MERGERS AND ACQUISITIONS IN GERMANY

DR. MARTIN FRÖHLICH

Attorney-at-law (Rechtsanwalt), Cologne (Germany)

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RESUMEN: Este artículo ofrece una visión general de la regulación de los acuerdos públicos y privados de fusiones y adquisiciones (M & A) en el Derecho alemán. El término M & A se aplica a todos los tipos de adquisiciones corporativas, incluyendo tanto los supuestos de buy-outs (compra de acciones de una sociedad con el fin de controlarla), como las joint ventures (especie de partnership formada por varias empresas para operaciones concretas) y las adquisiciones públicas. Los acuerdos pueden dividirse en dos categorías: las M&A privadas, donde el vendedor y el potencial comprador pueden negociar directamente la transferencia de la empresa, o por otra parte las M & A públicas, en las que la empresa pública cotizada en bolsa es adquirida de acuerdo con las respectivas normas de Derecho público.

ABSTRACT: This article gives a general overview of private and public mergers and acquisitions (M&A) deals under German law. The term M&A applies to all types of corporate acquisitions, including management buy-outs, joint ventures or public takeovers. Deals can be divided into two categories: private M&A deals, where the seller and the potential purchaser directly negotiate the transfer of the company, or (ii) public M&A deals, in which the a listed public company is acquired in accordance with the public takeover rules.

PALABRAS CLAVE: Fusiones y adquisiciones; acuerdo privado; acuerdo público; OPA.

KEYWORDS: mergers & acquisitions, private deal; public deal; takeover bid.

1. GENERAL MATTERS: PRIVATE AND PUBLIC M&A

One of the most fundamental distinctions within the M&A sector is the contrast between Private and Public M&A transactions. Whereas Private M&A describes transactions in which the target is not a listed company, Public M&A deals with transactions involving a listed entity. The most notable difference between private and public transactions is that public transaction are subject to public takeover regulation, while private transactions do not face such restrictions. Many public takeovers may involve buying interests from a great number of parties, which are unknown to the bidder in advance. In contrast, private transactions only involve a limited number of preselected bidders. Thus, both the negotiation situation as well as the legal aspects that have to be considered differ greatly between Public and Private M&A transactions. In Germany, most companies are private companies ("German *Mittelstand*") owned by families or financial investors. Thus, most M&A transactions in Germany fall in the group of private M&A.[1]

There is no specific "M&A law" in Germany. The general framework for M&A transactions is set by the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) and mandatory corporate law (Limited Liability Companies Act, GmbHG; Stock Corporations Act, AktG). The parties to a M&A agreement, will alwys intent to exclude the BGB-provisions to the extent possible and establish their own concept of guarantees and remedies.

2. PRIVATE TRANSACTION

2.1. Deal Structure: Share Deal / Asset Deal

A private deal may be structured as a share deal, an asset deal, or a combination of both. The decision on the deal structure will depend on the specific legal situation and the individual requirements of the respective parties. Corporate, employment and tax law aspects are also likely to influence the deal structure.

A share deal involves the acquisition of the target entity's shares. This way, all of its assets, liabilities and legal relationships are transferred indirectly to the purchaser. The main advantage of such deal structure is its relative simplicity. The structure may

[1] SCHULZ/WASMEIER, *The Law of Business Organizations*, Springer, 2012, p. 116

cause difficulties where the target is part of a wider group; problems may arise with regard to the separation of the entity. Intra-group arrangements such as domination and profit and loss transfer agreements will have to be identified and terminated. The purchaser will, further, have to make sure that all assets, legal permits and contractual relationships are available after closing. This requires entering into a detailed analysis of the change of control provisions in the respective documents. Finally, the need for a carve-out may arise if the seller wants to retain a part of the business, and numerous provisions protecting the purchaser against potential hidden liabilities will have to be incorporated in the agreement.

