PUBLIC M&A

Germany

LEXOLOGY
Getting The Deal Through

Consulting editor
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Quick reference guide enabling side-by-side comparison of local insights into public M&A issues worldwide, including types of business combination; principal laws and regulations; cross-border and sector-specific considerations; governing laws; filing and disclosure requirements; duties of directors and controlling shareholders; shareholder approval and appraisal rights; hostile transactions; break-up fees and frustration of additional bidders; government influence; conditional offers; financing; minority squeeze-outs; waiting and notification periods; tax; labour and employee benefits; restructuring, bankruptcy or receivership; anti-bribery, anti-corruption and sanctions issues; and recent trends.

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STRUCTURES AND APPLICABLE LAW

Types of transaction

How may publicly listed businesses combine?

Restructuring and reorganisation

The German Transformation Act (UmwG) provides four types of transactions that can be used by listed companies to restructure or merge:

Merger: two legal entities can be combined in such a way that either only one of the two companies continues to exist or both cease to exist and an entirely new company is created.

Demerger: regarding assets and liabilities the German law recognises the forms of demerger, splitting and spin-off.

Change of legal form: in this case only the legal form of the company is changed. For example, shareholders of an unlisted GmbH can become shareholders of a (listed) AG. It is also possible to convert a corporation into a partnership.

Transfer of assets: furthermore, it is possible for assets to be transferred in exchange for cash. However, this is not an independent type of conversion under transformation law.

Company acquisition (shares/assets)

Acquisition of shares (share deal): shares can be acquired by private purchasers via the stock exchange or by public takeover. These private or public offers can take the form of cash offers or exchange offers, in each case also in combination. Offers can be structurally differentiated into public acquisition offers, voluntary takeover offers and mandatory offers. It should be noted that in the case of a pure share consideration, a non-European offeror can only settle this on a European market.

Acquisition of assets (asset deal): assets can also be paid for with shares or optionally in cash. However, if significant parts of the business assets are transferred to the acquirer, this may constitute a transfer of business. This has far-reaching consequences, as in this case all existing employment contracts are also automatically transferred (unless the employee objects).

Cooperation models

Models of cooperation under German law arise primarily through joint venture agreements. In this case, a legally independent new company is created by two or more partners with the aim of long-term cooperation. However, there is also the possibility to cooperate through licence agreements or franchise agreements or to commit to cooperation within the framework of a community of interest or strategic alliance.

Law stated - 03 July 2022

Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

In Germany, mergers, cooperation and reorganisations are mainly governed by the following statutes:

- the Civil Code (basic form for agreements under private law);

- the Commercial Code (specifics among merchants);
- the Stock Corporation Act (concerning the most important form of company listed on the stock exchange);
- the Transformation Act (forms of restructuring and mergers);
- Securities Trading Act (regulation of securities trading);
- Takeover Act (acquisition of shares in companies);
- Securities Prospectus Act;
- Electronic Securities Act;
- Stock Exchange Act;
- Insolvency Code;
- Act against Restraints of Competition;
- Co-Determination Act;
- Works Constitution Act; and
- One-Third Participation Act.

For obvious reasons, the amended Foreign Trade and Payments Act (AWG) must also be taken into account. Since 2020, the AWG stipulates that investments by investors from non-EU countries into German companies will in future be subject to significantly higher hurdles than before and that the threshold for government intervention and prohibition of foreign investments will be significantly lowered. For the first time, the law defines the concept of threat, which specifies when a takeover endangers public safety and order. In addition, in response to the Corona crisis, the security-relevant areas were expanded so that the acquisition of at least 10 per cent of the voting rights of companies from the healthcare sector is now considered subject to notification and review. It should be noted that the character of an investor being from a non-EU country is determined according to the ultimate beneficial owner of the investing company.

European Union law (particularly regarding merger control and the rules on insider trading and ad hoc disclosures under the EU Market Abuse Regulation, MAR) must also be considered in certain (generally larger) transactions.

Law stated - 03 July 2022

Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Listed German corporations can be acquired across borders by way of a merger, takeover or pure acquisition. Cross-border mergers take place in accordance with the German Transformation Act. For example, German law requires a merger plan, merger report, certificates and reports from independent experts. It also sets out certain requirements for the procedure and form of the transaction. Under certain conditions, German companies can also be restructured in a cross-border tax-neutral manner with the participation of EU companies or even relocated abroad.

Currently, the German legislator is planning to make the implementation of cross-border conversions simpler, more efficient and more legally secure. In the course of this, a corresponding European Reorganization Directive must be implemented into German law by 31 January 2023. This directive is intended to create a uniform and digitally networked procedure throughout Europe for cross-border mergers, demergers and changes of legal form, which should also enable the company registers involved to communicate with each other. At present, a draft of the directive is already available on which comments can be submitted.

Law stated - 03 July 2022

Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Germany considers certain industries to be particularly important and protects them accordingly with additional regulations and laws. These are then regularly subject to completely new or at least more stringent notification and approval requirements. In such industries, it is particularly easy for the supervisory authority to prevent a planned transaction.

These include above all banks and insurance companies. But they also include all transactions involving companies in the media, communications and broadcasting sectors. Under the German Foreign Trade and Payments Ordinance, the German government can also prevent a foreign investment of more than 10 per cent in a defence company. The same applies to companies in the healthcare sector since the covid pandemic 2020.

Law stated - 03 July 2022

Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

The basis for any transaction is first a civil share purchase agreement (SPA). The extent to which more documentation based on other legal systems is also required depends on many different factors. For example, the type of shares (registered share, bearer share, registered share with restricted transferability, common share, preferred share) and whether the share is traded on the stock exchange can play a role, as can the type of transaction (public takeover, cooperation model, restructuring or merger). Differences also arise if the company's own shareholders acquire the shares or if the shares are subscribed, for example, through a capital increase. In addition to the share purchase agreement, further documents often have to be submitted: for example, in the case of a public takeover, the relevant offer documents after the announcement of an intention to make an offer. Securities may also not be offered to the public without a prospectus, which must be approved in advance by BaFin.

The legal documentation required will depend on the type of business combination chosen, namely, reorganisations and mergers; acquisitions of a certain stake or a public takeover; or cooperation models.

