

Public takeovers in Germany

Your essential guide to how
takeovers are conducted and regulated

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The German takeover landscape

German takeover regulation has evolved – and matured – significantly, as has takeover practice, since the German Securities Acquisition and Takeover Act (Takeover Act or WpÜG) came into force on 1 January 2002 and for the first time established a comprehensive statutory regime for takeovers of German listed companies. In those fifteen years, the Federal Financial Services Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* or BaFin), as the competent supervisory authority, has been responsible for regulating about 500 publicly announced takeover and merger transactions, as well as a significant number of other matters.

The market for public takeovers has continuously been facing changes in the European (and, to a more limited extent, German) regulatory environment. In 2016, several German statutes, including the Takeover Act and the German Securities Trading Act (Securities Trading Act or WpHG), were amended in order to implement the EU directive amending the Transparency Directive (2013/50/EU), through which the legislator extended disclosure requirements for major holdings of voting rights and implemented a stricter sanctions regime. Further, since 2014, the new regime of the EU directive on Criminal Sanctions for Market Abuse (eg on insider dealing and market manipulation, known as CSMAD, 2014/57/EU; the Market Abuse Directive) and the Market Abuse Regulation (EU No. 596/2014; MAR) established stricter rules to prevent, detect and punish market abuse and to revise the rules on the handling of inside information as well as ad hoc publicity. The new market abuse regime came into effect on 3 July 2016 and has since then constantly been on the radar screen of all market participants and their legal advisors.

Besides the regulatory changes, the public takeover environment in Germany since 2015 was shaped by a trend of consolidation in certain markets, most notably the real estate market, covering about a third of all voluntary offers in 2015, although the most prominent transaction, Vonovia/Deutsche Wohnen, did ultimately not go ahead.

As expected by many market participants, this trend slowed down somewhat in 2016, where only one public offer published (LSREF4 ARIA/ISARIA Wohnbau) was launched in the real estate market, but with at the same time some of the German

players being active in neighbouring geographical markets (eg Vonovia/Conwert).

Another trend continuing throughout 2015 and 2016 was takeover activity fuelled by foreign investors, who took up about half of all takeover bids in 2015 and 2016. In addition, the (ultimately withdrawn) takeover approach by the Canadian Potash Corporation for K+S was the most noted attempt by a foreign buyer to take over a major (former DAX, now MDAX) German listed company in recent years. Further, the – still pending – business combination between the London Stock Exchange and Deutsche Börse is technically also structured as a takeover offer out of a newly formed UK holding company for the German target entity.

At the same time, and irrespective of the type of bidder involved, despite fairly strict disclosure obligations regarding financial instruments (eg irrevocable undertakings or conditional share purchase agreements), there is still a not insignificant level of pre-bid deal protection in the market, which is implemented in particular via irrevocable undertakings by or conditional share purchases with major shareholders or, to the extent commercially feasible given the daily trading volumes in the target company's shares, relevant prior market purchases. Also, to a considerably greater extent than in recent years, business combination agreements were entered into before the bid in particular in major transactions.

The German market has recently also experienced a not insignificant amount of US-style shareholder activism. In a number of major transactions, including Vodafone/Kabel Deutschland and McKesson/Celesio, activist shareholders (eg Elliott) played a prominent role after the announcement of the deal and invested substantially to have the bid price increased. In addition, there have recently been several cases of shareholder activism aiming at exchanging all or part of a target company's management (Stada) and short-seller activists raising allegations (possibly) to influence stock prices (Ströer, Wirecard).

This guide provides an overview of how takeovers are conducted and regulated in Germany. For more information or if you would like to discuss in more detail, please do not hesitate to contact us.

The takeover regime

2.1 Are public takeovers regulated?

The Takeover Act governs takeovers in Germany. It applies to public takeover offers for German targets whose shares are listed in Germany or in another European Economic Area (EEA)-regulated stock exchange. In certain circumstances, 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 an additional set of detailed rules on the conduct of public takeover offers. The most fundamental principle obliges the bidder to treat all target company shareholders of the same class equally.

A number of ordinances supplement the Takeover Act. Of particular importance is the WpÜG offer ordinance.¹ It contains rules on providing supplementary information in the offer document, pricing rules for takeover offers (ie offers which are directed at gaining control) and mandatory offers (ie offers required upon gaining control other than by way of a takeover offer), as well as details of the circumstances in which exemptions from the mandatory takeover offer obligation may be granted.

Other statutory rules relevant to German takeovers include certain provisions of the German Stock Corporation Act (Stock Corporation Act or AktG) and the insider-dealing prohibitions and disclosure requirements of the Securities Trading Act and MAR.

German stock exchange rules and legislation are relevant 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, eg in a share-for-share or mixed cash-and-shares offer.

2.2 To which companies does the Takeover Act apply?

The Takeover Act applies to offers to acquire securities that were issued by a target company having its seat in the EEA and that are admitted to trading on an organised market in the EEA. If the target company has its seat in Germany, but the securities are admitted to trading on an organised market in the EEA other than in Germany, only

certain aspects (including, in particular, the provisions on mandatory offers) apply. If the target company has its seat in the EEA other than in Germany, the Takeover Act applies only if its voting securities are

- ▶ only admitted to trading on an organised market in Germany; or
- ▶ admitted to trading on an organised market both in Germany and in another EEA member state (other than the seat of the target company) and the securities were admitted to trading on an organised market first in Germany or simultaneously in Germany and the other EEA member state and the target company opted for BaFin as the competent supervisory authority.

2.3 How common are recommended or hostile takeovers of public companies in Germany?

In most cases the management of the target company does not so much focus on opposing the bidder, but rather on negotiating the best price for the shareholders. The last successful hostile takeover offer was Tocos/Hawesko in 2015, while the recent prominent attempt of a hostile takeover of Deutsche Wohnen by Vonovia (2016) ultimately did not proceed. In the majority of the cases in 2015 and 2016, the management supported the takeover offer in the reasoned statement which management is obliged to publish (see page 27).

2.4 Is litigation becoming a feature of takeovers?

Bidders (as well as parties having allegedly acquired control over a target company that is subject to the Takeover Act) now more often than in the past risk being sued. For example, the Federal Supreme Court (BGH) confirmed the claim of the target company's shareholders against the bidder to pay appropriate consideration taking into account the activities of shareholders acting in concert with the bidder (decision of 29 July 2014, II ZR 353/12). Nevertheless, the rights of target company shareholders against the bidder are still restricted. The Federal Supreme Court decided in June 2013 that a target company's shareholders cannot claim consideration (ie cash or shares) when a mandatory offer is not published in breach of the obligation to do so. The Court decided

¹ English translations of the Takeover Act and the related ordinances are available on the BaFin home page (www.bafin.de).

further that an interest claim does not arise as long as a mandatory offer is not published (judgment of 11 June 2013, II ZR 80/12). Only BaFin is in such cases in a position to enforce a mandatory offer.

