to 'obligations and conditions' that may be required by the relevant competition authority (ie, it is not necessary to specify the possible divestitures in detail).

Are any industry sectors protected from takeovers?

The intended acquisition of a significant holding (10 per cent or more of the capital or voting rights) in:

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

must be notified to the relevant authorities. A proposed increase or reduction of a significant holding in a German bank, financial services institution, investment company, operating institution of a stock exchange or insurance company beyond/below certain thresholds (20 per cent, 30 per cent and 50 per cent) must be notified in the same way. The Federal Agency or (in the case of an operating institution of a stock exchange) the competent stock exchange supervisory authority may prohibit the proposed acquisition or increase of holding if, for example, the managing directors of the purchaser are deemed unreliable.

Are there any restrictions on foreign ownership of German companies or assets?

The acquisition of a stake of at least 25 per cent of the voting rights in a German company by a non-EU and non-European Free Trade Association (EFTA) acquirer may be prohibited by the federal government for reasons of public order or security. The rules are not restricted to acquisitions in specific industry sectors or by certain types of investors. Clearance of the transaction may be sought prior to closing. The relevant waiting period is one month. Where the rules apply, public offers will therefore have to be made subject to clearance of the transaction by the German government.

The rules also apply to acquisitions by EU/EFTA investors in which a non-EU and non-EFTA investor holds a substantial stake, if the acquisition

structure was set up to avoid the foreign investment control rules. (See our briefing *New restrictions on foreign investments in Germany* at www.freshfields.com/publications/pdfs/2009/may09/25915.pdf.)

Mandatory offers

Are there any rules requiring an offer to be made if a certain threshold of shareholding is reached?

If a person acquires voting rights taking its aggregate amount of voting rights in the target to 30 per cent or more, it must publish this fact as soon as possible and launch a mandatory offer for all target shares (voting and non-voting and whether listed or not). In calculating the percentage interest in the target's voting rights, voting rights attaching to certain shares held by third parties (eg subsidiaries and trustees) are deemed to be held by it. In particular, concert party arrangements may, under certain circumstances, result in an attribution of voting rights. The scope of the relevant provision was extended through legislative amendments in August 2008, partly in response to shareholder activism and some of their tactics (in particular in the TCI/Deutsche Börse case) which, under the then existing rules, did not result in an attribution of voting rights.

What is the minimum consideration?

As in the case of takeover offers (see page 17), any mandatory offer must be at a price equivalent to at least the highest consideration paid or agreed to be paid by the bidder (or any persons acting in concert with it) for the relevant target shares during the six-month period before the launch of the mandatory offer. In addition, the consideration offered must be at least equal to the weighted average stock exchange price of the relevant target shares during the three-month period before the acquisition of control was announced.

The consideration must be in cash or consist of liquid shares that are admitted to trading on a regulated market of an EEA stock exchange. Shares offered in exchange for voting shares of the target must also be voting shares.

The bidder must make a cash offer to target shareholders if it (or a person acting in concert with it) acquired for cash 5 per cent or more of the shares or voting rights in the target in the six-month period before the announcement of the offer, or during the acceptance period.

What exemptions are available?

In certain circumstances, the Federal Agency must, upon written application, permit voting rights attaching to shares in the target company to be disregarded when calculating whether the control threshold of 30 per cent has been reached or exceeded. This applies, for example, to shares acquired in the course of group restructurings and (under certain circumstances) to shares held or intended to be held for trading purposes.

In addition, the Federal Agency may (but is not obliged to) exempt a controlling shareholder from the mandatory offer obligation if, for example, the controlling position was acquired:

- in connection with a financial rescue of the target;
- as a result of a reduction of the target's share capital; or
- where the controlling shareholder unintentionally acquired 30 per cent of the voting rights.

Exemptions from the mandatory offer obligation may also be granted by the Federal Agency if, for instance:

- a third party has a higher percentage of voting rights in the target; or
- it cannot be expected (by reference to shareholder attendance at previous general meetings) that the person who has acquired control of the target will be able to effectively control more than 50 per cent of the voting rights represented at future shareholders' meetings of the target.

Does the chain principle apply?

As soon as a person acquires indirect control over a target (ie through a subsidiary), it is obliged to launch a mandatory offer for all outstanding shares in such target. However, the person acquiring control may request that the Federal Agency exempts it from this mandatory bid obligation if the book value of the interest in the target amounts to less than 20 per cent of the book value of the total assets of the entity holding the target shares.

Information for target shareholders

What information is the bidder required to provide?