The requirements for acquisitions of shares of a German stock corporation will depend on the type of shares being acquired (namely bearer shares, registered shares, etc) and whether shares were bought over the stock exchange, subscribed in connection with a capital increase or bought from other shareholders. Depending on the structure of the transaction, more documentation than just a share purchase agreement (SPA) may be required. Typically, SPAs and also other documentation in connection with the acquisition of shares in a publicly listed company are governed by German law.

The Reorganisation Act sets out certain formal requirements as to form and procedure for the respective types of reorganisations and mergers under the Act (eg, a merger agreement always required notarisation).

A public tender offer will require an offer document governed by German law, otherwise, it will not be accepted by the public supervisory authorities.

Law stated - 03 July 2022

FILINGS AND DISCLOSURE

Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

Depending on the structure and volume size of the transaction, merger control filings and corresponding fees may be required for both public and private transactions. In the case of public takeovers of listed stock corporations, an offer document must be filed by the bidder with the German Federal Financial Supervisory Authority (BaFin) no later than four weeks after the announcement of the intention to make the offer. The information in the offer documents must be complete and correct; otherwise, the bidder may be liable to the shareholders if material information is provided incorrectly.

New Foreign Trade and Payment Act

However, for special sectors of the German economy, which are classified as particularly systemically important, there is a special investment review under the Foreign Trade and Payments Act and the Foreign Trade and Payments Ordinance In this context, the Federal Ministry of Economics and Climate Protection can examine the direct or indirect acquisition of a domestic enterprise or a shareholding in a domestic enterprise by a foreigner on a case-by-case basis and subject it to the investment examination procedure on the basis of a notification requirement. A distinction is made between an intersectoral examination procedure and a sector-specific examination procedure. Only non-EU nationals who wish to acquire domestic company shares are affected.

Commercial register

In Germany, registration in the commercial register is also regularly required. This is intended to fulfil a publication, proof, control and protection function vis-à-vis the public in order to guarantee transparency and legal certainty. Typically, the commercial register contains, among other things, information on the company name, registered office, branch and subsidiaries, the object of the company, persons authorised to represent the company, the legal form of the company, as well as the share capital or nominal capital and the name of the business owner. In connection with takeovers, restructurings and mergers must be registered in the Commercial Register in order to become effective. This also applies to some types of contracts and other measures, such as domination agreements, capital increases, profit transfer agreements and their respective (if necessary) termination.

Notarial authentication

There is no direct stamp duty in Germany. However, there are types of agreements that require notarisation and are regularly associated with a business combination. These include in particular the merger agreement and the purchase of real estate. The notarial costs depend on the volume of the transaction or the value of the property. Additional requirements, such as notarisation in English, require additional costs. For companies holding German real estate, it is generally also advisable to obtain tax advice with regard to real estate transfer tax.

Law stated - 03 July 2022

Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

In Germany, there is neither a general disclosure obligation nor a public database that discloses all material contracts in connection with a business combination. The information that must be disclosed depends on the structure and nature of the transaction. However, in the case of a business combination requiring the approval of the annual general meeting, all material agreements must be disclosed to the shareholders. They should still be in a position to make informed and appropriate decisions about their ownership interests after a corresponding transaction. This includes in particular the purchase price and the valuations and assumptions on which these are based. In the case of a public takeover, the bidder must publish in its offer document the extent of its future intentions with regard to the target company, its management and employees. Shareholders of listed stock corporations of German origin are required to notify the stock corporation and BaFin in writing without undue delay (ie, within four trading days at the latest), if they directly or indirectly reach, exceed or fall below thresholds of 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent of the voting rights in the stock corporation.

Disclosure of material shareholdings

If the required notifications are not submitted for the above-mentioned relevant shareholding limits, the rights attached to the shares (voting rights, information rights, attendance at annual general meeting, etc) shall become invalid. If the shareholder even fails to comply with the notification requirements intentionally or through gross negligence, the voting rights shall remain ineffective for a period of six months after the final submission of the required notifications.

It should be noted that such failures result in liability of the shareholder with fines of up to €2 million for natural persons and up to €10 million for legal entities. Alternatively, it may be 5 per cent of the sales of the entire group of companies in the relevant fiscal year, if this amount is higher. In addition to this, the sanctions and measures are published on BaFin's website with the names of the responsible person.

Furthermore, there are rules as to when certain voting rights can even be attributed to certain shareholders. For example, when cash-settled derivatives and other instruments that enable the holder to acquire shares trigger disclosure obligations or when someone holds shares on behalf of another.

Acquirers who meet or exceed the 10 per cent threshold or a higher threshold must inform the issuer of the source of the financial resources used for the acquisition and the purpose of the acquisition and so that the issuer can fulfil its obligation to disclose this information.

However, this rule does not apply if:

- the threshold has been reached through a public offer within the meaning of the Takeover Act;
- the issuer's articles of association contain a provision releasing the shareholder from the obligation to inform the issuer; or
- the shares are acquired by the Financial Market Stabilization Fund (state fund facilitating certain conditions related to the financial crisis under the Financial Market Stabilization Act).

Since the EU Market Abuse Regulation of 2016 (MAR), directors and officers (as well as persons closely associated with them) of listed stock companies must notify BaFin and the company itself of the purchase and sale of shares in their own company. Such transactions are also disclosed on BaFin's website and published via news providers

networked throughout Europe. The company is required to make such publication within two business days after it was informed by the director, the officer or closely related person about the transaction .

Periodic and ad hoc reporting of listed securities

Also, since the MAR, it has been regulated that listed business combinations are subject to detailed rules requiring certain periodic and ad hoc announcements. This is necessary to ensure that the public is informed of new facts that may have a significant impact on the stock market price and the company's valuation. This includes, in particular, the issuance of new shares, the sale or acquisition of large assets or shares, mergers, and the exercise of conversion rights and subscription rights, about which the public must be informed. This also applies to business combinations that are financed by the issue of new shares.

Act against Restraints of Competition

Under certain conditions, mergers between companies are subject to merger control by the German Federal Cartel Office. They may only be implemented after clearance has been granted. In doing so, the Federal Cartel Office examines and assesses the effects that a merger will have on competition.