All decisions of BaFin as the competent supervisory authority for German takeovers are subject to court review, at least conceptually. The courts have, however, on several occasions decided that neither aggrieved target company shareholders nor competing bidders have a right to challenge decisions of BaFin in takeover procedures, but only the bidder and, in some cases, the target company itself. In a recent decision, the Higher Regional Court of Frankfurt confirmed its view that target company shareholders may not appeal BaFin's decisions under the Takeover Act (OLG Frankfurt, decision of 15 September 2014, WpÜG 3/11); the same is, at least in principle, true for the target company itself.

In addition, under general stock corporation law, the target company's minority shareholders have the right to file an action against shareholder resolutions passed in the context of an offer, alleging non-compliance with applicable legislation. Minority (activist) shareholders often use this right to pressurise majority shareholders and target companies alike, though with mixed success (and, in recent years, to a somewhat declining degree).

2.5 Are there local issues that make takeovers difficult?

(a) Shares in listed German stock corporations can take the form of registered shares (*Namensaktien*) or bearer shares (*Inhaberaktien*). As registered shares, by law, have been the standard form only since 31 December 2015, bearer shares are still more common, although there has been an increase in the use of registered shares by listed companies, which seek to obtain information about their shareholders and direct access to them.

The transfer of registered shares is to be notified to the stock corporation and the transfer is to be registered in the stock corporation's share register before the acquirer may exercise any rights as the owner of the shares. The articles of association of a few stock corporations with registered shares require the consent of the company to transfer registered shares. Such transfer restrictions are common in certain sectors, such as insurance or airlines. As a rule, the company can grant or refuse such consent; however, refusal would be exceptional. By contrast, the articles of association cannot require the company's consent for the transfer of bearer shares.

(b) A further distinction between different types of shares can be made with regard to voting rights. Ordinary shares (*Stammaktien*) in a stock corporation always carry full voting rights, but preference shares (*Vorzugsaktien*) can be structured so 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.

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

The two-tier board system of German stock corporations comprises a management board (*Vorstand*) and a supervisory board (*Aufsichtsrat*). The management board is appointed (normally for three to five years, five years being the maximum term), removed and supervised by the supervisory board, not by the stock corporation's shareholders. Therefore, the shareholders have no direct control or influence over the management board. The supervisory board may remove members of the management board only for good cause, which specifically includes a vote of no confidence passed by the company's shareholders' meeting (*Hauptversammlung*), requiring simple majority. A shareholder (or more than one of them jointly) who has held 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 (requiring a 75 per cent majority of votes cast, subject to another majority provided for in the articles of association); and
- ▶ declare no confidence in the management board (or certain of its members) (requiring simple majority).

Upon passing these resolutions, the respective shareholder will gain effective control of the supervisory board and can, generally, push through a supervisory board resolution to replace the management 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 company's group and the industry sector in which it operates.

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

The members of the supervisory board elect a chairman, who is virtually always chosen by the shareholders' representatives and who has a casting vote. The deputy chairman, in turn, is chosen by the employee representatives (if the company is subject to employee co-determination). The shareholders' representatives on the supervisory board, therefore, generally have effective control even in supervisory boards with one third or parity employee representation.

By contrast, in case of a partnership limited by shares (*Kommanditgesellschaft auf Aktien* or *KGaA*), even if a bidder acquires a majority of the shares 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, but are a specific type of shareholder who cannot easily be expelled. Such partnership structures overall are still rather rare, but they are becoming more attractive, in particular for companies with a family-owned background, eg Merck, Henkel, Fresenius, Fresenius Medical Care, CTS Eventim, Hornbach, Ströer, CEWE).

2.6 Can public companies in Germany make themselves bid-proof?

Although 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. Only if the target company has the corporate form of a *KGaA*, as discussed above, it is impossible to achieve unwelcomed control over the management other than by acquiring the management vehicle from its – in most cases, family background – shareholders.

As a matter of law, German stock corporations can build certain takeover defence mechanisms into their constitutional documents. In practice, however, these have played a very limited role in German takeovers so far.

- ▶ Some German listed stock corporations have issued non-voting preference shares and/or registered shares. Placing non-voting preference shares with investors has in recent years proved difficult. Registered shares are more common, but only provide for a means of monitoring the shareholder base, and do not enable the target company to stop unwanted share purchases.
- ▶ Asset lock-ups may deter bidders to some extent, but they are not easy to implement, in particular with a view to fiduciary duties of the management towards the target company.
- ▶ The Takeover Act expressly permits the shareholders' meeting to authorise the management board to take certain frustrating actions (but it is uncommon to make use of this option).
- ▶ Authorised capital stipulated in the articles – allowing the target company's management to issue new share capital against cash or in-kind contributions and with exclusion of the subscription rights of the target company's shareholders – has been used to build up a shareholder block close to the management (in 2010, for example, target company Hochtief issued a 10 per cent stake to Qatar Holding, without, however, this eventually blocking the takeover and, in any event, without this being the main purpose of the share issue, which was primarily carried out for genuine financing purposes).

Deal preparation

Negotiation

3.1 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. In practice, a potential bidder will approach the target's management board some time before the transaction is formally announced. Often so-called investment agreements or business combination agreements are negotiated before the bid. However, the number of offers without the prior approval of the target's management has recently increased.

3.2 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 when two companies merge by way of statutory merger (*Verschmelzung* – see page 15). It is, however, common to have so-called investment agreements or business combination 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). A judgement of the Higher Regional Court of Munich (OLG München, decision of 14 November 2012, 7 AktG 2/12) has called into question the validity of business combination agreements infringing on the statutory allocation of powers between shareholders and management. Parties to such an agreement therefore have to carefully review which restrictions in particular on the management's ability to independently manage the target company can be agreed upon in a business combination agreement.

3.3 Can the bidder expect contractual representations or warranties?

A bidder may seek representations and warranties from major shareholders who sell shares outside the offer (or even into the offer), but representations and warranties by the target company are generally not legally possible, or at least questionable, due to capital maintenance restrictions and restrictions on financial assistance. Terms guaranteeing that the bidder will acquire good title to the shares are, in contrast, already implied by statute.

3.4 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. Also, but in practice only in rather unusual cases, criminal liability cannot be excluded.

3.5 What can a bidder do if the target refuses to co-operate?

If a target refuses to enter into discussions, the bidder may decide to nevertheless announce its decision to make an offer. The bidder can then put more pressure on the target board to cooperate by allowing due diligence and entering into negotiations with the intention of ultimately supporting the offer. This is known as the 'bear hug' approach.

The bidder may not grant or promise unjustified cash payments or other valuable benefits to members of the target boards in connection with the offer.