The Takeover Act and the WpÜG offer ordinance require offer documents to contain the following information:

- the name and other details of the bidder and all persons acting in concert with it (eg its holding companies and subsidiaries);
- the name and other details of the target and all persons acting in concert with it (eg its subsidiaries);
- a description of the securities that are the subject of the offer;
- the type and amount of the consideration offered;
- the offer conditions;
- the beginning and end date of the acceptance period;
- a description of the steps taken by the bidder to secure financing for the offer and the expected effects of the offer on the financial position of the bidder;

- the bidder's intentions regarding the future business activities of the target (and, to the extent affected by the offer, its own activities) as well as for the employees and their representatives;
- any material changes to the terms and conditions of employment agreements (including measures proposed for these terms and conditions);
- any payments made or benefits granted or offered by the bidder to members of the target boards;
- a copy of the cash confirmation for the financing of the offer (page 19);
- a responsibility statement of the bidder and other persons taking responsibility for the content of the offer document;
- details of the valuation methods applied for the target shares and, if applicable, the securities offered in exchange;
- details of target securities already held by the bidder, persons acting in concert with it and voting rights deemed to be held by the bidder;
- details of pre-offer dealings in target securities; and
- progress made with any antitrust filings or regulatory consents.

The offer document must be in German and must be published on the internet.

What information is the target required to provide?

The Takeover Act does not contain any specific rules about the information to be made available by the target to its shareholders or actual or potential bidders, although it does oblige both its management board and supervisory board to issue reasoned statements on the offer and any amendments to the offer (see page 26).

Who takes responsibility for the published information?

The bidder (represented by its management board) must take responsibility for the offer document, stating that – to the best of its knowledge – the information contained in the offer document is correct and that no material circumstances have been omitted.

Are there any special requirements for profit forecasts, asset valuations or statements on merger benefits?

The offer document must contain detailed information on the expected effects of a successful offer on the net worth, financial position and results of the bidder and its ultimate holding company (if any).

Role of target boards

What are the duties of the target boards?

The Takeover Act contains the general principle that the target's management board and supervisory board must act in the interests of the target company.

The Takeover Act requires each of the target's management and supervisory boards to issue reasoned statements regarding the offer without undue delay after receipt of the offer document. In their statements, the boards must comment in detail on the consideration offered, the likely consequences for the target of a successful offer, the goals being pursued by the bidder and any intention of members of the boards to accept the offer if they hold target securities. The management board must append to its own statement any statement on the offer issued by the target's works council. The management and supervisory board statements must be published without undue delay following receipt of the offer document and any amendment to it.

The bidder may not provide, or hold out the prospect of, unjustified cash payments or other valuable benefits to members of the target boards in connection with the offer.

What scope does the target management board have to frustrate a bid?

After a decision to launch an offer has been published, the management board of the target must not take actions that may prevent the offer's success. However, this prohibition does not apply to:

- actions that a prudent and conscientious manager of a company not subject to a takeover offer would have taken;
- a search for a competing bidder;
- actions approved by the supervisory board of the target; and
- actions based on an authorisation by a shareholders' resolution that have been approved by the supervisory board. Any such shareholders' authority will expire at the date set out in the shareholders' resolution and at the latest 18 months after the date of the resolution.

German listed companies may provide in their articles of association that the stricter regime on the prohibition of frustrating actions contained in the Takeover Directive (which Germany has opted out of) shall apply. However, to date, very few German listed companies (and no major one) have amended their articles to this effect.

Role of the financial adviser

Does the bidder have to have a financial adviser? If so, what is its role?

The Takeover Act does not oblige a bidder to retain a financial adviser in connection with a public offer. However, if shares are offered that are or will be listed on a German stock exchange, it must have a sponsor.

In addition, in the case of cash offers (or offers including a cash element), the bidder will require confirmation from a securities services enterprise that is independent of the bidder, that the bidder has taken the necessary steps to ensure that it will have the necessary cash amounts available at the time of closure of the offer.

Financial advisers in German takeovers do not make the offer on the bidder's behalf.

Does the target have to have a financial adviser? If so, what is its role?

Target companies tend to retain financial advisers only on more significant takeover offers. As the Takeover Act requires the target's management board and supervisory board to produce detailed statements with regard to the offer (see page 26), there is an increased likelihood that at least one of these will seek a fairness opinion or other financial advice on the merits of the offer.

Is it usual to sign an engagement or mandate letter?

It is accepted practice for the bidder and target to agree formal engagement letters with their financial advisers setting out the scope of the advisers' duties.

