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# **Germany**

## Takeover Guide

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## PUBLIC VS PRIVATE TAKEOVERS

During the past few years the number of takeovers of listed German companies has remarkably increased. Initially some of these attempts started as hostile takeovers (for example, Barilla/Kamps and INA/FAG Kugelfischer) but mostly ended as friendly takeovers, as recommended to the shareholders by the managing board (Vorstand) and the supervisory board (Aufsichtsrat) of the target stock corporation.

Aside from takeovers of listed companies, in Germany, takeovers of non-listed companies are of great economic importance. In 2007, slightly less than 1,300 transactions with German participation have taken place. However, in the same period of time only 47 (executed or intended) transactions, whose target was a listed company, were announced in Germany.

### Non-listed companies

The takeover of non-listed companies has not been regulated by German law until now. Although, or perhaps because of that, there are different possibilities to acquire such non-listed companies.

A company acquisition can basically be structured as an asset deal, whereby assets and if applicable, liabilities, are transferred to the acquirer by means of a singular succession, or in the form of a share deal by means of the acquisition of shares in the target company. In addition there are also several other possibilities to realise a company merger including by means of a lease agreement or a merger in compliance with the Law Regulating Transformation of Companies (Umwandlungsgesetz). The decision of which type of acquisition is the ideal one is dependent on the actual situation in the particular case at hand.

If the parties agree on an asset deal, the acquisition of the company shall be based on a company acquisition contract concluded between the acquirer and the target company, which inter alia stipulates the property, rights and other assets to be transferred. For the target company, an acquisition contract – whereby the target company remains in principle legally independent – implies a fundamental transaction that requires the consent of the partners respectively at a shareholders' meeting. Moreover, the consent of the contractual partners of the target company is required as far as their contracts with or claims against the target company shall be transferred to the acquirer. If employees of the target company shall be transferred too, requirements under labour law have to be considered for the transaction as well.

At first glance, a share deal – which is regularly based on an acquisition contract regarding the shares in the target company – appears to be less complex than an asset deal. However, these transactions may imply a similar complexity to an asset deal context, particularly in regards to the guarantees that may be offered for the target company and who the guarantor is.

### Listed companies

Contrary to the takeover of non-listed companies, the takeover of listed companies in Germany has been regulated in 2002 by the *Takeover Act* (Wertpapiererwerbs- und Übernahmegesetz = WpÜG). The *Takeover Act*, supplemented by a set of rules, stipulates in detail the lower limit of the offer price for a takeover offer.

The *Takeover Act* firstly applies to all stock corporations and partnerships limited by shares (KGaA), having their registered office in Germany and whose shares and share-like securities are (also) listed in Germany at an organised market. In transformation of the EU takeover directive, the regulations of the *Takeover Act* referring to corporate law (regarding thresholds of getting over control of the target, defensive measures,

mandatory offers, exemptions from mandatory offers as well as providing information to the employees) apply to all domestic companies, whose shares are solely listed at an organised market abroad.

### **Application of takeover rules to foreign transactions**

In terms of observing the market rules (concerning consideration, content of the offer and the offer procedure) the *Takeover Act* is applicable to foreign companies whose voting shares are exclusively listed in Germany at the organised market. The *Takeover Act* is further applicable to foreign companies that are not only listed abroad but whose shares are also listed in Germany at an organised market and are registered with the Federal Agency For Financial Services Supervision (Bundesanstalt für Finanzdienstleistungsaufsicht) as supervising authority.

### **Regulations under corporate law concerning German stock corporations and commonly used regulations in their articles of association**

German stock corporations have a two-tier board system consisting of the managing board on the one hand and the supervisory board on the other.

While the managing board is responsible for the daily business, the competencies of the supervisory board are regulated, in detail under German law. Its main task is the supervision of the managing board. Furthermore, the articles of association or the supervisory board itself may decide that the supervisory board primarily has to declare its consent to certain businesses.

While resolutions of the shareholders' meeting in principle merely require a simple majority, in certain cases, for example in regards to a domination and profit transfer agreement, a demerger, a capital increase or reduction or amendments to the articles of association (in particular when takeovers are concerned) a majority of 75% is required.

The managing board is appointed and supervised by the supervisory board (and not by the shareholders). The shareholders neither exercise direct control over the supervisory board nor over the managing board.

Most supervisory boards of German listed companies are subject to employees' codetermination. Dependent on the size and business sector of the company, the employees take half or one third of the supervisory board's seats. The representative of the shareholders is appointed by the shareholders.

Ordinary shares of a stock corporation always carry voting rights, contrary to non voting preferential shares which are also possible to some extent under German Corporate Law.