Confidentiality

3.6 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 tend to cover the fact that a transaction is being discussed and the confidentiality of the information exchanged. It should be noted that under relevant disclosure rules, issuers must disclose to the public without undue delay all relevant inside information unless certain exemptions apply. The rules require careful planning of public transactions to avoid disclosure obligations being triggered too early or the bidder being banned from dealings in the target's shares. One of the prerequisites can be the

conclusion of a confidentiality agreement as soon as an approach is made.

3.7 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 from six months to one year, after discussions have terminated. 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

3.8 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 rule, any bidder is advised to carry out as much due diligence as possible because the opportunities to withdraw after announcing a bid are 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 concrete rules.

Under German law, the management board of a stock corporation has a duty to keep sensitive information confidential. In practice, the management board can (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 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 unless the relevant information is made public or ceases to be price sensitive prior to the acceptance period (see page 13).

With share-for-share offers, the target will normally insist on reciprocal/reverse due diligence on the bidder to verify the assumptions underlying the valuation of the bidder's shares (eg Diebold/Wincor Nixdorf). If a prospectus is issued on the

combined group, the due diligence exercise does become more formal and expansive.

Care needs to be taken to ensure that the exchange of commercially sensitive information does not go beyond the level of information permitted by German, EU or other antitrust laws (including those in the US), where heavy penalties can be imposed for breaching the rules on anti-competitive information exchange. This issue can often only be overcome by the use of – rather standardized – clean team arrangements.

3.9 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 subsequent shareholders' meeting regarding the exchanged information. Furthermore, with share-for-share offers, the level of information of the bidder and the target's shareholders must be equal in material terms.

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

Receiving unpublished inside information on the target or its shares may, in principle, prevent the bidder from buying target shares. However, MAR now provides an exception for inside information received in the conduct of a public takeover if such information is published or ceases to be inside information prior to the start of the acceptance period. If the information continues to be unpublished and price-sensitive, the bidder may be prevented from launching the offer or buying shares after the offer is announced. While this is a widely discussed issue, unsolicitedly providing inside information to the bidder has not often been used as a defence by target companies and thus has not become a relevant problem in practice.

In any event, the bidder's own intention to make the bid is usually price-sensitive information but does not prevent the bidder from launching the offer and buying shares. Once the information has become public, it will no longer be regarded as inside information and the bidder may proceed with its bid.

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

In principle, German stock corporation law says a company must give all shareholders the same information. However, a shareholder has such right to equal information only in the company's shareholders' meeting. In addition, it would prove difficult in practice 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 target's management board.

3.12 What information will be publicly available on the target?

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 gives the following information in particular:

- ▶ information registered in or published by the commercial register (*Handelsregister*), such as the names of the members of the management board and the supervisory board, 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 shareholders' meetings (including lists of attendee shareholders, but not shareholders represented by banks or other nominees) and the company's annual financial statements;
- ▶ publications made by the stock corporation in the *Federal Gazette* (*Bundesanzeiger*), which are required for, among other things, shareholders' meetings (including agendas) and dividend distributions; and
- ▶ all disclosures made by the stock corporation under the Securities Trading Act and the Market Abuse Directive about, among other things:
 - insider information (ad hoc disclosure – see page 13);
 - 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 shares carrying voting rights.

3.13 How can the bidder get information about target company 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, 5, 10, 15, 20, 25, 30, 50 or 75 per cent of the voting rights in a German listed company has to inform the company and BaFin in writing when it has reached, exceeded or fallen below the relevant threshold. As a consequence of the Directive amending the Transparency Directive (see above page 2), such obligation is already triggered by the contractual right to acquire voting shares (in particular purchase agreements), ie ownership of the shares is not required to trigger the disclosure obligation. 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 the above mentioned thresholds (except for the 3 per cent threshold) of the voting rights.

Due to changes to the Securities Trading Act effective 1 February 2012, any positions in financial or other instruments are to be disclosed if they facilitate the acquisition of voting shares in a German listed company. In addition, rights for redelivery of voting shares under securities lending agreements and acquisition rights in the context of 'repo' transactions need to be taken into account. The aforementioned applies to all purchase positions where the counterparty could hedge its risk in full or in part by its holding of the relevant share – eg cash-settled derivatives. In these cases the same thresholds (except for the 3 per cent threshold) apply as set out above.

Natural or legal persons whose voting interest reaches or exceeds 10 per cent in the company must furthermore disclose, among other things, the aims pursued with their investment, whether they plan to acquire further voting rights within the next 12 months and whether they intend to exert influence on the management's composition (see also page 13).

The company must publish this information and BaFin maintains a database on its website (www.bafin.de).

Rules on directors' dealings (now: managers' transactions) have been revised by MAR with effect as of 3 July 2016. The basic principle still applies that members of the management 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 must notify the company and BaFin of dealings in the company's shares and derivatives. However, MAR has extended such disclosure obligation to more kinds of dealings and also to companies whose financial instruments are (only) traded over-the-counter (OTC). Certain de minimis and other exemptions still apply. The company and the persons bound by the rules on managers' transactions must publish any such information immediately. Furthermore, the company and management are obliged to document managers' transactions and to instruct the relevant persons on the above-mentioned rules.

3.14 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 and except under ad hoc publicity rules (which, however, would likely only play a role in cases of materially incorrect accounts). Likewise, auditors will not generally be liable vis-à-vis shareholders or a bidder for auditing a company's accounts unless they know that specific reliance is being placed on the audited accounts. The auditors are generally liable only to the company.

Approaching target company shareholders

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

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

Deal protection

4.1 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 when non-German companies are involved in the deal (eg recently Grand Chip Investment/AIXTRON). In the absence of relevant court decisions, the enforceability of break fees remains uncertain. However, the prevailing view is that a break fee payable by a German target does not amount to financial assistance for acquiring shares, which German stock corporation law bans, so it may reasonably be assumed that break fees are, indeed, enforceable.

4.2 What other forms of deal protection are possible?

There are no restrictions on stake building before making an offer, subject to complying with the relevant disclosure requirements (see page 13) and the rules on insider dealing. However, dealings in shares (including acquiring call options, etc.) during the six months before 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 done through outright purchases of target shares (subject to the rules that restrict market purchases – see page 14) 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 can 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 disclosure obligations (see page 13) encompass irrevocable undertakings, the structure and timing of the signing of such instruments must be co-ordinated with publishing the decision to make an offer.

Similarly, the bidder and the shareholder can enter into a share purchase agreement which is subject to the condition precedent of the public offer being successful.

The target's management board may agree to 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 27).

Offer announcement

5.1 Does a target have to announce that it has received a bid approach?

A bid approach could affect the target's share price. Under the European ad hoc publicity rules, listed companies must disclose to the public without undue delay all inside information that directly concerns the issuer (see page 13). However, a company can exempt itself provided that immediate disclosure is likely to prejudice its legitimate interests, delay of disclosure is not likely to mislead the public and the company is able to ensure the confidentiality of the inside information. Usually, a target should be able to rely on this exemption until the bidder announces the bid.