The following types of transactions fall within the scope of German merger control regulations:

- acquisition of at least 25 per cent of the capital or voting rights of the target company;
- acquisition of the assets or a substantial part of the assets of the target company;
- acquisition of control of another company; and
- any other agreement or combination between companies whereby one company can exercise a competitively significant influence over another company.

In addition, there is an obligation to notify the proposed concentration to the Federal Cartel Office if:

- at least one of the companies involved has consolidated sales of more than €50 million in Germany;
- the combined worldwide group sales of all the companies involved exceed €500 million;
- at least one other party involved achieves group sales of more than €17.5 million in Germany; and
- a notification to the European Commission pursuant to Regulation No. 139/2004 (EC Merger Regulation) is not required.

A notification requirement also exists if the turnover threshold of €17.5 million is not met, if the value of the consideration exceeds €400 million and if the target company is active to a significant extent on domestic markets. The same German merger control rules also apply to mergers involving non-German companies or taking place outside Germany, provided that the merger has a clearly appreciable impact on the German market. This is a discretionary case; furthermore, the thresholds must be exceeded in this case as well. However, the Federal Cartel Office also informally publishes a list of notified transactions on its website: www.bundeskartellamt.de.

Without the necessary antitrust approval, a transaction may not be executed (ie, concluded). It is thus ineffective and the parties requiring approval remain largely unable to act. Any enforcement measure is an administrative offence under the Act on Regulatory Offences and can accordingly lead to substantial fines.

Law stated - 03 July 2022

Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

Shareholders of listed stock corporations of German origin (that is, in principle, whose registered office is located in Germany) are required to notify the stock corporation and BaFin in writing without undue delay (at the latest within four trading days) of directly or indirectly reaching, exceeding or falling below thresholds of 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent of the voting rights in the stock corporation in a single announcement showing the aggregated voting rights, held directly or indirectly. Failure to lodge the required notices renders the rights attached to the shares (eg, voting rights) ineffective. If the shareholder fails to meet the notification requirements intentionally or owing to gross negligence, the voting rights will remain ineffective for a period of six months after the required notifications have been finally submitted. In addition, such failures may result in shareholder liability with fines, with respect to individual persons of up to €2 million and with respect to legal entities of up to the higher of €10 million or 5 per cent of the turnover of the whole group of companies in the relevant business year. Furthermore, measures and sanctions will be published on BaFin's website with the names of the respective responsible person.

There is a set of rules regarding when certain voting rights are attributed to certain shareholders – for example, when somebody is holding shares on their behalf or they own call options. In addition, legislation that came into effect in February 2012 and was amended in November 2015 tightened disclosure obligations, so that cash-settled derivatives and other instruments enabling the holder to acquire shares also trigger disclosure obligations.

Shareholders reaching or exceeding the threshold of 10 per cent or a higher threshold need to inform the issuer about the purpose of the acquisition; and the source of the financial means used for the acquisition. Upon receipt of such information, the issuer is obliged to publish it. This rule does not apply if:

- the articles of association of the issuer include a provision releasing the shareholder from the obligation to inform the issuer;
- the shares are acquired by the financial-market stabilisation fund (the state fund incorporated to ease certain
- conditions in connection with the financial crisis, as defined in the Act to Stabilise the Financial Markets); or
- the threshold has been reached via a public offer as defined in the Takeover Act.

Under the EU Market Abuse Regulation, which replaced the Directors' Dealings Rules of the Securities Trading Act as of 3 July 2016, once a total amount of €5,000 has been reached within a calendar year directors and officers (as well as closely related persons) of listed stock corporations must disclose any sale and purchase of their own company's shares to the company and to BaFin. These transactions must be disclosed by the company via media with European-wide coverage such as an electronic news provider, must be transmitted to the company register, and are disclosed in the annual document and on BaFin's website. Whereas previously, the company was required to publish any directors' dealings within three business days after the transaction occurred, since 1 January 2021 it is required to make such publication within two business days after it was informed by the director or officer (or closely related person) about the transaction.

Law stated - 03 July 2022

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

General duties of board members and shareholders

The members of the management board and supervisory board of a stock corporation must act in the best interest of the corporation and are under a duty to manage the business with the care of diligent and conscientious managers. Breach of this duty (eg, gratuitous disclosure of confidential business information) can lead to personal liability on the part of, or criminal sanctions against, the respective members. Shareholders of a stock corporation also have certain duties to each other and to the stock corporation (eg, not to commit fraud against minority shareholders). The powers and duties of the shareholders are defined in the Stock Corporation Act.

Duties of the bidding stock corporation in a public tender offer

Under the Takeover Act, the bidder's management must:

- treat shareholders equally, in particular with regard to information provided and price paid for shares;
- provide target shareholders with sufficient time and information to take a reasoned decision;
- proceed without unnecessary delay, so as not to obstruct the target in the pursuit of its business unnecessarily;
- not distort the market;
- secure financing of the bid; and
- comply with the disclosure requirements, for example, publication of the offer document; publication of all purchases of target shares after the publication of the offer document; and disclosure to the public of the number of target shares held at the beginning of the offer period, then the number of tendered shares on a weekly basis. In the last week of the offer period, the bidder must disclose the number of tendered shares on a daily basis.

Duties of the target stock corporation in a public tender offer

The duty of the target stock corporation's management board in a public tender offer is to:

- act in the best interest of the target company, but not necessarily in the interest of the shareholders;
- abstain by the management board from any measures that could influence the success of the offer (however, with certain exceptions);
- comply with certain disclosure requirements (including ad hoc publicity);
- equal treatment of all shareholders;
- publish a substantiated statement on the offer (not later than two weeks after the tender offer has been published);
- implement the tender offer procedure as expeditiously as possible;
- seek cooperation with its supervisory board; and
- ensure no market distortions regarding the trade in shares of the target or bidder or other companies affected by the offer are created.

Law stated - 03 July 2022

Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

Reorganisations and mergers

Pursuant to the Reorganisation Act, any reorganisation (merger, demerger, transfer of assets or change of legal form) requires a resolution of the general meeting approving the reorganisation with a majority of at least 75 per cent of the capital represented at the general meeting.

Acquisitions (share deal or asset deal)

In a public takeover, it is up to the shareholders to decide whether they accept the offer. The transfer of shares in or of assets of a public company generally does not require approval by the shareholders.