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## **ANTITRUST ISSUES**

Dependent on the size of the target company and/or the takeover bidder, the merger is subject to either national or European merger control or, should the situation arise, to merger control in other countries as well. For the takeover, the requirements of merger control must be strictly adhered to. Both, the national as well as the European regulations of merger control provide for a temporary prohibition of execution. If the merger is subject to control, such merger may not be executed until the merger has been authorized by the responsible merger control authority.

While the federal cartel office (Bundeskartellamt) is deemed to be responsible at federal level, the Commission of the European Communities is responsible at the European Level. If a merger is already subject to European merger control no further control must be executed by the concerned member states of the European Union.

The European Commission shall exercise merger control if the companies concerned have realized an overall turnover of more than €5 billion worldwide and at least two of the concerned companies could achieve a turnover of more than €250 million throughout the European Union. A control by the European Commission moreover, is exercised if the overall turnover realised by the companies involved, exceeds the amount of €2.5 billion and further turnover thresholds are exceeded by the companies in the respective EU member states.

However, under no circumstances will a European merger control take place if two thirds of the overall turnover of the companies involved have been realised in the same member state. In this case, the respective member state shall solely be responsible if the applicability criteria require merger control.

The EU Commission has to decide within a period of 25 working days, if:

1. the merger is not subject to the EU directive;
2. the merger is subject to the respective EU directive, but unobjectionable in antitrust matters;
3. decision on the institution of proceedings is concerned.

A decision whether the intended merger is compatible with the common market has to be made within a period of 105 working days after institution of proceedings at the latest.

In Germany a merger control is solely exercised at federal level if the companies involved have realized an annual overall turnover of more than €500 million worldwide and at least one of these companies could attain a domestic turnover of more than €25 million, unless one of the following de minimis exemption applies:

- either one the merging companies is independent and has realised an annual worldwide turnover of less than €10 million; or
- the merger affects a market (which has been in existence for at least five years) which had a total annual value of less than €15 million in the last calendar year in Germany.

The federal cartel office is obliged to inform the companies involved within the period of one month, after having received the completed application, whether the main examination proceeding will be instituted or not. Within a period of four months after receipt of the complete application a decision has to be made. If no decision is made by this time the merger is deemed to be permitted.

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## GERMAN PECULIARS REGARDING REGULATED INDUSTRIES

German law limits the acquisition of shares in certain, specially regulated branches of industries and imposes additional requirements on it.

According to this for example, the radio and media laws of Germany's single states limit the acquisition of voting shares in companies involved in the broadcasting operation.

According to the Foreign Trade Ordinance (Außenwirtschaftsverordnung), the acquisition of share holdings in domestic companies producing certain military weapons or encryption systems for foreigners or foreign companies shall be possible to a limited extent only. If more than 25% of the voting rights are obtained, the acquisition may be prohibited by the Federal Ministry for Economy and Labour (Bundesministerium für Wirtschaft und Arbeit). For the calculation of whether there would be 25% or more voting

shares achieved by the acquisition, the voting shares of those companies are added in which the acquirer already has a share of 25% or more.

In accordance with the Banking Act (Kreditwesengesetz) the acquirer has to inform the Federal Bank of Germany (Deutsche Bundesbank) and the Federal Agency immediately of its intention to acquire a material interest in a credit or financial services institution. A share is always deemed to be a material interest if 10% of the capital shares or voting rights of such company are held. The shareholder of such shares of material interest is moreover obligated to inform the two institutions of its intention to increase its voting shares to more than 20%, 33% or 50% of the voting or capital shares of a company. The same applies if the aforementioned threshold values shall be undercut due to an intended sale. The federal institution may, within a period of three months after receipt of the acquirer's notification, prohibit the acquisition if, for example, the acquirer is not reliable or if the supervision of the target company is complicated thereby.

In the field of air transport there are also restrictions for the acquirer resulting from the *Aviation Compliance Documenting Act* (Luftverkehrsnachweissicherungsgesetz). Airlines residing and listed in Germany always have to be owned and controlled, directly or indirectly, by the Federal Republic of Germany or its citizens. The observance of these regulations shall be ensured by the *Aviation Compliance Documenting Act*. Any transfer of shares of an airline requires the consent of the respective company. In the case of foreign acquirers obtaining 40% or more of the voting shares, there are several possibilities for the company to reduce the percentage of voting shares held by the foreign company. Aside from the repurchase of company stock and an increase of the share capital, the company may finally claim the compulsory sale of shares of the foreign acquirer.

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## INFORMATION ABOUT THE TARGET AND ITS SHAREHOLDERS

In an intended takeover the acquirer has to decide at an early stage on how it wants to obtain reliable information about the target company. Aside from current information about the financial situation and the operating business of the target company, information about the legal structure of the target company and the structure and identity of its partners or shareholders is also required by the bidder. Therefore, the main source of information is the commercial register which is freely accessible. From this the acquirer may obtain some general information about the target company.