In an asset deal, the relevant assets and liabilities of the target are transferred directly to the purchaser, which generally will be able to chose the items it would like to acquire. This freedom, however, is not without problems: If a commercial business is acquired by way of an asset deal and continued under the same commercial name ("*Firma*"), the German Commercial Code (*Handelsgesetzbuch*, HGB) holds the purchaser jointly and severally liable for all liabilities incurred by the seller in the conduct of the business.[2] The parties may, however, agree to exclude this liability, which subsequently will be notified to the creditors or will preferably be published in the commercial register. From a tax law perspective, the purchaser of the business will be liable for any business taxes and withholding taxes that were incurred from the beginning of the last calendar year prior to the acquisition and which are assessed within one year from the notification of the acquisition to the competent authorities. With regards to employment law, the transfer of a business or a part thereof will also trigger an automatic transfer of the rights and obligations under the relevant employment relationships.[3]

2.2. Pre-Sale Agreeements

A typical M&A transaction does not begin with the acquisition agreement rather it involves a number of pre-sale agreements that establish a framework for further negotiations which is safe in both legal and economic terms. Common pre-sale

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[2] If a purchaser acquires a business and continues under ist previous name, the purchaser assumes, in general, by operation of law all liabilities of the seller. Cf. HOPT, in BAUMBACH/HOPT, *HGB* , C.H. Beck , 2012, § 25.

[3] Cf. WEIDENKAFF, in PALANDT, *BGB,* C.H.Beck, 2013, § 613a.

agreements are confidentiality agreements, exclusivity agreements and letters of intent will usually play the most prominent role.[4]

2.2.1. Confidentiality Agreements

Under German law, the commencement of negotiations imposes pre-contractual obligations upon the parties to respect each other's due rights and interests.[5] That generally includes the obligation to keep disclosed information confidential.[6] Nonetheless, due to the general nature of these pre-contractual obligations, the parties will usually conclude separate confidentiality agreements that specify the requirements under which sensitive information may be disclosed. Such agreements contain a definition of confidential information, limitations on the parties' rights to use or disclose such information and an obligation to return or destroy data, should the transaction fail. If the transaction is successfully completed, the confidentiality agreement is typically replaced by confidentiality provisions in the share purchase agreement and/or a shareholder agreement, the latter in the case of a joint venture.

Where the target company is not a party to the confidentiality agreement, it is often declared that the agreement has been concluded to the benefit of the target (*Vertrag zugunsten Dritter*)[7], so that the target company may directly enforce against the purchaser the rights and remedies under the confidentiality agreement.[8] Another common clause reverses the burden of proof for unauthorized disclosure in favour of the disclosing party (i.e. the seller), thus making it easier to recover damages. Furthermore, concerning the consequences of a breach, contractual penalties are common and generally permitted under German law.[9] Non-solicitation clauses which prohibit the prospective purchasers from headhunting employees or approaching customers and suppliers, are common as well. However, the enforceability of such provisions that concern employees is unlikely. For the purpose of legal certainty, such

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[4] DENNY, in PETER FC BEGG (Ed.), *Corporate Acquisitions and Mergers*, Supp 1/2010, Kluwer Law International, p. 36.

[5] The roman law principle of *culpa en contrahendo* was incorporated into the German Civil Code in § 311 para. 2, cf. GRÜNEBERG, in PALANDT *BGB*, *op.cit.*, § 311.

[6] Federal Court of Justice (BGH), NJW 1961, 1308; EMMERICH, in *Münchener Kommentar BGB*, C.H. Beck, 2010, § 311 No 66.

[7] An agreement to the benefit of a hir person (*Vertrag zugunsten Dritter*) is codified in § 328 BGB; cf. WESTERMANN, in ERMANN, *BGB*, Dr. Otto Schmidt, 2011, § 328.

[8] DENNY, *op.cit.*, p. 38.

[9] Cf. §§ 339 BGB ss*; SCHAUB*, in ERMANN, *BGB*, *op. cit.,* §§ 339 ss.

provisions should only prohibit active solicitation without preventing employees from approaching a new employer on their own initiative.[10]

2.2.2. Exclusivity Agreements

If the negotiations are limited to only one purchaser, it is common to agree on exclusivity agreements. Generally speaking, the seller promises to refrain from preparing or entering into any other transactions that could pose a threat to the respective deal. Sometimes, these agreements even oblige the seller not only to provide all documents necessary for the due diligence, but also to negotiate in good faith so as to reach a final agreement. In order to maintain a strong bargaining position and to prevent unreasonably long lock-outs of other parties, the seller will usually insist on including a provision governing the termination of the exclusivity agreement.[11] Thus, the seller may put an end to the negotiations if the circumstances indicate that the purchaser is no longer engaged either in general or with relation to the initially contemplated terms. Often, a breach of the exclusivity agreement will be remedied by compensating expenses and damages, and by paying contractual penalties.