However, case law (the Holzmüller doctrine as amended by Gelatine) requires shareholders' approval by a majority of at least 75 per cent of the share capital represented at the general meeting to complete certain transactions that affect almost all of a company's assets. If all assets are disposed of, not case law but statutory law, (namely, the Stock Corporation Act) requires that 75 per cent of the share capital represented at a general meeting approve of the disposal.

Cooperation models

An ordinary business cooperation does not require shareholders' approval. Shareholders only have their general right to information about the company's affairs.

Law stated - 03 July 2022

COMPLETING THE TRANSACTION

Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

Compared to UK or US standards, unsolicited takeover attempts are still rare in Germany. However, as liquidity and transparency of capital markets have developed and private investors and institutional investors increasingly encouraged stock corporations to focus on shareholder value, the market attitude sees hostile takeovers in a more favourable light lately.

Under the current version of the German Takeover Act the target company may defend itself against hostile transactions (see below). Germany has taken the liberty to opt out of the stricter rules provided for in the EU Takeover Directive, and there is no inclination of corporations that may be the target of a hostile takeover to voluntarily opt in.

The history of hostile takeovers in Germany shows that targets very rarely have the financial means as well as the strategic foresight to successfully defend themselves against a hostile takeover attempt. So, while the target may make it difficult for the bidder or provoke a higher offer price, if an unsolicited offer is financially attractive, the 'hostile takeover battle' is mostly a PR battle and very rarely a legal one. Usually, it is rather a PR battle than a legal one. Thus, it is not the elaborate defence strategies, but more the comparably low free float of many German stock corporations and the stricter limitations of undisclosed stake-building that decreases the possibility of seeing too many hostile takeovers; the latter were introduced into German stock corporation law after the failed bid of Porsche to take over the

much larger Volkswagen AG by using elaborate leverage and cover-up strategies to hide from public attendance that, through a trust scheme devised by Porsche's investment bankers, it had already acquired (the rights to acquire) more than 30 per cent of Volkswagen's share capital in 2008.

The largest unsolicited takeover offer in Germany since the introduction of the Takeover Act was Merck's bid for Schering in 2006, which failed owing to Bayer's higher competing offer. It was followed by Vonovia's hostile takeover offer for Deutsche Wohnen in 2015, which lacked sufficient acceptance and Schaeffler's bid for Continental, which as far as the tender offer is concerned, had a friendly outcome.

The initially unsolicited bid for Techem in 2007 was also an interesting transaction; it ended up being a joint bid by BC Partners and Macquarie but failed because it did not exceed the required acceptance threshold. It is important for a bidder to realise that the 'effective control' threshold lies at 75 per cent of the voting rights, as this is the majority required at the shareholders' general meeting for major structural changes to the target stock corporation. Macquarie launched another – successful – takeover offer after having acquired more than 75 per cent of the shares in Techem by several share purchases outside the stock exchange.

The unsolicited takeover offer of ACS for Hochtief is one of the rare examples of an unsolicited offer that did not have a friendly outcome or fail owing to a higher competing offer. It was also, however, not a fully fledged takeover, but the offer was at a minimum price and only targeted to use the possibilities granted under the law to build a larger stake once the control threshold is crossed without being subject to the statutory minimum price rules. There have also been several hostile takeover attempts in recent years that did not trigger discussions about the rules governing takeovers. Interestingly, though, in 2014 we saw, for the first time, a successful takeover defence when Weidmüller's takeover attempt of R Stahl failed. In addition, in 2015–2016 the first hostile 'virtual' offer by Potash for K+S was withdrawn, the takeover attempt by Vonovia for Deutsche Wohnen failed with a rather low premium and Tocos' hostile takeover of Hawesko notably initiated by an entity owned by a supervisory board member of the target. Further examples of takeovers that at least started as hostile include Standard Industries/Braas Monier (2016), Pfeiffer Vacuum/Busch (2017), Uniper/Fortum (2017) and Grammer/Hastor (2017).

In 2019, the market saw a hostile takeover offer by the Austrian company AMS for the German company Osram, which subsequently led to legislative changes. After the first takeover failed because the number of shares tendered into the AMS offer did not reach the minimum acceptance condition AMS had built into its offer, AMS launched a second takeover offer via a wholly owned subsidiary. This triggered controversy as the Takeover Act prohibits a second offer by the same bidder within one year. The Federal Financial Supervisory Authority (BaFin) took a formal approach applying the strict wording of the statute and, because it only mentions the bidder but no wholly owned subsidiaries, did not intervene. Therefore, the offer was ultimately successful. However, the German legislature reacted by passing legislation that prohibits a new takeover offer not only by the bidder itself, but also by persons acting jointly with a bidder within a year of the first offer.

As regards defence against hostile transactions, owing to the 'duty of neutrality', after the decision to launch an offer has been published, the management board must not take any action that could prevent the success of the takeover offer.

However, the following (defensive and offensive) measures by the management board are permitted without the prior approval by the general assembly of shareholders:

- the search for a 'white knight' (ie, a friendly third party, normally a strategic investor) who is willing to match the hostile takeover offer;
- any action within the scope of the management board's powers if approved by the supervisory board and if the law (eg, the Stock Corporation Act) does not set forth further requirements; and
- actions that would have reasonably been taken if no offer had been launched, for example, measures in the ordinary course of business, measures to execute contractual obligations entered into before the bid or measures executing the established strategy of the target company.

Furthermore, the shareholders may, under certain restrictions, authorise the management board to take actions within the scope of the powers of the shareholders' meeting before and independent from any takeover offer.

These provisions seem to provide a wide scope to management. However, their impact is mitigated by the fact that pressure from institutional shareholders will prevent most listed companies from using the mechanisms available and because of the necessary compliance with other legal requirements (eg, under the Stock Corporation Act), in particular the duty to act in the best interest of the company. Also, the duty to treat all shareholders equally as set out in the Stock Corporation Act restricts the ability of the target to, for example, use a poison-pill defence (namely, 'flip-in' or 'back-end' provisions) as it is known in other countries.

As provided for in the EC Takeover Directive (Directive 2004/25/EC of 21 April 2004), the general assembly of shareholders may also impose a stricter 'duty of neutrality', which would then mean that only certain actions of the management board would be permitted. However, in practice, this is irrelevant because no company opts for a stricter duty voluntarily.