Listed companies are obligated to regularly publish price-sensitive information. Besides publication obligations relating to insider information or director's dealings, any listed company has to issue annual and semi-annual financial statements and, provided that the company is not obligated to make quarterly reports, to make interim management reports. The annual financial statement must be provided within a period of four months after the end of the business year at the latest and particularly includes the audited annual statements and a review of the situation. The semi-annual financial statements have to be made for the first six months of the business year and have to be published two months after the end of the period under review at the latest. The statement comprises a shortened statement of accounts and an interim review of the situation. The interim management reports have to be published by companies obligated thereto within a period of ten weeks after commencement and six weeks before the end of the first or second half of the business year, respectively. These reports have to provide information which allows an appraisal of the development of the company's business activity during the past three months.

Since 1995, companies listed at an organised market in Germany are obligated to publish information relevant to the stock price which is publicly unknown without undue delay. Thus, potential insider conflicts shall be avoided through a prompt and regular publication (so called Ad-hoc-publicity). This is aimed at facilitating an equal level of information of

all market participants and at avoiding inadequate market prices due to defective and incomplete information of the market.

The obligation to publish information on ad hoc basis arises as soon as there exists insider information directly concerning the company. However, the company is exempted from this obligation as long as the non-disclosure is required in order to protect the legitimate interests of the company, a misguidance of the public is not to be feared and the confidentiality of the respective information can be ensured by the company.

Besides the minutes and attendance lists of the shareholders' meeting – which may represent the shareholder structure of the stock corporation only partially – the acquirer of a listed target company has further possibilities to obtain information on the shareholder structure. The person who reaches, exceeds or falls below 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75% of the voting shares as well as the company has to inform the Federal Agency For Financial Services Supervision respectively; hereby the name and address of the respective person has to be registered.

Besides these legally regulated and freely accessible information in the event of a friendly takeover there is basically also the possibility to carry out a due diligence in the target company whether listed or not. However, the managing board of the target company respectively the management board of the target company is not legally obligated to permit such due diligence. The managing board rather decides at its own discretion whether the permission of such due diligence is in the interest of its company and in particular does not conflict with the company's interest to maintain confidentiality.

During a due diligence of a listed company there is another area of tension created by the possibility that the information obtained thereby could be used as so called insider information. During such due diligence the bidder regularly obtains information that is not publicly available to third parties and which could, in case of publication, have considerable influence on the share price. The unauthorized provision of this insider information to third parties as well as the acquisition or sale of shares using this information is not permitted by German law. However, the Federal Agency For Financial Service Supervision has provided legal guidance in order to help bidders to comply with the insider rules in the takeover context. Nevertheless, in the particular case this aspect has to be checked thoroughly.

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## TAKEOVERS OF LISTED COMPANIES ACCORDING TO THE GERMAN TAKEOVER ACT

### Announcement obligations

If a bidder has decided to make a takeover bid, this decision has to be published immediately, making the actual decision to make a takeover bid decisive. Suspicious facts, for example, those caused by speculations by the press do not imply an announcement obligation for the bidder. However, the bidder is not obligated to announce the details of the bid, such as the price and conditions at this stage.

The bidder must inform the Federal Agency For Financial Services Supervision and the managements of the respective stock exchanges. The bidder also has to inform the managing board of the target immediately, in writing, after the announcement of its decision to make a takeover bid. The managing board immediately informs the responsible works council or, if no works council is established, the employees about this announcement. Now, the bidder is also obligated to inform immediately and directly its works council or its employees, if no works council is established.

If the target company took notice of a takeover scenario prior to the announcement of the decision to make a bid, for example in the case of a previous examination, whether a bid

shall be submitted at all, the question arises whether the target company is obliged to make an ad hoc announcement in order to notify the public thereof, as this is a fact which could have influence on the share price of the target company. As set out above, a listed company may stand back from the publication of such insider information provided that certain requirements are met.

## **MANDATORY VS VOLUNTARY TAKEOVER OFFERS**

### **Mandatory Offers**

According to German law the person obtaining the direct or indirect control over a listed company has to announce this immediately – whereby the voting share must be quoted – within a period of seven calendar days at the latest and submit a so called mandatory offer – within a period of four weeks after the change in control has been announced – for the acquisition of all shares of the target company (ordinary as well as preferential shares). The takeover of control is assumed as soon as the bidder holds 30% of the voting rights of the target company. Voting shares of third parties may be attributed to the bidder under certain conditions. Contrary to the voluntary takeover bid – which has to be made if the control of the target group is intended – a mandatory offer means that the takeover of control has already taken place. However, there is no obligation to make a mandatory offer if the control over the target company was reached by means of a voluntary takeover offer. The Federal Agency For Financial Services Supervision may exempt from the obligation to submit a mandatory offer in certain cases if the respective requirements are met. The publication of the change in control shall be made in a similar manner to the announcement of the decision to make a takeover offer.