Will the financial adviser have to give a public opinion on the offer?

No. However, the disclosure of any fairness opinions rendered to either the target's management or supervisory board has become market practice.

Rights of employees

Do target employees or their representatives have to be consulted before the offer is announced?

The Takeover Act requires that the target's management board informs the target employees of any public offers announced or launched for target shares. However, target employees need not be consulted by a bidder.

What rights do employees have to challenge an offer?

Employees of the target have no rights to challenge the offer at any stage.

Does a bidder have to say anything about the future of target employees?

The Takeover Act requires the offer document to contain information on the bidder's intentions regarding the future business activities of the target. This includes, in particular, any intentions the bidder has regarding the target's employees, their representatives and the members of the target's

management board, and any material changes to the terms and conditions of employment agreements (including any anticipated actions).

Possible application of US tender offer rules

When do US securities laws apply to public takeovers in Germany?

When a bidder offers to purchase some or all of the shares of a target company and any of those shares are owned by shareholders who are resident in the US (US holders), the transaction is likely to be subject to Sections 14(d)(1) and 14(e) (the US Takeover Rules) of the US Securities Exchange Act of 1934, as amended (the Exchange Act).

Are exemptions to the US securities laws available?

If a public offer is made for the securities of a German target company that meets the definition under the Exchange Act of a 'foreign private issuer' and such securities are held predominantly by shareholders who are not US holders, two levels of exemptions to the US Takeover Rules are available.

- The tier I exemption provides relief from most requirements of the US Takeover Rules in transactions involving US holders who own very few shares of the target company (10 per cent or less of the target company's 'free float' shares).
- The tier II exemption provides relief from some of the requirements of the US Takeover Rules in transactions that involve US holders who own a significant, but not predominant, quantity of shares of the target company (more than 10 per cent but not more than 40 per cent of the target company's free float shares).

The Securities and Exchange Commission (SEC) recently amended its rules on cross-border takeovers, which took effect in December 2008, to make falling within the exemptions much clearer (and, to some extent, easier) so as to encourage bidders to include US shareholders in such cross-border takeovers. For example, it increased the flexibility under which the percentage of the target company's free float shares owned by US holders is determined, so that the bidder may calculate the number of shares held by US holders:

- at any date not more than 60 days before and not later than 30 days after the public announcement of the transaction; and
- (in certain circumstances where the acquirer is unable to perform the analysis within this period) a date within 120 days before the public announcement may be used,

and divide that number by the free float shares. The free float shares are the total number of the target company's outstanding shares, less any shares owned by the bidder or an affiliate of the bidder.

The new rules also set out an alternative test for determining eligibility for the exemptions in certain cases, such as when the target shares are in bearer form or in cases of non-negotiated ('hostile') transactions.

The new rules also codify previous class-wide exemptive relief that allows a bidder, its affiliate and/or its agents (subject to their meeting certain conditions) to purchase a target's securities outside of a tender offer, which is generally proscribed under Rule 14e-5. The conditions that must be met include the following:

- the bidder must reasonably intend to rely on a tier II exemption and the laws of the 'home jurisdiction' (in the case of a German target company this includes the Takeover Act);
- the bidder must allow for purchases to be made outside of the offer and provide that the offer price be increased to match any consideration paid outside the offer that is greater than the offer price; and
- no purchases outside the tender offer may be made in the US.

However, with the adoption of these new rules, the SEC announced that there will be an increased scrutiny of bidders who fail to include US holders in their takeover offers and the manner in which they are being excluded.

Appendix 1: outline timetable for an offer under the Takeover Act

Day	
- 35	Mandatory offer: date of acquisition of control over target.
- 28 ²	<p>Mandatory offer</p> <p>Notification of the acquisition of control over the target to:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Federal Agency for Financial Services Supervision; and <input type="checkbox"/> stock exchange(s) on which target, bidder and/or other relevant securities (including options etc) are listed. <p>Immediately thereafter: public announcement of acquisition of control over target.</p>
- 28	<p>Voluntary offer</p> <p>Notification of the decision to make an offer to:</p> <ul style="list-style-type: none"> <input type="checkbox"/> Federal Agency for Financial Services Supervision and <input type="checkbox"/> stock exchange(s) on which target, bidder and/or other relevant securities (including options etc) are listed. <p>Immediately thereafter: public announcement of decision to make an offer.</p>
0	Submission of offer document to Federal Agency for Financial Services Supervision.
+ 10 business days ³	Clearance of offer document by Federal Agency for Financial Services Supervision.
+ 11 business days	<p>Publication of the offer document.</p> <p>Start of acceptance period.</p>
Publication date + up to 2 weeks ⁴	Management board and supervisory board of target to publish reasoned statements on the offer.
Publication date + 4 weeks	Earliest possible end of acceptance period.