5.2 When does the bidder need to make an announcement?

Under the Takeover Act, once a bidder has decided to make an offer it must publish this decision without undue delay. A mere market rumour about a possible offer will not trigger said announcement obligation or a duty to formally decide on an offer. However, specific market rumours may require the target to make an ad hoc announcement on the potential 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 announcing its decision to launch an offer, the bidder must notify BaFin and all relevant German stock exchanges.

5.3 What if bidder denies it is interested in bidding?

There is no strict 'put up or shut up' rule before the bidder has published the decision to make an offer. If the target company has published any takeover plans, however, the bidder may be forced to announce its decision not to make an offer.

After publishing the decision to make an offer, the formal timetable stipulated in the Takeover Act starts running. If the bidder does not transmit or does not publish an offer document, BaFin will prohibit the offer. The bidder is then barred from making a renewed offer for one year. BaFin will, however, grant an exemption if the target company agrees.

Timing

6.1 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 prevent target management from indefinitely being subject to 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 BaFin. BaFin may extend the period to up to eight weeks if the bidder cannot meet the four-week deadline, for example, because of the cross-border nature of the offer or the need for a share capital increase.

Following submission of the offer document, BaFin has 10 business days to review it. The offer document must then be published immediately or as soon as BaFin clears it.

The acceptance period must be at least four weeks and not 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 31.

6.2 Do target company shareholders have withdrawal rights?

Target company shareholders may only withdraw their acceptances in limited circumstances and therefore tend to accept offers late in the acceptance period. To overcome this problem, the bidder can (as a term of the offer) grant accepting shareholders the right to withdraw their acceptances before the end of the acceptance period. However, in practice, BaFin insists that a special withdrawal right in favour of accepting shareholders is included in the offer in case relevant clearances have not been obtained after a certain period following 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 company shareholders may by law withdraw their acceptance if the bidder revises the offer. However, bidders often give 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 competing offers. In such cases, target company 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.

6.3 If a bid fails, can a bidder make another offer?

If BaFin has prohibited an offer, 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, BaFin may, and generally will, grant an exemption from this cooling-off restriction if the bidder applies, with the consent of the target.

Stakebuilding

7.1 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 securities using inside information, irrespective of whether they act on their own account or for the account of a third party. Violating the insider-dealing provisions is a criminal offence punishable by fines or imprisonment.

The bidder's intent to 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 has become public. However, a potential bidder 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 therefore often advisable for a bidder to refrain from market purchases after 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 25).

7.2 What disclosure obligations apply to share dealings?

In principle, share acquisitions need to be disclosed only if the purchaser's 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. The holding of (other) (financial) instruments (ie financial instruments and all instruments falling under the new notification requirements – see page 8) are to be notified at the same threshold except for the 3 per cent threshold (ie the minimum threshold for notification of financial instruments is 5 per cent of the voting rights). If call options, forward purchases and similar instruments or other instruments (such as interests in cash-settled derivatives – eg CFDs) are held, the potentially obtainable share in the voting rights arising thereby and the other shareholdings subject to notification obligations must be aggregated.

The offer document must contain details of all target shares the bidder already holds or that persons acting in concert with the bidder already hold, as well as the proportion of voting rights they hold. Acquisitions of target shares by any of the aforementioned persons during the six months 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.

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

Any party whose voting rights in a target company reaches or exceeds 10 per cent must disclose certain information about its intentions for the target and about the financing of its share acquisitions. In particular, it must inform the public about intended future increases of its shareholding in the company, the strategic goals pursued with the acquisition, if any, and whether the share acquisition was financed through debt or equity. In practice, however, the information published hereunder tends to be limited and general.

7.4 Will share dealings affect the terms of the bid?

Share dealings can affect the terms of a public offer aimed at acquiring 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 25). In these cases, the offer price must not be lower than the highest price paid by the bidder (or any person in concert with it) in the six months before the launch of the offer. In addition, if the bidder or any party acting in concert with it buys shares at above the offer price during the offer period or (but only through off-market transactions) during the one-year period after the expiry of the acceptance period, the bidder will have to increase the price offered to all shareholders.

A bidder will also have to offer cash if it or any party in concert acquires in aggregate 5 per cent or more of the target shares or voting rights for cash in the six months 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 offers.

7.5 Are share dealings by concert parties (or others) attributed to the bidder?

Share dealings by parties deemed to be ‘acting in concert’ with the bidder will be regarded as dealings by the bidder itself under German takeover law. The definition of acting in concert is particularly important regarding the mandatory offer threshold, which is defined as the holding of at least 30 per cent of the voting rights in the target company.

The Takeover Act provides a list of examples that are considered as equivalent to the voting rights of the bidder himself, like voting rights of a subsidiary of the bidder or voting rights which may be acquired by the bidder by a declaration of intent. Additionally, any voting rights attached to shares in the target company will be attributed to the bidder if it or its subsidiary coordinates on the basis of an agreement or in another manner their conduct with a third party in respect of the target company. Coordinated conduct requires that consensus is reached on voting rights or that a collaboration in another manner takes place to reach a permanent and material change in the target company’s business strategy. Only agreements that solely relate to individual issues (one off) are excluded.

7.6 Are there any rules preventing market manipulation?

It is a criminal offence to make a misleading statement or to create an impression that proves 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, mishandling of inside information and disseminating false or misleading information in the Securities Trading Act, the Market Abuse Regulation and the Market Abuse Directive.

Offer structuring and obtaining full control

8.1 What is the usual form of a takeover offer?

Most takeover offers for German companies have been cash offers. However, in the last years, there have also been a few share for share takeover transactions; the latest ones were Diebold/Wincor Nixdorf (2016), London Stock Exchange/Deutsche Börse (2016/2017), ADLER Real Estate/WESTGRUND (2015), Vonovia/Deutsche Wohnen (2015) (mixed cash/share transaction), DEMIRE/Fair Value (2015) and alstria office/DO Deutsche Office (2015).

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.

8.2 Is there a statutory merger alternative?

It is possible to merge (*verschmelzen*) companies incorporated in Germany or even in different EEA member states by way of a collective transfer of assets, liabilities, contracts, etc. With a merger, the shareholders of the merged company receive shares in 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, 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 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, if they are German legal entities; otherwise, the respective national rules

apply) 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 have 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 when 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 (which is to be 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 (companies);
- ▶ management report on the merger by each of the merged company (companies) and the acquirer (*Verschmelzungsbericht*).

The effect is that the target company ceases to exist, with target company shareholders receiving shares in the bidder as the surviving entity. If the target company is merged into 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 company 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.