2.2.3. Letter of Intent

The term designates different types of pre-sale documents that serve to record matters such as the state of discussions, general principles of the deal or envisaged timetables. Is serves as a basis for the final acquisition agreement.[12] The titles of such documents are wide ranging ("letter of understanding", "memorandum", etc.). However, letters of intent commonly only tend to be concluded if negotiations take place between no more than two parties. Since a letter of intent will often contain a mixture of binding and non-binding provisions, the extent to which it creates legal obligations is not always easy to determine. In this respect, substance prevails over form, and the document is construed according to the expressed or implied intentions of the parties. Typically, the binding provisions will not address core issues of the deal, but rather refer to fairly peripheral matters such as confidentiality.[13]

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[10] DENNY, *op.cit.,* p. 39.

[11] DENNY, *op.cit.,* p. 40.

[12] DENNY, *op.cit.,* p. 42.

[13] DENNY, *op.cit.,* p. 42.

2.2.4. Liability

As mentioned before, under German law, the mere entering into negotiations results in a reciprocal obligation to take account of the due rights and interests of the other party. Any wilful or negligent breach of these pre-contractual obligations may result in a claim for damages. The amount of damages is generally limited to the loss as compared to a hypothetical situation in which the breach has not occurred.[14] The types and the content of pre-contractual obligations have been formed by the courts over a long period of time, but some disputes remain. Within the context of an M&A transaction, the most important group of obligations refer to confidentiality issues that are addressed by clauses concerning non-solicitation, disclosure, misrepresentation, and the breaking-off of negotiations.[15]

2.3. Due Diligence

Under German law, there is no general requirement for a purchaser to carry out a due diligence on a target. There is, however, a practical necessity of carrying out a due diligence, since the prospective purchaser will usually want to reduce the risk of unpleasant surprises after the signing of the deal.[16] A failure to undertake a due diligence might threaten not only the economic benefits of the transaction, but will also leave the purchaser's management open to personal liability on the grounds that they have failed to act with the necessary degree of care. Often a due diligence will be required in connection with the financing of the deal.

The scope of a due diligence will largely depend on the circumstances of the particular case, including the nature of the target's business, the familiarity of the purchaser therewith, and the scope of the transaction.[17] For the most part, it will have to deal with the same issues as in other jurisdictions. Typical areas of due diligence are change of control provisions, financing, tax risks, merger control issues, compliance with laws, employee issues, IP/IT issues, corporate housekeeping, title to shares in group companies, integration into the sellers' group which would need to be

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[14] §§ 249 BGB ss.

[15] DENNY, *op.cit.,* p. 44 s.

[16] DENNY, *op.cit.,* p. 48.

[17] KOFFKA, in EILERS/KOFFKA/MACKENSEN, *Private Equity, Unternehmenskauf, Finanzierung, Restrukturierung, Exitstrategien*, C.H. Beck, 2012, p. 36; DENNY, *op.cit.,* p. 49.

terminated post closing as well as domination and profit transfer agreements[18] which are very common due to tax benefits.[19] These agreements not only need to be terminated correctly with effect from closing of the acquisition at the very latest, but their ongoing implications may also need to be reflected in the purchase price mechanism. A further frequent point of interest is the tracing of titles to shares, especially where a GmbH is concerned. This is because it is extremely rare for a GmbH to issue share certificates or maintain any form of share register. The company has to register a shareholders' list with the company's commercial register (§ 16 GmbHG)[20]. Such list, however, may be incorrect and does therefore not constitute sufficient evidence regarding the title in shares. There is no "publice faith" in the correctness of the shareholders' list. Therefore, a *boda fida* acquisition of shares in a German GmbH is only possible under very strict conditions.[21]

2.4. The Purchase Agreement

The core document of any transaction is the share/asset purchase agreement.

Most purchase agreements, must be notarized in an M&A transaction in order to be valid. Mandatory corporate law (§ 15 paras. 3 and 4 Limited Liability Companies Act) set forth that the share purchase agreement as well as the actual transfer of the shares[22] must be notarizaed.[23]

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[18] In Germany, a proft and loss transfer agreement obliges one party to transfer its entire profit to another company (*Gewinnabführungsvertrag*). German law obliges the other party to compensate any net losses the company transfering its profit may have. Such profit and loss transfer agreements are normaly agreed together with a domination agreement (*Beherrschungsvertrag*) under which the transfering company also agrees to be managed by onother, "controlling" company, cf. HÜFFER, *Aktiengesetz*, C.H. Beck, 2012, §§ 291 ss;

[19] *Koffka*, in EILERS/KOFFKA/MACKENSEN, *op.cit.,* p. 38.