Other 'poison pills', such as maximum or multiple voting rights, for example, are not permitted under the German takeover law.

Law stated - 03 July 2022

Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

Although increasingly 'en vogue' in cross-border transactions, break-up fees are so far not standard in public takeover situations. They are, however, often seen 'PIPE'- transactions (ie, in agreements with shareholders of public companies). Nevertheless, break-up fee arrangements (and, even more so, reverse break-up fee arrangements) with a target that is a German public company are so far not market standard; this may be the case since under German take-over law, break-up fee agreements or clauses are subject to a number of limitations (eg, the target company's management board may only enter into them if they are in the best interests of the target).

The second reason why break-up fee clauses are rare in Germany is that Germany has a well-established legal and court history with regard to pre-contractual liability if one party breaks off negotiations unreasonably after it has induced confidence that an agreement would be reached, based on the well-established principle of culpa in contrahendo.

Law stated - 03 July 2022

Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

Unlike in other European countries, there is generally no such thing as a golden share in Germany. A notable exception is the VW Act, which creates a special legal situation for Volkswagen. The VW Act has been found to be partly inconsistent with Community provisions on the free movement of capital by the European Court of Justice (ECJ). In November 2008, the German parliament made some minor amendments to the VW Act. The ECJ approved these amendments in October 2013.

Germany has a comprehensive foreign investment control regime that covers all sectors and businesses, provided that certain categories of acquirers reach or exceed certain thresholds of voting rights in German target companies.

Under the Foreign Trade and Payments Act (AWG) and the Foreign Trade and Payments Ordinance (AWVO), (direct or indirect) acquisitions of 10 per cent or more of the voting rights in German businesses active in the defence or encryption sectors by any foreign investor require a notification to, and a prior approval by, the Federal Ministry for Economic Affairs and Energy (BMWi). The same is true for the acquisition of 10 per cent or more of the voting rights in German targets active in certain sensitive civilian sectors by any non-EU or non-EFTA investor. In both cases, completion of any such acquisition is subject to a statutory condition precedent of the BMWi granting approval and the investment is subject to a strict gun-jumping prohibition: without obtaining BMWi's prior approval, the consummation of the investment would be null and void and certain closing steps may constitute criminal offences under German law.

The relevant sensitive civilian sectors include in particular the operation of critical infrastructures (eg, in the energy, water, banking, insurance, transport, traffic, health or food sectors) and software specifically designed for their operation, cloud computing services and certain business sectors related to healthcare and infection protection. Outside the scope of such mandatory approval requirement, the BMWi has the power to review, veto or stipulate conditions for (direct or indirect) acquisitions of 25 per cent or more of the voting rights in any other German business by a non-EU and non-EFTA investor if the public order and security of Germany, another EU member state or in relation to projects or programmes of Union interest is potentially impaired.

The BMWi may decide to review an investment within two months after gaining knowledge of the decision to issue a takeover offer or of the publication of the assumption of control (eg, by way of a notification or an application for an approval or a compliance certificate). Upon application, the BMWi may issue an approval or a compliance certificate, as the case may be, within the statutory period of two months (Phase I), unless the BMWi initiates an in-depth review (Phase II) leading to a further four months review period upon receipt of the complete set of required information (with certain statutory extension possibilities).

Several amendments to the AWVO and the underlying AWG in 2020 and 2021 have substantially tightened the German foreign investment control regime. In particular, the scope of investments subject to the reduced threshold of 10 per cent of the voting rights and a prior approval requirement has been extended to cover, against the background of the covid-19 pandemic, investments in a broad range of German target companies active in the healthcare and infection protection sectors. Furthermore, a gun-jumping prohibition has been introduced for investments in sensitive civilian sectors which is backed by criminal sanctions (prison sentence of up to five years or a fine). Furthermore, the general review standard for investments outside the scope of the defence and encryption sectors has been materially softened, which means the BMWi is entitled to restrict or prohibit an investment in the case of a 'potential impairment' of the public order or security of Germany, another EU member state or in relation to projects or programmes of Union interest (as opposed to a 'threat' to the public order or security of Germany). The legislative amendments are resulting in increasing numbers of applications for approvals and foreign investment compliance certificates and have slowed down many cross-border transactions.

Law stated - 03 July 2022

Conditional offers

What conditions to a tender offer, exchange offer, merger, plan or scheme of arrangement or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

Under the German Takeover Act, a bidder may only make a bid conditional upon the occurrence of events beyond its own control. For example, standard conditions include that the required regulatory permits are granted (in particular

antitrust clearing from German, EU and US authorities); and that a minimum number of shares are tendered.

If an offer is subject to (the bidder's) shareholder approval, the Takeover Act requires that such approval is granted five days prior to the end of the offer period.

Material adverse change (MAC) conditions have become a common feature in takeovers in the past 20 years. The first business MAC in an offer document was accepted in Bosch/Buderus and has been used in different forms ever since. The first market MAC was introduced in the Blackstone/Celanese offer document. However, BaFin has established several requirements with which MAC conditions must comply. In recent years, compliance conditions have also been introduced and are often included in offer documents.

Tender offers must no longer be structured such that the shareholders are invited to tender their shares to the bidder (and acquisition is completed when the bidder accepts the offer of the shareholders). Under the Takeover Act, the bidder must make a binding offer to the shareholders (acquisition is completed when the shareholders accept the bidder's offer).

Law stated - 03 July 2022

Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Pursuant to the German Takeover Act, the bidder in a public offer must, prior to the publication of the offer document, take the necessary steps to ensure that he or she has at his or her disposal the necessary means for paying the consideration to the shareholders accepting the offer. Where the offer provides for a cash payment as consideration, an investment services enterprise, typically a bank, shall confirm in writing that the bidder has taken the above-mentioned financing measures. The offer document must contain information on such financing measures as well as details of the expected consequences of a successful offer for the bidder's financial position, financial performance and earnings position.

If shares in a target company are transferred via a share purchase agreement (SPA) rather than public offer, details about the purchaser's financing measures and his or her financial position might be mentioned in the SPA or agreed upon in detail. However, this is at the parties' disposal.