Timing issues and the possibility of dissenting shareholders make it unusual to use a statutory merger to effect a takeover. However, a statutory

merger may be the preferred route in certain circumstances – for example, if substantial amounts of property transfer tax can be avoided or if the continuing use of certain licences or regulatory approvals that could fall away through a takeover is facilitated.

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

8.3 Is there experience of dual-headed company structures?

There are no examples of dual-headed merger structures involving German listed companies. More common are joint holding structures in business combinations such as London Stock Exchange/Deutsche Börse (2016/2017), with the two listed companies which are parties to the combination being acquired by a newly founded holding, most often set up either in a ‘neutral’ (and tax efficient) jurisdiction or in a jurisdiction providing regulatory benefits to the combined business.

8.4 Is there a minority squeeze-out mechanism?

There are several ways to compulsorily acquire all target shares that have not been tendered in the offer. They require the bidder to hold (directly or indirectly) at least 90 (in certain cases) or otherwise 95 per cent of the target’s share capital and pay adequate cash compensation to the minority shareholders concerned.

A parent company with a shareholding of at least 90 per cent of the voting rights in the subsidiary may squeeze-out the minority shareholders by merging the subsidiary into the parent company, if both companies involved are either a German stock corporation (AG), a partnership limited by shares (*Kommanditgesellschaft auf Aktien*, KGaA) or a European public company (*Societas Europaea*, SE). Consequently, bids are more often made by stock corporations or KGAs than by limited liability companies (*Gesellschaft mit beschränkter Haftung*, GmbH), which adds a certain amount of complexity to the transaction.

Under the Stock Corporation Act, if a shareholder, irrespectively of its legal form, holds at least 95 per cent of the share capital, it can request a shareholders’ resolution to be passed to transfer all the shares of the remaining shareholders to itself in return for cash compensation. In the past, this has been by far the most common mechanism to squeeze-out minority shareholders. 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 give 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. Dissenting shareholders may take legal action against the squeeze-out resolution and delay the date on which the squeeze-out becomes effective by five to six months until a court has cleared the squeeze-out in an accelerated proceeding (*Freigabeverfahren*). Disputes over the amount of the compensation to be paid are to be dealt with in a separate appraisal procedure, which may easily take years (but does not delay effectiveness of the squeeze-out).

Under the Takeover Act, the bidder can, within three months of the end of the acceptance period, apply for a court decision transferring the remaining shares in the target to the bidder if it holds at least 95 per cent of the share capital. Minority shareholders are entitled to the same compensation as the one 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 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, which is why this squeeze-out alternative is of little practical relevance.

8.5 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 90 or 95 per cent of the target's share capital.

- ▶ The bidder and the target can enter into a domination and/or profit-and-loss pooling agreement (PLPA). 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 minority shareholders' shares at fair market value. If 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 be recognised for German tax purposes only if the foreign company had a domestic branch to which the shares of the German subsidiary belong. Foreign parent companies, therefore, sometimes have a tendency to enter into domination agreements without providing for a profit-and-loss absorption. A domination and/or profit-and-loss pooling agreement requires a 75 per cent vote by the target's shareholders' meeting.
- ▶ Provided 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 (KGaA) may be listed on a stock exchange. It is, however, rarely seen in practice, as the legal risks involved – in particular from minority shareholder litigation – are in most cases significant.

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 cash rich shell company. The majority shareholder would have to extract from the target its pro rata share of the consideration paid, but both this and the transfer may have adverse tax consequences. In addition, the sale of all assets of the target will most likely be considered as aggressive and may create additional transaction risks as a result of shareholder litigation.

8.6 What are the requirements for delisting the target?

If the bidder has acquired most of the target's shares, it may envisage delisting the target to take it private. Contrary to previous judgements, the Federal Supreme Court held in 2013 that delisting shares requires neither a public offer nor the approval of the shareholders' meeting. While such approval is still not required, the German Stock Exchange Act (Börsengesetz) was amended in 2015 to the effect that, in principle, delisting shares does require a prior offer to all shareholders. Said requirement does not apply if the respective shares are still admitted to trading on a German regulated market or a regulated market in the European Union or the EEA provided that on the respective market delisting is also subject to the requirement of a prior public offer.

Terms of the offer

9.1 What degree of control does BaFin have over the price and other terms?

Before publication, the offer document must be submitted to BaFin for review. BaFin 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 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.

9.2 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 25), 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 when the offer is announced or, as the case may be, disclosure of the acquisition of control. If the bidder (or any party in concert with it) has bought (or agreed to buy) 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. With 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 months before the offer is announced.

The minimum offer price is to be determined separately for each class of shares of the target company. Minimum price requirements mean bidders can use the 'low balling' strategy that has been used in Germany since 2007 (eg Deutsche Bank/Deutsche Postbank, ACS/Hochtief, Tocos/Hawesko and KB Holding/Vossloh). In these cases the bidder holds a major shareholding of a little less than 30 per cent and launches a voluntary offer at the legal minimum price or buys further shares in the market to trigger a mandatory offer at a price below the actual share price. In both cases the bidder does not strive for a high acceptance rate because it only intends to reach (or slightly exceed) the control threshold of 30 per cent of the voting rights. Subsequently, the bidder

is in a position to buy more shares at a low price in the market without being obliged to launch further mandatory offers under the Takeover Act (no creeping-in rule), or the target company, now effectively controlled by the bidder, starts a share buy-back, in which the bidder does not participate, effectively increasing its stake in the target.

9.3 Is there a requirement to treat all shareholders equally?

One of the principles of the Takeover Act (and of German corporate law) 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 to all other shareholders. However, shareholders holding different classes of target shares may be paid different prices for their shares (see page 19).

9.4 Can a bidder revise its offer terms?

The bidder can revise only 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 other than through a limited number of actions, such as reducing the acceptance level for the offer during the last two weeks of the offer period. The same effect can, in limited cases, be achieved by actions the target company takes (such as calling a shareholders' meeting during the offer period).

Offering cash

10.1 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 21); or
- ▶ are not within the control of the bidder.

10.2 What must the bidder do to ensure it has the financing?

If the offer is for cash or includes a cash element, a securities services enterprise – usually a bank – 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/bank 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. Furthermore, while this depends on the bidder and the bank financing the bid, general practice is a full credit agreement (not merely a term sheet or a commitment letter) being concluded prior to the confirmation.

10.3 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 acquiring 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 dividends. This rule may restrict financial restructuring after a bid unless the corporation is first converted into a different corporate form (eg a limited liability company or limited partnership) or a domination agreement / PLPA (see page 17) is put in place. Consequently, such agreements are usually concluded in takeovers by financial investors and are very often the bidder’s first intermediate objective.