### **Voluntary Takeover Offers**

A voluntary takeover bid must always be submitted if the bidder has decided to take over the control in a listed target company by means of the acquisition of voting shares. For the calculation and addition of voting shares in the target company the same regulations are applicable as for the mandatory offer. If the bidder wants to obtain control over the target company with the intended acquisition he is obliged to submit an offer for all shares (i.e. ordinary and non-voting preference shares) of the target company.

In the case of a voluntary takeover bid the bidder has to send the bidding documents to the Federal Agency for Financial Services Supervision within a period of four weeks after the announcement of the decision to make a takeover bid; or in the case of a mandatory offer within four weeks after publication of the change in control. This period may be extended by up to four weeks if the bidder cannot comply with this 4-week term due to the fact that a cross-border takeover is intended or if it is not possible to previously take the capital measures required.

If the Federal Agency for Financial Services Supervision has permitted the bidding document, or if 10 days have elapsed and the Agency has not prohibited the offer, the bidder shall immediately publish the bidding document. Such publication regularly has to be made on the Internet and in the electronic Federal Gazette. A publication of the bidding documents prior to the official announcement of the bidding documents is not permitted. Furthermore, after the announcement the bidding documents shall immediately be submitted to the managing board of the target company who forwards it to the responsible works council or directly to its employees, if no works council is established. The bidder is also obliged to directly forward the bidding documents to its works council and its employees.

### **Further course of proceeding**

The term of acceptance stipulated by the bidder in the bidding documents has to be at least four weeks and may not exceed ten weeks.

The bidder is entitled to change certain points of its offer during the term of acceptance. Therefore it may increase the amount of the consideration, offer a further kind of consideration, reduce the minimum acceptance level concerning the voting shares its offer is bound to or even abstain from certain conditions. However once the term of acceptance is stipulated it may not be extended.

Should the bidder change the conditions of its offer as specified above the offerees are allowed to revoke their prior declarations of acceptance. The offerees are even entitled to withdraw if another bidder submits a competing offer after declaration of acceptance.

In case the takeover bid fails due to the fact that conditions of the bidder have not been fulfilled or if it was prohibited by the Federal Agency for Financial Services Supervision, a new offer prior to the expiry of one year is not permitted. However, this regulation is not applicable where the bidder's offer has been mandatory. Nevertheless the Federal Agency may suspend this blocking period upon written request of the bidder and if the target company agrees thereto.

### **Pre-Takeover Share Dealings**

Depending on the time of the respective acquisition, the acquisition of voting shares in a listed target company prior to the final takeover by the bidder is subject to particular requirements.

In principle, the more advanced an offering procedure is the more restrictions are imposed on the acquisition of voting shares by the bidder.

Regardless of the time of the acquisition of shares, in any case the bidder must observe the abovementioned announcement obligations if the certain voting share quotes are reached, exceeded or if voting share quotes fall below these thresholds. Indeed for the acquisition of voting shares, the bidder is not obligated to disclose his takeover intentions to the seller. However, a bidder runs – at least during the preparation period – the risk of the publication of his takeover intention if he acquires voting shares and reaches or exceeds one of the threshold values (3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75% of the voting shares) which implies the obligation to notify the Federal Agency. Under certain circumstances this may be negative for the bidder having regard to the minimum price to be offered on his part for the takeover bid or mandatory offer.

With a view to insider information it would be very problematic if the bidder acquires voting shares in the target company on the free market after his due diligence with the company and the obtaining of insider information as a result thereof. The bidder should regularly act with caution and in either case take legal advice.

After the announcement of its decision to submit a takeover bid and the publication of its bidding documents, the acquisition of shares in the target company by the bidder may have far-reaching consequences. This is a result of the bidder's obligation to publish any quote of shares held in the target company by the bidder itself, the persons acting in concert with it and by their subsidiaries and to inform the Federal Agency thereof at regular intervals as follows:

- weekly after publication of the bidding documents,
- daily during the last week prior to the expiry of the term of acceptance,
- immediately after expiry of the term of acceptance,
- immediately after expiry of the extended term of acceptance,
- immediately after having reached the share required for a squeeze-out under capital market law (95% of the share capital).

Apart from that, the acquisition of shares may have influence on the kind and amount of the consideration to be offered. If the bidder wants for example, to offer shares instead of a monetary consideration for its takeover bid it has to ensure that within six months prior to the publication of the decision to submit a takeover bid or change in control of the target company until the expiry of the term of acceptance, it and the persons acting in concert or their subsidiaries, will have acquired less than 5% of the shares or voting shares in the target company against payment. Otherwise the bidder would be obligated to offer payment as consideration for takeover bid.