[20] Cf. BAYER, in LUTTER/HOMMELHOFF, *GmbHG*, Dr Otto Schmidt, 2012, § 16; HUECK/FASTRICH, BAUMBACH/HUECK, *GmbHG*, C.H.Beck, 2010, § 16.

[21] § 16 para 3 GmbH; cf. BAYER, in LUTTER/HOMMELHOFF, op. cit., § 16; HUECK/FASTRICH, *op.cit.,* § 16.

[22] Under German law, the principle of abstraction (*Abstraktionsprinzip*) requires to differentiate between the obligation to transfer ownership in an asset (*Verpflichtungsgeschäft*) and the actual transfer of ownership with effect in rem (*Verfügungsgeschäft*). Cf. OECHSLER, in *Münchener Kommentar BGB*, *op.cit.,* § 929 No 2 ss.

[23] Cf. BAYER, in LUTTER/HOMMELHOFF, *op.cit.,* § 15; HUECK/FASTRICH, in BAUMBACH/HUECK, *op.cit.*, § 15.

In a share deal, the specification of the target shares is the first and most important step in the purchase agreement. In addition, the agreement on the transfer of the ownership has to contain a complete list of rights and obligations linked to the specific share. An asset deal on the other hand requires that the assets which are being transferred are specified in the purchase agreement by listing each and all of them exhaustively *(Bestimmtheitsgrundsatz).* A asset purchase agreement requires notarization if among the assets to be transferred are real estate or shares in a GmbH. Further, an asset purchase agreement requires notarization if the seller, by virtue of such agreement, sells and transfers its entire assets.

Where the need for notarization is triggered by a particular aspect of a transaction (e.g. it involves a share in a GmbH, § 15 para. 3 and 4 GmbHG), it will apply to the entire transaction, i.e. not only the (share) purchase agreement requires notarization but also all ancillary agreement. It is often difficult to determine what exactly constitutes te entire transaction for this purpose. As a general rule, where one part of a transaction requires notarization and another by itself does not, both parts must be notarized if they are interdependent in the sense that the parties would not be willing to conclude one without the other.[24] Where the parties fail to comply with the notarization requirement, the transaction will be null and void, even with respect to ancillary documents that have in fact been notarized.

Notarization of an agreement entails the parties appearing before an notary and the entire agreement -including all schedules, appendices and exhibits and all ancillary agreement being read aloud to the parties in the presence of the notary-. The agreement becomes binding only once everything has been read aloud and the notarial deed has been signed by the parties and the notary. Since reading a lengthy agreement takes time (many hours), it is essential that the parties factor this reading time into their overall timing considerations.[25]

Once the assets or shares have been specified in the purchase agreement, the parties will, as in any jurisdiction, have to determine the consideration payable. Two methods have, in general, evolved in private M&A transactions (i) the closing accounts mechanism and (ii) the locked box mechanism.

Under a closing accounts adjustment mechanism, the purchase price will be based on the target's value at the moment of closing. In the share purchase agreement, the parties agree on a preliminary purchase price and a formula to adjust such purchase price based on financial statements to be prepared as of the Closing date

[24] DENNY, *op.cit.,* p. 76.

[25] DENNY, *op.cit.,* p. 77.

(closing accounts). On that basis, the preliminary purchase price will be increased or decreased based depending on certain positions in the closing accounts.[26]

In a locked box mechanism, the purchase price is based on the last available financial statements (effective date). all profits and losses following such effective date are taken over by the purchaser. The seller therefore guarantees that the effective date statements are true and correct, that no dividends, capital measures etc have occurred between effective date and signing, and the seller (i) guarantees that no such measures have occurred between effective date and signing and (ii) covenants that no such measures will occur between signing and closing (no leakage covenant).[27] The target is purchased in the state as it was at the effective date and treated as a "locked box".[28]

On the other hand, if the parties have stipulated a locked box mechanism, the consideration payable will depend on the target's value at the moment of signing. This way, the exact amount of the consideration payable will already be known at the moment of signing.