² The publication must be made without undue delay and in any case within seven calendar days of the acquisition of control.

³ Business days are any days other than Sundays and public holidays.

⁴ The publication must be made without undue delay after publication of the offer document.

Day

Publication date + 10 weeks	Latest possible regular end of acceptance period.
Expiry of acceptance period - 5 business days	Latest possible date for bidder's shareholder meeting to approve offer, if necessary.
Expiry of acceptance period - 1 business day	Latest possible date for publication of changes to the terms of the offer. If any such changes are published during the two-week period before expiry of the acceptance period: automatic extension of the acceptance period by two weeks.
Expiry of acceptance period + 3 business days ⁵	Announcement of results of offer ('announcement date').
Announcement date + 2 weeks	Last possible date for acceptance of successful takeover offer.
From announcement date until 1 year after the announcement date	Period during which, following successful takeover offer or mandatory offer, off-market acquisitions of target shares by bidder (or concert parties) and consideration paid must be disclosed on an ongoing basis. Such acquisitions can result in a retroactive increase of the offer price.

⁵ The announcement must be made without undue delay after the expiry of the acceptance period.

Appendix 2: selected experience in public takeovers in Germany (2005-2009)

- Deutsche Lufthansa on its public offer for Austrian Airlines (September 2009);
- aleo solar and Eriksen-Group on Robert Bosch's public offer for the company (August 2009);
- secunet Security Networks on Giesecke & Devrient's public offer for the company (August 2009);
- IDS Scheer on Software's public offer for the company (July 2009);
- The Financial Market Stabilization Agency (SoFFin) on its public offer for Hypo Real Estate Holding (April 2009);
- Porsche Automobil Holding on its mandatory offer for Scania (January 2009);
- Porsche Automobil Holding on its mandatory offer for Audi (September 2008);
- Petrotec on IC Green Energy's public offer for the company (September 2008);
- Augur Financial Opportunity Fund on its public offer for cash.life (September 2008);
- Continental on Schaeffler Group's public offer for the company (August 2008);
- Corestate Capital on the acquisition of a majority stake in Alta Fides and on the subsequent mandatory offer (August 2008);
- Deutsche Bank as financial adviser of Sophos on their public offer for Utimaco Safeware (July 2008);
- Taylor Nelson Sofres (TNS) on its intended merger with GfK by way of a public exchange offer (June 2008);
- ING Direct on its public offer for Interhyp (May 2008);
- HCI Capital on MPC Münchmeyer Petersen Capital's public offer (May 2008);
- Eczacibasi Group on the public offer for burgbad (May 2008);
- D+S europe on Apax's public offer for the company (May 2008);
- Grainger on the public offer for FranconRheinMain (February 2008);
- AWD Holding on Swiss Life's public offer for the company (December 2007);

- Computershare on its public offer for VEM Aktienbank (November 2007);
- itelligence on NTT Data Corporation's public offer for the company (October 2007);
- Alcon on its public offer for WaveLight (August 2007);
- The State of Berlin on the disposal of its majority shareholding in Landesbank Berlin Holding (July 2007);
- Permira on its public offer for Hugo Boss (June 2007);
- PPR on its public offer for PUMA (April 2007);
- Dr Ing hc F Porsche on its public offer for Volkswagen (March 2007);
- Tishman Speyer on its public offer for AAA Aktiengesellschaft Allgemeine Anlageverwaltung (March 2007);
- Salzgitter Stahl und Technologie on its public offer for Klöckner-Werke (March 2007);
- All3Media Deutschland on its public offer for MME Moviement (March 2007);
- Areva on its public offer for REpower Systems (January 2007);
- Morgan Stanley as financial adviser to BC Partners on their public offer for Techem (December 2006);
- Schwarz Pharma on UCB's public offer for the company (September 2006);
- Deutz on Same Deutz-Fahr Holding and Finance's public offer for the company (July 2006);
- Lazard as financial adviser to Zapf on Bandai's public offer for the company (June 2006);
- Linde on its public offer for BOC (March 2006);
- CVC on its public offer for Kromschröder (June 2005);
- UniCredito on its public offer for HypoVereinsbank (June 2005); and
- HeidelbergCement on Spohn Cement's public offer for the company (May 2005).

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