The bidder's conduct during the offering procedure may also influence the amount of consideration to be offered. If the bidder and the persons acting in concert or their subsidiaries acquire – during the period after publication of the bidding documents and prior to the publication of the share the bidder will have in the target company after expiry of the term of acceptance – shares in the target company outside the offering procedure and a – on a value basis – higher consideration than the one offered in the takeover bid is granted or stipulated, the offerees must be granted an elevated consideration up to the debit amount. The same applies if the bidder outside the stock exchange acquires shares in the target company to a higher amount than the offered consideration in the takeover bid within the term of one year after the publication of the share the bidder will have in the target company after expiry of the term of acceptance. In this case the higher amount must be paid to those shareholders who already had accepted the original offer.

## **IMPORTANT TERMS OF THE TAKEOVER OFFER**

### **Price**

The takeover offer of the bidder, whether voluntary or mandatory, must stipulate a consideration at a certain minimum price as provided by the regulations of the Takeover Act Offer Ordinance.

The bidder is not bound to this minimum price solely if the fulfilment of its offer does not lead to the takeover of the control of the target company, for example due to the fact that the offer in the first place is a partial offer only. In this case the bidder may determine the value of the consideration to be made at its own discretion as long as all shareholders of the target company are treated equally by this offer.

### **Offer conditions**

The bidder may stipulate conditions for its offer, whereby the effectiveness of the offer may depend on their fulfilment. For example, essential antitrust conditions are accepted on the part of the Federal Agency for financial services supervision. The conditions stipulated by the bidder however, have to be objective and the recipient of the offer has to be enabled to make a reasonable decision about the acceptance of the offer on the basis of the information provided.

Moreover the bidder may make its offer conditional on the acquisition of voting shares in the target company to a certain minimum extent by virtue of this offer. In practice the efficiency of takeover offers is often conditional on the acquisition of at least 75% of the voting shares by the bidder. However, the bidder is entitled to lower the acceptance conditions until the end of the term of acceptance at any time. If this occurs during the last two weeks prior to the expiry of the term of acceptance this term is extended by two weeks automatically for the recipients of the offer. Moreover, the shareholders of the target company are entitled to revoke their acceptance declaration even if they had already accepted the offer at that time.

## Withdrawal of the offer by the bidder

Once the bidder has announced its decision to make a takeover offer it is obligated to execute the further offering procedure. Its offer may only expire if the bidder's conditions relating to this offer are not fulfilled.

## Equal treatment of shareholders

According to German takeover law, any shareholders of the target company who are holding securities of the same kind have to be treated equally. This principle is reflected in various provisions of the *Takeover Act*, for example in the bidder's obligation to pay in certain cases (i.e. acquisition of shares outside of the current or just completed offering procedure) a higher price than offered before. At the same time the bidder may offer considerations of different value for securities of different kinds. In practice this is often applicable for ordinary and preference shares.

## Consideration

The takeover bid or mandatory offer of the bidder in particular, must advise as to the kind of consideration that is offered for the shares of the target company by the bidder. Therefore the consideration may be effected in monetary form or liquid shares.

Takeovers of German listed companies, whereby the bidder offers shares in return have been rather uncommon. In such cases of shares in return the bidder regularly changed own shares against the shares of the target company (for example in the takeover of Orange by Mannesmann or the takeover of the HypoVereinsbank by Unicredito).

If the bidder intends to make a consideration in form of shares it shall, for its counter performance, offer voting shares against the voting shares of the target company. For this consideration the bidder is obligated to offer payment to the shareholders if the bidder, or the persons acting in concert with it or their subsidiaries, have acquired at least 5 % of the shares or voting shares of the target company against payment within the 6-month period prior to the publication of the change in control or the publication of the decision to submit a takeover offer until the end of the term of acceptance. However, usually the consideration is made in the form of payment. The *Takeover Act* therefore provides for an adequate payment to be offered to the shareholders of the target company. For the determination of the adequacy the average share price of the target company as well as a possible earlier acquisition of shares in the target company by the bidder have to be taken into account.

The adequacy of the consideration has been regulated by the Takeover Act Offer Ordinance in detail and is applicable if a consideration is made in monetary form as well as in liquid shares. In accordance with the legal provisions the adequacy of the consideration is calculated as minimum value and to be determined separately for different kinds of shares. The bidder therefore is still granted to offer a consideration exceeding the minimum value determined in order to increase the acceptance of its offer.

The consideration, first of all, has to amount at least to the highest value of consideration granted by or agreed with the bidder, persons acting in concert with the bidder or their subsidiaries, for the acquisition of shares in the target company during the last six months prior to the announcement of the decision to submit a takeover offer, respectively the publication of the change in control.