The purchase price will be calculated on basis of the enterprise value agreed upon by the parties. The enterprise value is typically determined on basis of either the Discounted Cash Flow method (i.e. the determination of expected future cash flow) or an EBITDA (earnings before interest, taxes, depreciations and amortisations) multiple. The purchase price payable will correspond to the enterprise value "net debt" (i.e. enterprise value plus the company's cash less its financial debt). The so determined purchase price is the company's equity value.[29]

M&A agreements are usually made subject to a great variety of possible conditions precedents (closing conditions) such as the receipt of regulatory clearances, the obtaining of third-party consents or the rectification of a defect of the target that has come to light during the due diligence. Only upon fulfilment (or waiver by the purchaser) of the closing conditions, the parties will proceed with the closing of the transaction. The agreement further provide for a mechanism of rescission if the closing conditions are not fulfilled (or waived) by a certain date (the long stop date).[30]

While such defects that are revealed before signing can be addressed by the parties right away, other defects that occur after signing need to be addressed separately. Thus a warranty regime is required. However, the warranty system of the German Civil

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[26] SCHRADER, in EILERS/KOFFKA/MACKENSEN, *op.cit.,* p. 56.

[27] SCHRADER, in EILERS/KOFFKA/MACKENSEN, *op.cit.,* p. 61.

[28] SCHULZ/WASMEIER, *The Law…*, *op.cit., p.* 121.

[29] Cf. SCHRADER, in EILERS/KOFFKA/MACKENSEN, *op.cit.*, p. 56.

[30] DENNY, *op.cit.,* p. 89.

Code does not, in general, meet the needs of an M&A transaction.[31] This is why in a vast majority of the transactions, independent contractual warranties are stipulated while the statutory warranty regime is dispensed. The implementation of warranties strongly depends on the parties' bargaining position. Finally, the purchase agreement also stipulates the legal consequences in case of breach of the contractual warranties. Typically, the share purchase agreement would include, *inter alia*, the following guarantees:

The shares are validly owned by the seller, free from any third party rights and freely transferable (title guarantee),

No insolvency of the target is pending or threatened,

The last financial statements were set up in accordance with generally accepted accounting principles and statutory law (IFRS, German GAAP) and give a true and fair view of the financial and earnings situation of the target, no liabilities other than contained in the financial statements,

Information regarding assets such as material agreements, intellectual property rights, real estate, employees and compliance with laws are true and correct.

Tax guarantee.

Such guarantees are typically given as of the signing and closing date.[32]

Remedies for a breach of a guarantee would be (i) specific performance, and (ii) damages. The claim for damages will typically be subject to a *de minimis* amount (i.e. only claims above such amount may be enforced against the seller) and a liability cap (purchase price for title guarantee; certain percentage of purchase price for business guarantees).

Besides the warranties, the purchase agreement may include indemnities for the benefit of the seller and the purchaser. Among the widely-used indemnities in favour of the purchaser are tax indemnities and environmental indemnities as well as several other indemnities that deal with known risks such as pending actions or potential product liability claims. On the other hand, indemnification may also be stipulated in favour of the seller. Apart from the commonly used indemnification clauses, the possible necessity under German law to terminate an existing domination agreement that involves the target entity requires specific indemnifications. The purchaser has to be indemnified in respect of all claims of the target under the domination agreement.

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[31] KOFFKA, in EILERS/KOFFKA/MACKENSEN*, op.cit.,* p. 37.

[32] Cf. SCHULZ/WASMEIER, *op.cit.,* p. 122.

In particular, the target may question the accuracy of the annual financial statements and in this way may influence the purchase price.[33]

While the parties generally add to their legal duties by means of contractual warranties and indemnifications, they may also want to limit their liability. This especially applies to the scope of warranties that are limited for example by using terms or caps. Yet the parties' liability towards each other cannot be excluded entirely. Liability for fraud or intentional conduct for example cannot be waived under German law.

2.5. Closing

The signing of the purchase agreement is followed by the closing phase. In order to finalise the transaction, the parties will agree on the transfer of ownership of the shares or assets. This transfer requires different steps depending on the type of shares or assets to be transferred.

