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GLOBAL M&A SERIES



A GUIDE TO TAKEOVERS IN GERMANY

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FOREWORD

This Guide provides an overview of takeovers of public companies in Germany, including the acquisition of a stake in a German public company and launching (or defending) a formal takeover offer.

It considers, from both a legal and regulatory perspective, the various stages of a takeover from planning an offer through to achieving effective control. It offers clear explanations on key issues including pre-offer planning and stake building (sections 3 and 4) and the process and implementing of a takeover (sections 5 and 6).

This Guide also covers further integration steps leading to a complete taking private (section 7).

It does not, however, consider in detail any tax or accounting implications of a takeover or the impact of securities laws of other jurisdictions where a target has shareholders residing abroad.

Definitions of words and expressions used are contained in the Glossary at the end of the Guide.

This Guide does not purport to be comprehensive or to render legal advice. The position stated is as of 1 October 2017.

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1.1 Control and Offer Types

German takeover law assumes for takeover purposes that a shareholder holding at least 30 per cent of the voting rights has “control” over a listed company. This mirrors similar thresholds in other European countries. As a factual matter, 30 per cent of the voting rights constitute the majority of votes represented at most general meetings of publicly traded companies.

In calculating the control threshold, voting rights from any target shares held by a person other than the bidder will be attributed to the bidder if the bidder has sufficient influence over these voting rights. If several parties coordinate their conduct in relation to the target, this may be qualified as “acting in concert” with the consequence of reciprocal attribution of the corresponding voting rights to each party involved.

Moreover, a shareholding of more than 25 per cent of a company’s voting rights normally constitutes a blocking minority for certain structural decisions.

As soon as one or more persons acquire control, they must launch a mandatory offer. If an offer is made voluntarily in order to obtain control, it qualifies as so-called takeover offer - as opposed to a simple offer made by a bidder that already has control or wants to stay below the control threshold.*

1.2 Transparency

Takeovers in Germany are governed by the Takeover Act (Wertpapiererwerbs- und Übernahmegesetz, WpÜG) and the respective regulations. A primary goal of the Takeover Act is to improve the transparency of the takeover procedure for all parties involved, thereby creating a so-called level playing field. This entails, in particular, notification and publication duties of the bidder vis-à-vis the BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht, the supervisory authority, cf. 1.5), the stock exchanges where the shares are admitted to trading the target and, of course, the public at large. These notification duties are not limited to the technical details of the offer; rather, they extend to:

- the anticipated consequences of a successful offer for the target,
- the bidder’s intention with regard to the future operations of the target, and
- the bidder’s shareholding in the target prior to, during and immediately after the offer proceedings, and circumstances surrounding the acquisition of these holdings.

* Average percentage of votes present in 2017 for German DAX companies was at 62.9% (Source: www.barkowconsulting.com).

1.3 Further Principles

The Takeover Act sets forth certain general principles:

- holders of the same class of shares must be treated equally,
- shareholders of the target must be given sufficient information and time to make an informed decision about an offer,
- both the bidder and the target must carry out the offer proceedings expeditiously and the regular business operations of the target may not be unreasonably hindered, and
- the procedure must endeavour to eliminate any market distortions created by speculative trading in shares of the target, the bidder, or other companies affected by the offer.

Whilst these general provisions do not call for any concrete sanctions, they are important to understand the process and the legal implications of public takeovers in Germany.

1.4 Scope of Offer Regulation

German takeover law applies with regard to publicly-held stock corporations listed on a regulated market in the EU or EEA which either have a registered office in Germany (i.e. Aktiengesellschaft (AG), Kommanditgesellschaft auf Aktien (KGaA) and Societas Europaea (SE)) or are listed on a German regulated market, irrespective of their legal form. The detailed scope of application is illustrated in the flow chart in Annex 1.

1.5 Regulator

The supervisory authority in Germany is the BaFin, comparable to the FCA in the UK or the SEC in the USA. German takeover law contains detailed rules of conflict to determine the competent supervisory authority in cases where a transaction might touch several jurisdictions (e.g. in case of listings in several European member states). An overview over these rules of conflict is also provided in the flow chart in Annex 1.

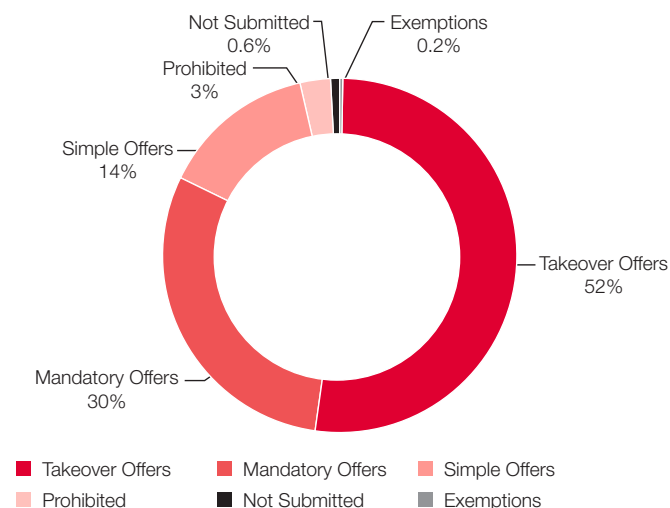
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2.1 Number of Offers, Offer Types and Investor Motivation

Between 1 January 2002 and 31 August 2017, a total of 487 offers were announced under the Takeover Act. Of these 487 offers, takeover offers constitute the majority (253 offers) with mandatory offers following (148 offers) and simple offers only amounting to roughly 14 per cent (69 offers) (see chart 1) (see sections 3.2 and 5.2 for more details on offer types). 13 offers were prohibited by BaFin and 3 offers were announced but not submitted.

Chart 1: Offer Types (2002–2017)



Roughly three quarters (74.5 per cent) of the offers were launched by strategic investors, leaving 25.5 per cent of the offers to financial investors.

Chart 2 shows the different offer types over time (2002 until 31 August 2017), highlighting the peak in offers in 2007, leading to a steep decline in 2009 and 2010 and a come back in 2011. In 2012 the numbers slightly dropped again but remained relatively stable thereafter.

Chart 2: Offers under the Takeover Act (2002–2017)



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