At the same time the consideration has to be made in compliance with the average weighted domestic share price of the target company during the last three months before the announcement of the decision to make a takeover bid; respectively prior to the publication of the change in control. In case the shares of the target company have been listed on a domestic stock exchange for a period of less than three months the value of consideration is determined on the basis of the average weighted domestic share price

during this period. Therefore, the Federal Agency provides the minimum prices calculated for shares traded on domestic stock exchanges on the basis of these legal provisions upon request.

As previously mentioned, the minimum value calculated thereby often is not sufficient in order to persuade the required number of shareholders of the sale of their shares to the bidder. However, with the publication of the bidding documents at the latest the bidder has to determine the kind and amount of its consideration; nevertheless during the offering procedure, in principle, it may change the kind of consideration, whereby the amount may solely be increased, until one work day before expiry of the term of acceptance. Such change of consideration must be published – similar to the bidding documents – and the Federal Agency must be informed. The shareholders of the target company who have already accepted the earlier offer of the bidder, may withdraw from this contract until the end of the term of acceptance. If such a change is made during the last two weeks prior to the expiry of the term of acceptance the offer of the bidder may still be accepted up to two weeks after expiry of the term of acceptance.

Moreover, a change in the offer value compulsorily occurs if the bidder or persons acting in concert with it or their subsidiaries acquire – against a higher consideration than quoted in the offer – further shares in the target company after the announcement of the offer and prior to the publication of the shares the bidder will have in the target company. The difference incurred must also be paid to the recipients of the offer of the respective kind of share.

### **Financing and Financial Adviser**

The public offer to be made by the bidder may not be made on the condition of financial feasibility. At the time of the submission of the takeover bid or mandatory offer the bidder shall have already made financing agreements assuring the de facto availability of the consideration payable to the shareholders. The bidder has to specify in its bidding documents how the bidder is going to finance the offer. The agreements concluded with credit institutions or other creditors therefore, shall be examined prior to the submission of the offer in order to assure that there are no provisions in conflict with the fulfilment of the bidder's obligations resulting from the offer. Such conditions conflicting with the offer conditions are conditions out of financing agreements as well as regulations entitling the creditor to a one-sided termination of the contract. If shares are to be transferred against a consideration in the form of payment, the bidder will charge an independent securities services provider confirming that any required measures have been taken, in order to ensure that the funds required are available for the overall fulfilment of the offer when the claim for the consideration becomes due.

### **Information of the Target's Shareholders**

As far as the takeovers of listed companies are concerned, the necessary takeover bid has to be addressed to the shareholders of the target company. Under the *Takeover Act* and the corresponding Takeover Act Offer Ordinance the bidding documents published by the bidder must contain inter alia the following information:

- name and other details of the bidder;
- the securities which are subject to the offer;
- type and amount of the consideration offered for the securities of the target company;
- the conditions on which the efficiency of the offer shall depend;
- commencement and end of the term of acceptance;

- details on the required steps which ensure that the bidder is in funds of the capital necessary to completely fulfil the offer and details to expected effects of a successful offer to the pecuniary circumstances, financial and profit situation of the bidder;
- details of the intentions of the bidder with regard to the future business activities of the target company and the bidder and in particular with regard to the employees and their representatives, members of the managing entities and material changes to the terms and conditions of employment and related proposed measures;
- details on cash benefits or any other non-cash benefits granted or promised to the members of the management or supervisory board;
- confirmation of a securities services provider that the bidder has taken all steps necessary to ensure that the bidder is in the funds required to completely fulfil the takeover offer at the time the claim to the cash consideration is due;
- name and other details of the persons acting in concert with the bidder or the target company and the persons whose voting rights are legally attributed to the bidder;
- the valuation methods applied to determine the consideration and the reasons why the application of these methods has been adequate;
- details on requirements and progress of any antitrust filings or regulatory consents with regard to the acquisition of the target company's securities;
- numbers of securities already held by the bidder of persons acting in concert with the bidder and their subsidiaries as well as the number of voting shares held by them;
- a responsibility statement signed by the bidder and the persons taking responsibility for the contents of the bidding documents.

Furthermore, the shareholders of the target company may draw information from the statements which have to be made by the management and the supervisory board.

### **The Target's Board within the Takeover Context**

When a listed company is confronted with a takeover offer, for the management and the supervisory board the question is raised which kind of authorisations and obligations arise from that.

### **Prohibition of unjustified benefits**

The bidder is specifically prohibited to grant or promise any unjustified cash benefits or any other unjustified non-cash benefits to the members of the management or supervisory board of the target company with relationship to the takeover offer. At the same time the members of the management and supervisory board are also prohibited to accept such unjustified benefits offered by the bidder. Furthermore, the bidder has to disclose any promised or granted benefits already within the content of the bidding documents.