Offering securities

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

A share-for-share offer by a German listed company may cause technical difficulties. Therefore, any such offer will in most cases be made using shares from the bidder's authorised capital, thereby substantially reducing the risk of a shareholder challenge. Share-for-share offers by foreign bidders are not subject to these technical and legal challenges. In the last two years, only three share-for-share offers and three mixed offers were published: London Stock Exchange/Deutsche Börse (2016/2017), alstria office/DO Deutsche Office (2015) and DEMIRE/Fair Value (2015) (share-for-share offers) and Vonovia/Deutsche Wohnen (2015), ADLER Real Estate/WESTGRUND (2015) and Diebold/Wincor Nixdorf (2016) (mixed offers).

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

With takeover offers and mandatory offers, the Takeover Act requires any shares offered as consideration to 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 a prospectus (although there are exemptions).

11.3 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 company shareholders on the basis of a shareholders' resolution, a valuation of the target shares may be required for the bidder's own share capital increase. The valuation must contain financial projections for the target as a matter of German law and practice.

Conditionality

12.1 What level of shareholder support is required for the bid to be successful?

There is no minimum acceptance threshold under German law that has to be met for the bid to be successful. Normally, bidders intend to increase their shareholding in the target to 30 per cent or more to avoid being obliged to launch a mandatory offer at a later stage (see page 25). In practice, many bidders – in particular if they are financial investors or otherwise require a high acceptance level, eg under their bid financing – 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 acquire the shares of minority shareholders compulsorily is 90 or 95 per cent of the target's share capital – see page 16).

The bidders may, and very often do, reduce the acceptance level or any other condition of the offer before the end of the acceptance period (eg Arrow Central Europe Holding Munich/DATA MODUL; Vonovia/Deutsche Wohnen and very recently Grand Chip Investment/AIXTRON). By doing so during the last two weeks of the acceptance period, the acceptance period is automatically extended by two weeks. In addition, if the bidder reduces or waives (eg VMS Deutschland/MeVis Medical Solutions) the acceptance condition(s), target company shareholders who have accepted the offer will have the right to withdraw their acceptances. There are examples for major bids that failed because the acceptance threshold was not achieved, like the first bid of McKesson for Celesio and Fresenius' attempt to acquire Rhön Klinikum by a public bid (McKesson was successful in acquiring Celesio three months later by launching a new bid; the acquisition of Rhön Klinikum by Fresenius was finally structured as an asset deal). Recent examples of the minimum acceptance threshold not being met are GE Germany Holdings/SLM Solutions Group and Vonovia/Deutsche Wohnen. If the acceptance threshold is not met, a bidder can still waive this condition and acquire the shares that have been tendered in the offer.

12.2 What other conditions are permitted or required?

The Takeover Act does not prescribe any mandatory conditions. 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 (which de facto and also as a matter of law may be mandatory for the bidder). BaFin also accepts certain (though limited) 'material adverse change' and 'compliance' conditions. BaFin expects the offer either to lapse or to become unconditional (with the exception of regulatory consents, such as merger control clearances, and the registration of capital increases) at the end of the acceptance period.

In any event, conditions may not be subjective and must be clearly drafted and sufficiently specific.

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

12.3 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 (although, in case of a breach, an offer may in practice be difficult to enforce). Once launched, an offer may lapse only if a condition is not fulfilled.

Antitrust and regulatory matters

13.1 What is the relevant legislation and who enforces it?

Public takeover offers may trigger merger control requirements in various countries. For example, in the European Union, either the European Commission or the member states may be competent to review the transaction.

European merger control

Merger control under European merger control law is regulated by the EU Merger Regulation (EUMR), enforced by the European Commission. A transaction will be subject to notification if:

- ▶ it qualifies as a concentration (*Zusammenschluss*) within the meaning of the EUMR, that is, it is a merger of two or more previously independent undertakings or the acquisition of control of the whole or parts of another undertaking; public takeovers generally fall into the EUMR scope; and
- ▶ it meets the relevant jurisdictional thresholds for notification, which are:
 - the aggregate worldwide group turnover of all the parties is more than €5bn and the aggregate Union-wide turnover of each of at least two of the parties is more than €250m; unless each of the parties achieves more than two-thirds of its aggregate Union-wide turnover in one and the same member state;
 - or
 - the combined aggregate worldwide group turnover of all the parties is more than €2.5bn; the aggregate Union-wide turnover of each of at least two parties is more than €100m; in each of at least three member states, the aggregate turnover of all the parties exceeds €100m; and in each of those three member states, the turnover of each of at least two parties is more than €25m; unless each party generates more than two-thirds of its Union-wide turnover within one and the same member state.

Currently, the European Commission is evaluating certain procedural and jurisdictional aspects of the EUMR. The jurisdictional key proposals of the European Commission, *inter alia*, comprise the introduction of (i) a review of the acquisition of non-controlling minority shareholdings and (ii) a jurisdictional threshold linked to the purchase price of a target in cases where the target generates no or little turnover at the time of the acquisition, but has considerable market potential for other reasons (eg commercially valuable data as often is the case in the digital and pharmaceutical

industries). As of January 2017, the European Commission was at the stage of seeking feedback from the public.

German merger control

Merger control in Germany is regulated by the Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*; GWB) in cases that do not fall under the jurisdiction of the European Commission as set out above. This legislation is enforced by the Federal Cartel Office (*Bundeskartellamt*). A transaction will be subject to notification if:

- ▶ it qualifies as a concentration (*Zusammenschluss*) within the meaning of the GWB; public takeovers generally fall under the scope of the GWB, which also encompasses the acquisition of minority shareholdings; and
- ▶ it meets the relevant jurisdictional thresholds for notification, which are:
 - 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; and the turnover in Germany of another party involved amounts to more than €5m; unless one party achieves less than €10m worldwide turnover (in the case of the target including the seller and all its affiliates, provided that the seller controls the target and, in the case of the acquirer, including all its affiliates).

For the sake of completeness it should be mentioned that German merger thresholds are currently subject to revision (with the revised provisions coming into force probably still in the spring of 2017). Under the future rules, transactions may also be subject to German merger control law in cases where the conditions named above are met in principle, but the target company has not generated any turnover in Germany so far, provided that, *inter alia*, the purchase price exceeds €350m.

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

The GWB and the EUMR both provide for a suspension obligation for transactions subject to merger control.

- ▶ Transactions that are subject to merger control may not, under the GWB, be completed before either the Federal Cartel Office has cleared the transaction or the relevant waiting periods of one month (first phase) or four months (first

and second phases together) after submission of a complete notification have expired without the Federal Cartel Office having prohibited the transaction. With the consent of the notifying parties, these waiting periods may even be further extended. This is applied in many cases after commitments have been proposed by the parties to allow the Federal Cartel Office to properly market test the commitments. The eighth reform of the GWB has introduced an automatic extension of the second phase investigation by one month in the event that the parties submit commitments to the Federal Cartel Office. In addition, the reform has introduced a stop-the-clock mechanism in second phase proceedings should the notifying parties not fully respond to an information request of the Federal Cartel Office.