During the world financial crisis of 2008/2009, obligations of the seller to (at least indirectly) assist in the purchaser's financing became more common. The parties can, for example, establish an earn-out mechanism, which allows the purchaser to defer the payment of a part of the purchase price depending on the achievement of certain goals regarding the target company's performance. Another possibility for seller's assistance in the purchaser's financing is to conclude a vendor note, that is, a loan of the seller to the purchaser regarding a part of the purchase price. In Germany, vendor notes are, however, still not as common as in other European countries or the US.

Law stated - 03 July 2022

Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

There is a general squeeze-out mechanism provided for in the Stock Corporation Act, as well as a special one in connection with public takeovers or via a merger.

If a shareholder holds 95 per cent of the entire share capital of a stock corporation, the general meeting may resolve to squeeze out the remaining minority shareholders. The resolution must be registered in the commercial register. As of the registration, the shares of the outstanding shareholders are transferred by law to the principal shareholder, who must indemnify the former shareholders for the (mandatory) transfer. The 95 per cent shareholder who has pushed the squeeze-out, is obliged by law to provide a guarantee as security for such indemnification. An independent auditor has to evaluate whether the indemnification is adequate. Although the adequacy of the squeeze-out compensation is often subject to court scrutiny, the squeeze-out resolution taken by the general assembly of shareholders of the target may not be challenged based on the alleged inadequacy of the compensation; rather, while such a court challenge is generally possible, the authors of the German Takeover Act have 'outsourced' such legal challenge to a separate court proceeding taking place after the squeeze-out has already been registered in the commercial register and has thus become valid.

Following a takeover, the bidder also has a right to squeeze out the remaining minority shareholders by court decision (namely shareholders' resolution is not required). If a bidder holds 95 per cent of the registered share capital carrying voting rights, he or she can apply for a transfer of the remaining shares carrying voting rights; if the bidder also owns 95 per cent of the entire registered share capital, he or she can apply for a transfer of the remaining preference shares without voting rights. Remaining shareholders have a right to request the bidder to buy their shares if the bidder meets the requirements for such takeover-related squeeze-out. Both the right of squeeze-out and the right of sell-out can only be exercised within the three months after the end of the acceptance period of the preceding takeover. For different reasons, however, the 'takeover squeeze-out' is irrelevant for practical purposes.

There is also the possibility of a 'merger squeeze-out', which requires a stock corporation to hold 90 per cent of the registered share capital carrying voting rights of another stock corporation.

Law stated - 03 July 2022

Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

There are a number of time periods under the Takeover Act, including:

- the publication of the decision to launch a tender offer via the internet and an accepted electronic information system in Germany must be made without undue delay after the decision has been taken;
- without undue delay, the bidder must send the publication to the stock exchange and to BaFin, and must inform the management of the target company (which must inform its works council) and its own works council;
- the bidder must prepare the offer document and file it with BaFin within four weeks of publication of the decision to tender;
- the authorities must review the tender offer document within 10 business days and:
  - allow publication of the offer document;
  - prohibit tendering the offer;
  - grant a further period of up to five business days to correct any mistakes; or
  - issue no decision at all (then the bidder may publish the offer document after 10 business days);
- the offer period must be no less than four weeks and not more than 10 weeks;
- both the management board and the supervisory board of the target company must publish a substantiated statement regarding the takeover offer without undue delay after receipt of the same; and
- if completion of a business combination requires registration of a document with the commercial register, additional waiting periods must be considered.

Law stated - 03 July 2022

OTHER CONSIDERATIONS

Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

The most relevant taxes for corporations in Germany are:

- corporate income tax with a single corporate income tax rate of currently 15 per cent;
- solidarity surcharge with a tax rate of 5.5 per cent on the corporate income tax;
- wage tax, which depends on the amount of remuneration, on remuneration paid to employees;
- business tax with a tax rate of about 10-15 per cent depending on the multiplier applied by the respective municipality;
- real estate transfer tax with a tax rate between 3.5 and 6.5 per cent on the (near market) value of the property;
- VAT of 19 per cent, with a reduced rate of 7 per cent applies on certain consumer goods and services for daily use.

German companies have considerable flexibility in structuring their taxable income to reduce the impact of high marginal tax rates. The most important of these are tax grouping, loss carry backs, and loss carry forwards.

However, even such relief is subject to certain restrictions: for example, loss carry forwards can only be offset up to an amount of € 1 million and, beyond that, up to 60 per cent of the remaining annual profit. This rule applies to both corporations and individuals, for income and corporation tax as well as for trade tax. As a rule, tax loss carry-forwards at the level of the target company expire in full in the event of a share transfer of more than 50 per cent.

Nevertheless, there are exceptions (eg, in the case of intercompany transactions):

- the target company has operated the same business continuously for at least the last three years and continues to do so until the losses are offset;
- in the case of acquisitions for the purpose of restructuring the target company's business, the loss carry forwards may also not expire; and
- if the target company has hidden reserves, the losses and loss carry forwards do not expire up to the amount of the allocated hidden reserves.

Another important distinction must generally be made under German Tax Law as to whether shareholdings are held as private assets or as business assets.

Shareholders who hold their shares in a corporation as private assets are subject to a withholding tax of 25 per cent plus solidarity surcharge on both capital gains and dividend distributions. If the shareholders hold 1 per cent or more of the shares or have held them in the five preceding years, the regular tax rate applies to 60 per cent of the capital gain. It should be noted that no tax is payable on the disposal of shares if the shares were acquired before 2009, are held as private assets and account for less than 1 per cent of the shares in the company. The background to this is that German tax law was partially reformed in the course of the financial crisis in 2008. A withholding tax of 25 per cent (plus solidarity surcharge) is levied on dividends distributed to shareholders by a company resident for tax purposes in Germany. This percentage is credited or refunded to domestic shareholders who are not subject to the final withholding tax and may be reduced for foreign shareholders under double taxation agreements if certain conditions are met. For

trade tax purposes, dividends paid by shareholders of a German corporation are 95 per cent tax-exempt if they hold at least 15 per cent of the company's share capital at the beginning of the assessment period. Such exemption from trade tax is also possible for dividends received by corporate shareholders from foreign corporations if certain conditions are met. Dividends received from corporate shareholders who directly hold less than 15 per cent are fully subject to trade tax.