### **Obligation to state on takeover offer**

After having received the bidding documents published by the bidder, the management board as well as the supervisory board have to issue a well-founded statement on the takeover offer and as the case may be on any change of the offer without measurable

delay. The statement has to express the board's opinion on type and amount of the offered consideration and on the expected effects of a successful offer on the target company, in particular on its employees, the terms and conditions of employment and the headquarters. Furthermore, the statement has to address the issue of the bidder's intentions to offer a takeover bid. Moreover, if members of the management or supervisory board hold shares in the target company themselves, their statements will also express their opinion and intentions with regard to the takeover offer.

Additionally, after reception of the bidding documents, the management board of the target company is obliged to forward the bidding documents to the competent works council or, if such a works council does not exist, directly to the employees. If the works council decides to make an own statement on the takeover offer, the management has to attach this statement to its own statement.

The statements made by the management and the supervisory board and, as the case may be, by the works council, must be published immediately and be forwarded to the works council.

### **Prohibition of counter measures**

After a decision to submit a public takeover offer has been published, the management board of the target company in principle is not allowed to take any action that could prevent the success of such an offer. However, there are certain exemptions to this principle. Following the regulations of the *Takeover Act* the prohibition of counter measures does not apply to the following actions taken by the management board of the target company:

- actions which would have been taken by an orderly and diligent manager of a company which is not confronted with a takeover offer;
- search for a competitive offer;
- actions the supervisory board has agreed to;
- actions taken on the basis of a prior corresponding authorisation given by the shareholder's general meeting.

However, after the EU Takeover Directive has been transformed into German Law, the articles of association of German stock corporations from now on may determine that the above mentioned exemptions do not apply to the company. If the articles of association contain such regulation, solely the following actions taken by the management board of the target company are considered to be permitted:

- actions taken by the management board or the supervisory board with prior authorisation of the shareholder's general meeting given after the decision to submit a takeover offer was published;
- actions taken within the daily business operations;
- actions outside the daily business operations which contribute to the realisation of measures having been considered to be taken and partially realised prior to the publication of the decision to submit a takeover offer;
- search for a competitive offer.

The shareholder's general meeting of a company whose articles of association determine that the exemptions mentioned at first are not applicable may resolve that these exemptions apply. This is only possible if the articles of association of the bidder or a company dominating the bidder do not determine that these exemptions neither are

applicable. The required resolution of the shareholders' general meeting will be valid for 18 months at the longest.

### **Squeeze-out of Minority Shareholders**

According to German law there are different possibilities for the majority shareholder to acquire the remaining shares from minority shareholders compulsorily. Thereby, it is differentiated between the squeeze-out under company law, in particular the Stock Corporation Act (Aktiengesetz), and the squeeze-out under capital-market law which has been implemented in the *Takeover Act* by means of the EU takeover directive. The latter squeeze-out proceeding shall only be possible for the majority shareholder who holds at least 95% of the voting capital of the target company after a successful takeover or mandatory offer.

The squeeze-out proceeding under company law may be introduced by the shareholder who is directly or indirectly holding shares, no matter if they are voting shares or not, in the amount of at least 95% of the share capital of a German stock corporation or a partnership limited by shares; irrespective of whether it is a listed company or not. The objective of this proceeding is to transfer the remaining shares against payment of an appropriate cash compensation by operation of law to the majority shareholder. This is realised by a shareholders' transfer resolution. In the course of the preparation of the shareholder's meeting the majority shareholder will prepare a report stating the conditions for the transfer and the appropriateness of the cash compensation. The appropriateness of the cash compensation, moreover, shall be examined by a court-appointed auditor. The majority shareholder is also obligated to present a statement of a bank which guarantees in case of registration of the transfer resolution with the commercial register the fulfilment of the obligation to immediately effect the cash compensation to the minority shareholders. For the transfer resolution adopted by the shareholder's meeting an application for the registration with the commercial register has to be filed. With the registration of the transfer resolution any shares held by minority shareholders are transferred to the majority shareholder by operation of law.

Minority shareholders – under certain premises – may challenge the transfer resolution itself but will not be heard with the reasons that the cash compensation fixed by the majority shareholder is inappropriate. The appropriateness of the cash compensation may be only examined by the minority shareholders through a special legal proceeding, which does not suspend the registration of the transfer resolution and the efficiency of the squeeze-out. If the transfer resolution is challenged, which is happening in practice very often, the transfer resolution basically cannot be registered with the commercial register as long as the legal challenge is ongoing. Thus, the squeeze-out can possibly be delayed for years. The company may, under certain, narrow circumstances, request the competent court to declare through court order that the challenging of the transfer resolution does not suspend the registration of the transfer resolution with the commercial register. If so ordered, the squeeze-out can be registered despite the fact the legal action is still pending.