- ▶ Under the EUMR regime, a comparable suspension obligation also applies. The waiting period is typically 25 working days from the notification (first phase) and can be extended by a further six to seven months if the Commission opens an in-depth (second phase) investigation.

However, under both the GWB and EUMR regimes, public takeover bids, by contrast to other transaction types, are not subject to the full suspension obligation, under the following conditions.

- ▶ Under the EUMR regime, the prohibition of putting a concentration into effect can be waived if 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).
- ▶ Since its eighth reform, the GWB has been aligned with the EUMR as to the suspension obligation for public takeover bids, allowing the notifying parties under certain conditions to consummate the public takeover before clearance.

In practice, merger control clearance shifts the antitrust risk to the acquirer, who will bear the risk of having to unwind the transaction if the European Commission or the Federal Cartel Office prohibit the takeover. Therefore, despite public takeover bids not being subject to the full suspension obligation under the conditions set out above, the acquirer will typically make the offer conditional on receiving all relevant regulatory clearances to leave the antitrust risk with the target company shareholders.

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

Besides, BaFin 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 12).

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

If 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, BaFin 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).

13.4 Are any industry sectors protected from takeovers?

The intent to directly or indirectly acquire 10 per cent or more of the capital or voting rights (*qualified holding*) in:

- ▶ a German bank (including CRR credit institutions);
- ▶ a German financial services institution (including MiFID investment firms);
- ▶ a German asset management company;
- ▶ a German operating institution of a stock exchange;

- ▶ a German (re)-insurance company;
- ▶ a German central counterparty (CCP; *zentrale Gegenpartei*);
- ▶ a German payment services institution; or
- ▶ a German e-money institution

must be notified to the competent supervisory authorities. A proposed increase or reduction of a qualified holding beyond or below certain thresholds (20 per cent, 30 per cent and 50 per cent) and/or a proposed acquisition of control in any of the aforementioned regulated entities must be notified in the same way. Subject to certain requirements (eg unreliability or financial instability of the acquirer), the intended acquisitions can be prohibited by the competent supervisory authorities.

No sector-specific rules for the aforementioned regulated entities apply with regard to the obligation to notify a transaction to the Federal Cartel Office. A transaction has to be notified to the Federal Cartel Office – regardless of the sector – if it qualifies as a concentration and the relevant jurisdictional thresholds are met. It should, however, be noted that specific provisions apply as regards the calculation of the turnover-related thresholds in case the aforementioned regulated entities are concerned. In addition, there is a sector-specific provision in the GWB itself that permits a bank to acquire 25 per cent or more of the shares of an enterprise in the course of its business to resell the shares in the market without having to undergo a clearance procedure. Provided the bank does not exercise the voting rights attached to the shares it holds and resells the shares within one year, such a transaction does not constitute a concentration for merger control purposes. This time limit may, on application, be extended by the Federal Cartel Office if it is substantiated that the resale was not reasonably possible within this period. There are similar provisions in the EUMR should such a case be notifiable to the European Commission.

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

Acquiring a direct or indirect 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 subject to review by the Federal Ministry for Economic Affairs and Energy (BMWi) to be initiated within three months from the publication of the decision to submit a public offer or from the publication of

the acquisition of control. The acquisition may finally be prohibited, or restrictions might be imposed, by the BMWi with consent of the federal government for public order or security reasons.

The rules are not restricted to acquisitions in specific industry sectors or by certain types of investors. Clearance of the transaction may be sought before or after the closing of the acquisition. The relevant waiting period is one month. When the rules apply, public offers will 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.

In addition, specific procedures and restrictions including, but not limited to, notification and approval requirements apply to foreign investors acquiring a significant holding in a company in the defence or IT security sector, in operators of high-quality earth observation systems and in air carriers.

Up to 2016, no public takeover offer in Germany has, since the Takeover Act came into force, been prohibited or restricted under any of the above provisions (other than antitrust provisions). However, in October 2016 the BMWi withdrew the clearance certificate with regard to Grand Chip Investment's envisaged acquisition of Aixtron and reopened the investment review pursuant to the German Foreign Trade and Payments Act (AWG) and the Foreign Trade and Payments Ordinance (AWV); ultimately, the required clearances (including CIFIUS clearance in the US) was not obtained and the transaction did not complete. Further developments in this field should be closely monitored as a revision and further tightening of the foreign investment control regime is being discussed on a political level (in particular against the background of the Midea/KUKA transaction in 2016).

Mandatory offers

14.1 Mandatory offer threshold

If the aggregate voting rights held in the target company reach or exceed 30 per cent, the holder of the voting rights (ie the bidder) must publish this fact as soon as possible and launch a mandatory offer for all (remaining) target shares (voting and non-voting and whether listed or not). In calculating the bidder's 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 the bidder. In particular, concert party arrangements may, under certain circumstances, result in an attribution of voting rights.

Target company shareholders cannot force a bidder to launch a mandatory offer. The Federal Supreme Court decided in June 2013 that a target company's shareholders cannot claim consideration (ie cash or shares) when a mandatory offer is not published despite an attainment of control and the violation of the obligation to publish and to make an offer. The court also decided that an interest claim does not arise as long as a mandatory offer is not published (decision of 11 June 2013, II ZR 80/12). As a result, a bidder has to pay interest to shareholders when a mandatory offer is published belatedly, but not when it is not published at all. While in the latter case a fine of up to EUR 1m may be incurred, target company shareholders are still not protected directly, because any such fine would have to be paid to BaFin.

14.2 What is the minimum consideration?

As with takeover offers (see page 18), 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 in concert with it) for the relevant target shares during the six months 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 months 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 company 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 months before the announcement of the offer or during the acceptance period.

14.3 What exemptions are available?

In certain circumstances, BaFin must, on 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 group restructurings and (under certain circumstances) to shares held or intended to be held for trading.

In addition, BaFin may (but is not obliged to) exempt a controlling shareholder from the mandatory offer obligation if, for example, the controlling shareholder unintentionally acquired 30 per cent of the voting rights, or the controlling position was acquired:

- ▶ in connection with a financial rescue of the target; or
- ▶ as a result of a reduction of the target's share capital.

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

- ▶ a third party has a higher percentage of voting rights in the target than the potential bidder; or
- ▶ it cannot be expected, by reference to shareholder attendance at previous annual shareholders' meetings (*ordentliche Hauptversammlungen*), that the entity which 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, which is only relevant in target companies with relatively high attendance rates at shareholders' meetings.