In contrast, individual shareholders who hold their shares in a corporation as business assets must pay tax on 60 per cent of the capital gains and 60 per cent of the dividends received. In most cases, however, only 60 per cent of the related expenses are deductible in this case, and likewise only 60 per cent of the total amount of capital losses are taken into account as tax losses. As soon as the European Parent-Subsidiary Directive applies (ie, if the shareholder of an EU company holds 10 per cent or more of the company's share capital, the rate for dividends is zero per cent). Otherwise, German tax law only provides for a general reduction in the tax rate for dividends to 15 per cent (plus solidarity surcharge) if the recipient of the dividend is a corporation.

Operating expenses in connection with shareholdings are generally deductible for corporate income tax and trade tax purposes. Shareholders subject to corporate income tax are 95 per cent economically exempt from corporate income tax and trade tax on capital gains from shares, subject to certain exceptions.

Corporate shareholders who directly hold 10 per cent or more of the company's nominal share capital at the beginning of the calendar year are 95 per cent exempt from corporate income tax on dividends, but are otherwise fully subject to tax if they fall below this threshold.

Capital gains of foreign shareholders without a tax connection to Germany are generally fully exempt from corporate income tax. There is, however, an anti-abuse provision that can deny the reduction or refund of withholding tax, for example, if the recipient does not have sufficient substance.

Changes with regard to transactions have been made to the real estate transfer tax in the near past: Among other things, the real estate transfer tax was triggered by a direct or indirect transfer of 95 per cent or more of the shares in a company owning German real estate. Since 2021, the real estate transfer tax is already triggered if at least 90 per cent of the shares in a corporation owning real estate are transferred to new shareholders within 10 years.

Law stated - 03 July 2022

Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

Employees in German stock corporations have a major influence on the operation and organisation of the company. Comparatively, this influence significantly exceeds that in legal systems of other countries. The two levels of employee representation are co-determination by the works council and co-determination at the management board level.

Co-determination of the works council

A works council can be elected in any company with more than five employees. Elections take place throughout Germany every four years between the beginning of March and the end of May. Every employee can be elected. The works council deals with social, personnel and economic matters of the company. The Works Constitution Act gives employees the right to elect a works council, which has certain information, consultation, participation, approval and other co-determination rights in a wide range of employment matters, which are structured to varying degrees.

In addition, the works council must set up a finance committee in companies with more than 100 permanent employees. The finance committee usually consists of members of the works council and is the first mandatory point

of contact for the employer in larger companies, especially in the case of most mergers.

Board level co-determination

Two important laws provide for employee representation at board level:

- the One-Third Participation Act: Companies that, together with their subsidiaries, have more than 500 full-time employees must have a supervisory board (SB) This SB has to be composed of one-third members elected by the employees and two-thirds members elected by the shareholders; and
- the German Codetermination Act: It only applies to corporations with more than 2,000 employees; Here, the SB must be composed of equal numbers of shareholder and employee representatives. In the event of a tie, the chairman of the SB, who is generally a member of the SB elected by the shareholders, has the casting vote. In addition, the SB also appoints the Executive Board, so that the employees have an influence here as well.

Law stated - 03 July 2022

Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The main differences between business combinations in an ordinary situation and those where the target company is insolvent or at risk of insolvency arise from the statutory provisions of the German Insolvency Code. Since 2021, Germany has also introduced an Act on the Stabilization and Restructuring Framework for Companies due to European law requirements, which provides for a new pre-insolvency company-related restructuring procedure. The restructuring procedure can be carried out at an early stage of a crisis. The aim of the restructuring procedure is to restructure the company before an insolvency event occurs.

The restructuring procedure is aimed at all companies threatened with insolvency. This means that insolvency is imminent, but the company is still solvent. The forecast period for impending insolvency is two years. Thus, a company is threatened with insolvency if it is expected to become insolvent in the next two years.

Reasons for imminent insolvency are: no new customers can be acquired; sales slump; costs rise continuously; orders fail to materialise or banks no longer grant loans.

The prerequisite is that the prospect of reorganisation is good. Until now, companies could file for insolvency in such cases and restructure through the insolvency proceedings. Now the path outside insolvency is also open to them.

Acquisition in restructuring proceedings

As with the insolvency plan procedure, the restructuring is implemented through a restructuring plan, which provides the opportunity for M&A transactions. The debtor usually develops the plan together with the affected shareholders and a potential acquirer. The restructuring plan provides a high degree of flexibility in terms of which stakeholders are to be included in the restructuring plan and the modalities for acquiring assets or shares in the target company. Like an insolvency plan, a restructuring plan may in particular provide for a debt-to-equity swap, a transfer of shares or other measures under company law. Despite the inclusion of shareholders and their rights in the restructuring plan, the plan may be adopted without shareholder approval.

However, particularly as the restructuring process has yet to prove itself in practice in Germany, the provisions of the Insolvency Code remain most authoritative for the implementation of transactions with companies threatened with

insolvency or insolvent companies. It is important here to distinguish between the relevant time phases.

Acquisition prior to filing for insolvency

Prior to the filing of an insolvency petition, there are, by and large, no specific restrictions on the acquisition of shares or assets from a seller that may become insolvent. However, if insolvency proceedings are opened against the seller's assets after the acquisition, there is a risk that the insolvency administrator may challenge the transaction on the grounds that it was made to the detriment of the seller's insolvency creditors. This may be the case even if the purchase price paid by the buyer was reasonable and represented the fair value for the target company. As a consequence of a successful avoidance, the purchaser would have to return everything transferred by the seller to the insolvency estate. In return, the purchaser would have a claim to repayment of the purchase price from the insolvency estate. However, there is a risk for the purchaser that the purchase price is not fully included in the insolvency estate or is not kept separate from other assets of the insolvency estate and thus the claim for repayment of the purchase price fails. In such a case, the purchaser would only be entitled to the insolvency quota for its claim. During the coronavirus pandemic, this risk of recovery was temporarily mitigated by statutory adjustments. If the underlying purchase agreement has not yet been fully performed by at least one party at the time the insolvency proceedings are opened, the insolvency administrator always has the right to refuse performance of this agreement and prevent the transaction from being completed.