The squeeze-out proceeding under capital market law shall be possible for the shareholder who is directly or indirectly holding shares in the amount of at least 95% of the voting capital of the listed target company, after a successful takeover or mandatory offer. The bidder may file an application with the only competent Regional Higher Court (Landgericht) in Frankfurt am Main for the transfer of the remaining voting shares against the grant of an appropriate compensation by court's decision. The application has to be filed within three months after expiry of the acceptance period. The consideration granted for the transfer of shares must be appropriate. The appropriateness of the compensation is assumed if the bidder has, by means of the takeover or mandatory offer obtained at least 90% of the share capital being subject to the offer. Such compensation has to be made in line with the consideration of the takeover or mandatory offer; however a cash compensation always has to be offered alternatively. The outstanding shares will be transferred through a legally effective court order which is only challengeable by

immediate complaint (sofortige Beschwerde). The immediate complaint, whereby also the appropriateness of compensation may in principle be examined, therefore has suspending effect.

The main difference between these two squeeze-out proceedings is a shareholder's resolution is not needed under capital market law. This may effect a considerable facilitation and speed-up of the squeeze-out proceeding. However, due to the fact that with an immediate complaint, the appropriateness of the compensation may in principle be examined, a speed-up of the proceeding may only be expected if the appropriateness of the compensation may be assumed irrefutably. This is only applicable if the bidder, by means of the takeover or mandatory offer, has obtained at least 90% of the share capital concerned by the offer. In this case the squeeze-out proceeding in compliance with the requirements of the *Takeover Act* implies a considerable speedup in comparison to the squeeze-out stipulated by the Stock Corporation Act.

Another advantage of the squeeze-out proceeding under capital market law is the fact, that it is limited to the voting shares of the target company while the squeeze-out proceeding under corporate law covers all classes of shares. Additionally and contrary to the squeeze-out under corporate law a shareholder holding 95% of the voting shares may start the capital market squeeze out proceeding irrespective of any non-voting preferential shares outstanding.

The sell-out provision of the takeover directive, which has also been laid down in the *Takeover Act* recently, is in close conjunction with the squeeze-out regulations. Minority shareholders may, according to this regulation, accept the offer of a takeover bidder even within a period of three months after expiry of the acceptance period if the bidder is entitled to execute the squeeze-out proceeding according to the *Takeover Act* after a successful takeover or mandatory offer.

### **Alternatives of achieving effective control**

For a bidder, who after a takeover offer does not hold 95% of the voting shares in the target company, besides the possibility of a squeeze-out, there are several alternatives which also lead to achieving the effective control of the target company.

### **Domination and profit transfer agreement**

The bidder could also conclude a domination and profit transfer agreement with the target company. Such agreement would enable the bidder to give legally binding instructions to the management board of the target company. However, the conclusion of such contract requires inter alia, a resolution of the shareholder's general meeting which at least must be resolved by a majority vote of 75% of the nominal capital represented in the shareholder's meeting. Additionally, the outstanding shareholders have to be offered sufficient compensation.

### **Merger**

Another possible option is a merger of the bidder and the target company. The merger requires inter alia, a resolution of the shareholder's general meeting which at least must be resolved by a majority vote of 75% of the nominal capital represented in the shareholder's meeting. As a result of such merger the target company ceases to exist. The shareholders of a target stock corporation receive shares of the surviving stock corporation respectively, where the bidder is not a stock corporation, an adequate consideration in monetary form. The adequateness of the equivalent in both cases has to be proofed by an court-appointed auditor.

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## SUMMARY

Although – with regard to the total numbers of mergers and acquisitions in Germany – those takeovers of listed companies to which the regulations of the *Takeover Act* apply seem to have a minimal importance, their economic importance is immense. In the year 2007 takeover offers for listed companies were published with a transaction amount of 6.4 billion €.

Takeovers in Germany – besides the anti-trust and regulatory regulations applicable – have, as far as listed companies are subject to the takeover, to comply with the regulations set by the *Takeover Act*.

The transformation of the EU Transparency Directive and the Takeover Directive into German law as well facilitated the possibilities of the interested bidder to obtain information necessary for its decision whether a takeover offer shall be submitted or not. Once the bidder has decided to do so or it even has acquired a certain number of shares in the target company his obligations with regard to the takeover offer are determined by the *Takeover Act*. The essential content of the bidding documents to be published are determined by the Takeover Act Offer Ordinance.

Even if the bidder under German law has further possibilities to achieve effective control over the target company, a successful takeover offer may authorise the bidder to execute the squeeze-out proceeding under capital market law. This proceeding will finally end up in acquiring all available shares in the target company by the bidder.