14.4 Does the chain principle apply?

As soon as an entity acquires indirect control over a target (eg through a subsidiary), it must launch a mandatory offer for all outstanding shares in the target. However, the entity acquiring control may request BaFin to exempt 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 company shareholders

15.1 What information is the bidder required to provide?

The Takeover Act and the WpÜG offer ordinance require offer documents to contain, *inter alia*, 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 amount of the compensation offered for the revocation of special rights (in particular delegation rights and multiple voting rights), where applicable;
- ▶ the offer conditions;
- ▶ the start and end date of the acceptance period;
- ▶ 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 (see page 28);

- ▶ 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 be published, among other things, on the internet.

15.2 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.

15.3 Who takes responsibility for the published information?

The bidder 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.

15.4 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 board and defence strategies

16.1 What are the duties of the target boards under the Takeover Act?

The Takeover Act contains the 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.

16.2 What options 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.

Target companies often seek to defend against hostile takeovers by refusing to grant any information, thereby preventing effective due diligence or by talking up the stock market price. Such actions, as well as seeking a white knight or lobbying against the value of the bidder's shares, are not considered frustrating actions. They are seen as legitimate defence tactics and do not violate the principle that it should be the shareholders to decide about the offer. In the takeover of Braas Monier by Standard Industries, the (Luxembourgian) target company tried to issue 'free shares' to its current shareholders in order to drive up the cost of the takeover. However, the issuance of free shares has been prevented by the (Luxembourg) courts and the transaction ultimately completed as a friendly deal after the bidder had increased the offer price.

German listed companies may state 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 few German listed companies (and no major one) have amended their articles to this effect.

Role of the financial adviser

17.1. Must the bidder have a financial adviser? If so, what is its role?

The Takeover Act does not oblige a bidder to retain a financial adviser on a public offer. However, if shares are offered that are or will be listed on a German stock exchange, it must have a sponsor, and also in other takeover transactions financial advisers – on both sides – are common.

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

Financial advisers in German takeovers do not make the offer on the bidder's behalf. The offer is in most cases made via a German bidding vehicle or by the ultimate beneficiary of the offer itself.

17.2 Must the target have a financial adviser? If so, what is its role?

Target companies tend to retain financial advisers – or at least M&A advisers – on most 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 27), there is an increased tendency for at least one of these to seek a fairness opinion or other financial advice on the merits of the offer. Recently, a number of inadequacy opinions issued by the target company's financial adviser have been published (eg , Terex/Demag Cranes, ACS/Hochtief, Weidmüller/R.Stahl, Vonovia/Deutsche Wohnen).

17.3 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.

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

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

Rights of employees

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

The Takeover Act requires the target's management board to inform the target's works council or, in the absence thereof, employees of any public offers announced or launched for target shares. However, target employees need not be consulted by a bidder.

18.2 What rights do employees have to challenge an offer?

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

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

The Takeover Act requires the bidder to state in the offer document its intentions about the future business activities of the target. This includes, in particular, any intentions of the bidder regarding the target's employees, their representatives and the members of the target's management board and material changes to the terms and conditions of employment agreements (including any anticipated actions).

Possible application of US tender offer rules

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

When a bidder offers to buy some or all of the shares of a target company and any of those shares are owned by shareholders resident in the US (US holders), the transaction is likely to be subject to the rules of Regulation 14E (the US Tender Offer Rules) under the US Securities Exchange Act of 1934, as amended (the Exchange Act). Certain offers involving securities that are registered under US securities laws and listed on a US securities exchange will also be subject to the rules of Regulation 14D of the Exchange Act.

19.2 Are exemptions to the US securities laws available?

If a public offer is made for 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, there are two levels of exemptions to the US Tender Offer Rules available, which are set out in Rule 14d-1 under the Exchange Act.

- ▶ The Tier I exemption gives relief from most requirements of the US Tender Offer Rules in transactions involving US holders who own a few shares of the target company (10 per cent or less of the target company's 'free float' shares).
- ▶ The Tier II exemption gives relief from some of the requirements of the US Tender Offer 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 Tier I exemption requires all publications to be made available in English to US shareholders on a comparable basis to that provided to German shareholders. Although not formally required under the Tier II exemption, given the general US anti-fraud rules that apply to any takeover offer extended into the US, it is generally recommended to follow the same procedure with publications in a Tier II offer.

The Securities and Exchange Commission (SEC) adopted these exemptions to encourage bidders to include US shareholders in cross-border takeovers. However, in connection with the adoption of these exemptions, the SEC stated that it will view with scepticism takeover offers that fail to include US holders and the manner in which they are being excluded.

There is some 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 beneficially 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 when 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 exemptions also set out an alternative test based on average daily trading volume 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 exemptions also allow a bidder, its affiliate and/or its agents (subject to their meeting certain conditions) to buy a target's securities outside of a tender offer, which is generally proscribed under Rule 14e-5 of the Exchange Act. The conditions that must be met include the following:

- ▶ the tender offer must meet the conditions of the relevant exemption, and any purchases made outside the offer must be conducted in accordance with the laws of the 'home jurisdiction' (for a German target company this includes the Takeover Act);
- ▶ the bidder must prominently disclose in the offer documents the possibility of purchases outside the offer (including announcements that mention the offer);
- ▶ the offer materials must explain how information about any such purchases will be disclosed; and
- ▶ this information must be disclosed in the US in a manner comparable to the disclosure made in Germany.

In transactions conducted under the Tier II exemption, the following additional conditions must be met:

- ▶ the offer price must 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.

Appendix 1: Overview of the takeover process

	Day
Mandatory offer: date of acquisition of control over target.	- 35
Mandatory offer: Notification of the acquisition of control over the target to: ▶ BaFin; and ▶ stock exchange(s) on which target, bidder and/or other relevant securities (including options, etc.) are listed.	- 28
Immediately thereafter: public announcement of acquisition of control over target. ²	
Voluntary offer: Notification of the decision to make an offer to: ▶ BaFin; and ▶ stock exchange(s) on which target, bidder and/or other relevant securities (including options, etc.) are listed.	
Immediately thereafter: public announcement of decision to make an offer.	
Submission of offer document to BaFin	0
Clearance of offer document by BaFin.	+ 10 business days ³
Publication of the offer document.	+ 11 business days (Publication Date)
Start of acceptance period. Management board and supervisory board of target to publish reasoned statements on the offer.	Publication Date + up to 2 weeks ⁴
Earliest possible end of acceptance period.	Publication Date + 4 weeks
Latest possible regular end of acceptance period.	Publication Date + 10 weeks
Latest possible date for bidder's shareholders' meeting to approve offer, if necessary.	Expiry of acceptance period - 5 business days
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 - 1 business day
Announcement of results of offer.	Expiry of acceptance period + 3 business days ⁵ (Announcement Date)
Last possible date for acceptance of successful takeover offer.	Announcement Date + 2 weeks
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.	From Announcement Date until 1 year after the announcement date

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 all days except for Sundays and public holidays.

⁴ The publication must be made without undue delay after the Publication Date.

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

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