Acquisition in the pre-opening phase

The pre-opening phase is the period between the filing of the insolvency petition and the formal opening of the insolvency proceedings by the insolvency court. During this period, which regularly lasts up to three months, the insolvency court usually appoints a temporary insolvency administrator who acts on behalf of the failed company or can at least exercise a veto right. As transactions at this stage carry a higher risk of being challenged by the final insolvency administrators, making acquisitions at this stage of the insolvency proceedings remains only a theoretical option. The final insolvency administrator, who may be the same person as the preliminary insolvency administrator, may refuse to perform the underlying acquisition contract even after the opening of insolvency proceedings if the contract has not already been fully performed by at least one party at the time of the opening of insolvency proceedings. It should thus be noted that in any case the parties should obtain the consent of the insolvency court to the transaction.

Acquisition during the insolvency proceedings

At this stage, transactions with the insolvency administrator are most common. The final insolvency administrator is given the authority to sell the assets of the insolvent company. He or she then has no right to challenge such transactions or to refuse to fulfil a business agreement that he or she has entered into with the buyers. In addition, the insolvency administrator is, for example, only prepared to give guarantees to a fairly limited extent, which must be taken into account when determining the purchase price. The debtor or the final insolvency administrator can develop an insolvency plan to reorganise the insolvent company. An insolvency plan provides for various options and modalities to acquire assets or shares of the target company. In particular, an insolvency plan, including a debt-equity swap, a transfer of shares or other corporate actions, may be adopted without shareholder approval. In deviation from the general principle, creditors participating in a debt-equity swap based on an insolvency plan are not exposed to any liability risk due to a potential overvaluation of their claims. Against this background, the acquisition of shares in an insolvent target company as part of an insolvency plan is an option to be seriously considered.

Law stated - 03 July 2022

Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

In Germany, there are no specific regulations relating to the connection between corruption and corporate mergers. In any case, corruption is punishable under criminal law, which means that both natural persons and the companies themselves can be punished and their profits, which have resulted from the corruption, can be skimmed off.

Law stated - 03 July 2022

UPDATE AND TRENDS

Key developments

What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

With over 30 public takeovers recorded in Germany in 2021, last year was one of the most active years in the public M&A sector in German corporate history. In 2018, there were only 15 takeovers, then in 2019 there were 28, and in the first covid-19 year there were 23 public takeovers. Notably, the total volume of transactions also doubled in 2021 compared to the previous year, reaching almost €70 billion.

The largest transaction, at €18 billion, was carried out by Vonovia AG, which acquired Deutsche Wohnen AG. The practice of reducing the volume of transactions and thus also the volume of financing by concluding non-tender agreements has increased further. On the other hand, it must be noted that compared with previous years, however, 15 delisting offers (compared with only three delisting offers in the previous year) and only 18 takeover or mandatory offers were published.

Access to the capital market could appear to be increasingly less attractive for listed companies in view of the extensive information requirements under capital market law. Otherwise, many delisting offers now take place shortly after a previous takeover bid for the respective target company. It is also worth noting that foreign investors were more active in the German takeover market in 2021 than in previous years. Due to the global market environment and the macroeconomic situation (inflation, rising interest rates, decrease in the number of IPOs, etc), a cooling market in the M&A sector is also expected for Germany in 2022.

The trend of activist engagement in German listed stock corporations is continuing, as is the increased use of warranty and indemnity insurance in M&A deals. Given that foreign investment control rules have been further tightened at reasonably short notice, Chinese inbound investment into Germany is far from the record levels of 2016.

In 2021, BAFin approved 33 public takeover offers. Not only was 2021 a record year in numbers of takeovers but also in the target market capitalisation (TMC) of €84.1 billion was a record number for the German takeover market. This was not only a very substantial increase towards 2020 (23 takeover offers with a TMC of €36.0) but has also easily broken the record dates so far scored for a number of takeover offers (28 in 2019) as well as TMC (€56.8 in 2017).

Of these 33 takeover offers, 13 were de-listing, which confirms the trend to de-listing in recent years.

The large increase in the number of takeover offers is largely due to the very vivid activity in the mid-cap sector while the large-cap sector showed a modest increase, while the small-caps sector even saw a substantial decrease in the number of offers submitted to BAFin for approval.

The average premium offered by the bidders in 2021 decreased to 13.01 per cent.

The hottest topic in the 2021 market was the takeover offer with a minimum acceptance threshold which lead to two unsuccessful bids of VONOVIA SE for Deutsche Wohnen. It remains to be seen whether market players will use this minimum acceptance threshold in the future after the third bid by VONOVIA for Deutsche Wohnen was finally successful.

A notable development that had already started in 2020 and continued in 2021 were the legal actions based on the revision of section 26 paragraph 1 of the German Takeover Act, which came into effect on 1 January 2020. The revision was triggered by the failed takeover offer by AMS for Osram in 2019. AMS subsequently submitted a second takeover offer via a wholly owned subsidiary, although the first offer failed. When legal action initiated by Osram's works council was not successful, the German legislator felt compelled to close the legal loophole that the Osram case unveiled. Since 2020, not only the bidder but also any persons acting jointly with the bidder are prevented from submitting a second offer within one year of a failed bid.

Law stated - 03 July 2022

Jurisdictions

Australia	Squire Patton Boggs
Austria	Wolf Theiss
Bermuda	BeesMont Law Limited
Brazil	Loeser e Hadad Advogados
Bulgaria	Kambourov & Partners, Attorneys at Law
Canada	Bennett Jones LLP
China	HJM Asia Law & Co LLC
Germany	GSK Stockmann
Ghana	Kimathi & Partners Corporate Attorneys
Greece	Karatzas & Partners Law Firm
India	Khaitan & Co
Israel	Barnea Jaffa Lande
Italy	Nunziante Magrone
Japan	Hibiya-Nakata
Luxembourg	Bonn & Schmitt
Nigeria	G Elias
North Macedonia	Debarliev Dameski & Kelesoska
Norway	Aabø-Evensen & Co
Sweden	Advokatfirman Hammarskiöld
Switzerland	Homburger
Taiwan	Lee and Li Attorneys at Law
United Arab Emirates	IN'P Ibrahim & Partners
United Kingdom	Herbert Smith Freehills LLP
USA	Simpson Thacher & Bartlett LLP
Uzbekistan	Azizov & Partners

Vietnam	Bizconsult Law Firm