In a share deal, the transfer of shares depends on the legal entity involved. While interests in a partnership only require the parties to reach an agreement in whatever form[34], interests in a German limited liability company (GmbH) require the transfer agreement to be notarized in order to be valid (see above Section 2.4). In addition, transfers need to be notified to the company's commercial register. As regards stock corporations (*Aktiengesellschaft*), bearer shares (*Inhaberaktien*) are transferred by agreement of the parties and, as the case may be, by delivery of share certificates. Registered shares (*Namensaktien*) can be transferred in the same way but may also be transferred by endorsement.[35]

In an asset deal, the principle of abstraction (*Abstraktionsprinzip*) must be observed with respect to the transfer of the various assets (see 2.4 above). Whereas in most legal systems the conclusion of the purchase agreement involves the transfer of the property, both steps are legally separated and generally independent under German law.[36] As a consequence, the transfer of real property only occurs after registration of the transfer in the land register (*Grundbuch*) (§§ 873, 925 BGB). In the same way, movables need to be

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[33] DENNY, *op.cit.,* p. 92.

[34] HOPT, in BAUMBACH/HOPT , *op.cit.,* § 105 No. 71.

[35] Cf. §§ 66 ss. AktG.

[36] Cf. OECHSLER, in *Münchener Kommentar BGB, op.cit.,* § 929 No 2 ss.

delivered to the purchaser or there must be some form of surrogate for delivery for the transfer of property to be perfected. Receivables as well as intellectual property rights are transferred by an assignment agreement between seller and purchaser and without the agreement having to comply with any particular form.[37]

3. PUBLIC TAKEOVER

In the current legislation on public, the European Takeover Directive[38] was implemented.

3.1. Regulatory Framework

Public takeover offers for securities of a German company whose shares are admitted to trading on a regulated market of the European Union or an official or regulated market in Germany are subject to the Securities Acquisition and Takeover Act *(Wertpapiererwerbs- und Übernahmegesetz*, WpÜG*)*. The act is substantiated by several ordinances of which the Takeover Act Offer Ordinance *(WpÜG-Angebotsverordnung)* is the most prominent one. The ordinance provides further details on the required contents of the offer document and the price to be offered by the bidder in case of a takeover bid. Furthermore, the ordinance substantiates the circumstances of compulsory offers and explains the conditions under which there is no obligation to make an offer.

Besides this there are the Stock Corporation Act (*Aktiengesetz*, AktG) and the Securities Trading Act (*Wertpapierhandelsgesetz*, WpHG) which contain relevant rules for takeovers. The Securities Supervision Division of the Federal Agency for Financial Services Supervision (*BaFin*) monitors the procedures that apply to takeover bids for listed companies. It checks the offer documents for completeness and obvious infringements to the procedure. In such a case, the BaFin may prohibit the offer or bid (§ 15 WpÜG).

The main purposes of the WpÜG are to protect the minority shareholders of the target company,[39] to ensure transparency and equal treatment of all shareholders.[40] A

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[37] DENNY, *op.cit.,* p. 99.

[38] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

[39] SCHULZ/WASMEIER, *The law of Business, op.cit.,* p. 125.

public offer is mandatory if a shareholder has acquired more than 30% of the shares in the target company (§ 29 para 1, § 35 para 2 WpÜG).

3.2. Offer Procedure

The bidder has to inform the BaFin and all German stock exchanges that list securities of the bidder, the target or other companies. Then the offeror must publish its decision to make an offer. The publication has to take place in German, via the Internet and by way of an electronic information dissemination system with a wide circulation among credit institutions, financial services institutions and banks. The publication needs to occur without undue delay (*unverzüglich*). The offeror must disclose its intent to launch an offer as well as the target's identity, the securities that will be subject to the offer and finally the internet address at which the offer document is published (§ 10 WpÜG).

After announcement of the offer, the bidder has to provide the offer document to the BaFin (§ 11 WpÜG). This contains further information, which serves to enable the shareholder to identify the terms and conditions of the offer. The shareholder should be in a position to decide whether or not to accept the offer.[41] Among other things, the offer document must incorporate a valuation method, provide information on the financial background of the bidder as well as on the bidder's motivation to obtain interests of the target as well as the period in which the offer may be accepted (§ 11 WpÜG). The BaFin reviews the document. Only if the bidder obtains the BaFin's approval, he will be allowed to publish the offer document (§ 14 para. 2 WpÜG).

The target's management and supervisory boards must respond to the offer within a period of two weeks (§ 27 WpÜG). They especially have to give their view on the type and amount of the consideration payable, the impact of the offer on the target's business and employees, their representatives and the location, as well as the terms and conditions of work. They also have to take a view on the bidder's motivation and prompt the board members that hold interests in the target to disclose whether or not they intend to accept the offer.[42]

[40] VERSTEEGEN, in HIRTE/VON BÜLOW, *Kölner Kommentar WpÜG*, Heymann, C. , 2010, § 1 No 11.

[41] SEYDEL, in *Kölner Kommentar WpÜG*, *op.cit.,* § 11 No 2 ss.

[42] HIRTE, in *Kölner Kommentar WpÜG*, *op.cit.,* § 27 No 45.

In contrast to the target's management and supervisory board, which are obliged to respond, there is no such obligation for the shareholders or an obligation to accept the bidder's offer. They may respond at their sole discretion to the offer within a period of four to ten days, the exact duration being determined by the bidder. Any amendment of the offer document causes this period to be extended (§21 WpÜG). The bidder is subject to disclosure obligations (§23 WpÜg). During the acceptance period the bidder has to regularly inform the bidder on the number of interests held and obtained. In addition, at the end of the acceptance period, the bidder must publish the final results.

3.3. Terms of the Offer

The offer procedure is complemented by several requirements to the terms of the offer. The requirements imposed by the Securities Acquisition and Takeover Act differ significantly between mandatory offers, voluntary takeover offers voluntary offers regarding only party of the shares.[43] Mandatory offers have to address all shares and shareholders of the target. On the contrary, those offers which are voluntary because they do not involve taking control of the target in turn may be limited to certain types or a certain amount of shares. The terms of takeover and mandatory offers are subject to specific requirements concerning the consideration payable, the conditions permitted and the financing involved.

The consideration payable must consist of either cash or shares being admitted to trading on the official or regulated market in Germany or on the regulated market of a member of the European Union § 31 WpÜG). However, if the bidder has acquired at least 5% of the target's interests against payment in cash within the six months that precede the announcement date or within the period between the announcement date and the end of the acceptance period, then the consideration payable offered by the bidder must at least alternatively be in cash (§ 31 para 3 WpÜG). The consideration payable must at least amount to the average stock exchange price of the target's interests during the three months that precede the announcement date (§ 31 para 1 WpÜG). In case the bidder or its associated entities have paid or offered to pay a higher price within the last six months preceding the announcement date, the consideration payable must at least equal the amount of the offered price (§ 31 para 5 WpÜG).

While there are strict rules in order to determine the consideration payable, this does not apply to the conditions that the bidder imposes to his offer. Whereas in case

[43] VON BÜLOW, in *Kölner Kommentar WpÜG*, *op.cit.,* § 29 No 15 ss.; DENNY, *op.cit.,* p. 106.

of mandatory offers, the only admissible condition is the receipt of regulatory approvals, there are no such restrictions when it comes to voluntary offers.[44] Thus a common condition is that the bidder makes his offer subject to an acceptance threshold often amounting to 30% (control), 50% (majority) or 75% (super majority).[45] The threshold cannot be increased but may be reduced within the acceptance period. As a consequence, shareholders having already accepted the offer prior to the reduction of the threshold are allowed to revoke their acceptance.

The bidder has to give information on the financing of his offer. To underline its serious intent, the bidder has to provide for financing that covers its offer entirely. If the offer is in cash also, a securities service enterprise independent of the bidder has to confirm its capacity to pay the required amounts. In order to do so, the securities service may ask the bidder to provide for securities. This serves to protect the interests of the shareholders that accept the bidder's offer.

3.4. Frustrating Actions

In order to protect the bidder, certain restrictions are imposed on the target's management board after the announcement of a takeover is made. The management board is not allowed to undertake frustrating actions. It has to act as a reasonable and prudent manager of a company not being addressed by a takeover offer. That does not permit trying to find a third party investor in order to prevent the takeover offer.[46] The executive board is allowed to take such actions that the shareholders' meeting has decided on before the announcement of the offer or such actions which are decided by the supervisory board even after the announcement.[47]

Dr. Martin Fröhlich
Attorney-at-law (Rechtsanwalt)
martin.froehlich@freshfields.com

[44] HASSELBACH, in *Kölner Kommentar WpÜG*, *op.cit.,* § 18 No 13 ss.

[45] HASSELBACH, in *Kölner Kommentar WpÜG*, *op.cit.,* § 18 No 26.

[46] HIRTE, in *Kölner Kommentar WpÜG*, *op. cit.,* § 33 No 74.

[47] HIRTE, in *Kölner Kommentar WpÜG*, *op.cit.,* § 33 No 78.