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Contributed by P+P Pöllath + Partners **Authors:** Matthias Bruse, Tobias Jäger, Wolfgang Grobecker, Daniel Wiedmann

Law and Practice

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1. Trends

1.1 M&A Market
Despite the uncertainty regarding the Brexit negotiations and the discussions surrounding the presidential elections in the USA, the M&A market in Germany remained at a consistently high level in 2016. The deal volume increased from USD116.156 million in 2015 to USD199.982 million in 2016, and the number of M&A deals increased by 5.9%. The low interest rate policy as well as the high cash holdings of German corporations were the key drivers for M&A transactions in 2016.

1.2 Key Trends
Influencing Factors
China's investment activities increased in particular, from a transaction volume of under USD1 billion in 2015 to over USD10 billion in the first half of 2016 alone, which is more than all previous years combined. This made Germany the number-one country for Chinese investments in Europe. While Chinese investors have previously focused on German technology companies (and still do), the area of investment has widened to include everything from pharma and biotech companies to clinics and care homes.

However, Chinese investments declined to a certain degree in the fourth quarter of 2016, which may partially be explained by a change of the political climate for such investments. In particular, there has been an increased level in the frequency of the review of such transactions under German foreign investment regulations, which were tightened in July 2017 (please see also below).

Transactions with Private Equity Involvement
2016 was the best year for transactions with private equity involvement in Germany since the pre-crisis year 2007, with a total purchase value of USD20.8 billion and a total sales value of USD19.7 billion. For the first time since 2012, the investment sum was higher than the revenues generated by the sale of interests. The mid-market became a very important field for private equity investors.

1.3 Key Industries
Industrials & Chemicals is still the most active sector in Germany, with 32% of the M&A transaction volume, followed by the Business Services and Consumer sectors, with 12% each.

2. Overview of Regulatory Field

2.1 Acquiring a Company
Private M&A – Acquisitions of Non-Listed Companies
Typically, acquisitions of private companies are organised in an auction process co-ordinated by investment banks or M&A advisers, which advertise the target company by sending out teasers to potential buyers. After concluding a non-disclosure agreement, interested parties gain access to an information memorandum containing basic financial and legal information about the target company, and are then asked to submit non-binding offers outlining their ideas regarding the purchase price and transaction structure. The bidders submitting the best indicative offers are granted access to a data room to perform due diligence on the target. The due diligence process is followed by binding offers; the seller then enters into negotiations with those bidders who have submitted the most attractive offers. The core element of every private transaction is the sale and purchase agreement. Important topics are, in particular, the determination and structuring of the purchase price, which typically follows a "locked-box model" or a closing accounts concept, representations and warranties, and the scope of potential damages. In Germany, there is a legal separation between the conclusion of the sale and purchase agreement (the Signing) and the transfer in rem of shares (the Closing). In most transactions, the transfer in rem of the shares is subject to the payment of the purchase price and other conditions precedent, eg, merger control clearances.

Public M&A – Acquisitions of Listed Companies
The most practical way to obtain control over a publicly listed company in Germany is by acquisition of shares via a public tender or takeover offer. A takeover offer (*Übernahmeangebot*) is mandatory if a party seeks to obtain control of a public company, ie, to acquire at least 30% of its voting rights (as defined by the German Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*)). This requirement should be considered if an investor seeks to acquire a substantial participation in a publicly listed target.

Cross-Border Mergers
Cross-border statutory mergers of companies are possible under the German Transformation Act (*Umwandlungsgesetz*). However, cross-border statutory mergers of companies involving minority shareholders are of minor practical importance, as the purchase of shares against cash payment is less complicated. In addition, the merger appears to have no specific advantage, as the acquiring company has to offer an exit option to dissenting shareholders via a cash compensation to be based on the intrinsic value of the target company. This regularly proves to be a prohibiting factor.

2.2 Primary Regulators
Regulators for Public M&A – Acquisition of Listed Companies
Takeover Act (Wertpapiererwerbs- und Übernahmegesetz)
Public takeovers of listed companies are regulated by the Takeover Act and the Takeover Act Offer Ordinance (*WpÜG Angebotsverordnung*), and other statutory ordinances. Other legislation not specific to public takeovers also applies, in particular the rules of the German Stock Corporation Act (*Aktiengesetz*), the Market Abuse Regulation and the Transformation Act (*Umwandlungsgesetz*). Compliance with the Takeover Act is overseen by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*), whose powers include (i) preventing the bidder from making a proposed offer that does not comply with statutory requirements and from making any subsequent offers for one year, and (ii) imposing fines of up to EUR1 million.

The Takeover Act concerns any public offer (*öffentliches Angebot*) to acquire shares of publicly listed stock corporations, SEs and partnerships limited by shares that have their registered seat either in Germany and whose shares are traded on the German regulated market (the Takeover Act does not apply to stock corporations listed only in the open market segment), or – under certain further conditions – in another European Economic Area (EEA) member state.

There are three classes of public offers:

- a take-over offer (*Übernahmeangebot*), aimed at obtaining control of the target. "Control" means the power to exert at least 30% of the target's voting rights, individually or on a joint basis acting in concert with others;

- a mandatory offer (*Pflichtangebot*), which must be made if and when control has been obtained by other means than a take-over offer, and where no exemption applies; and
- an acquisition offer (*sonstiges Erwerbsangebot*) not aimed at acquiring control, by buying less than 30% of the target's voting rights (together with any other target shares attributed to the bidder), buying additional shares if control has already been obtained, or buying non-voting preference shares only.

Stock Corporation Act (Aktiengesetz)
The Stock Corporation Act (and its extensive case law) is the main source of legislation for listed targets and their officers and shareholders. Its provisions are partially superseded or reiterated by the Takeover Act. Importantly, a German stock corporation's management board must always act in the company's best interests (*Unternehmensinteresse*), which are not necessarily identical to the shareholders' best interests. In general, the company's best interest comprises the interests of the shareholders, the employees and, arguably, the creditors of the target company. This focus of the target management's fiduciary duties on the company's best interest may give rise to numerous issues during a take-over. In addition, the Stock Corporation Act and the Takeover Act govern various defence measures of the target's management against hostile takeovers, and both also contain rules on squeeze-outs (see **6.10 Squeeze-out Mechanisms**).

Securities Trading Act (Wertpapierhandelsgesetz)
This act concerns, among other things, the mandatory notification of voting rights and other instruments (see **4.2 Material Shareholding Disclosure Threshold** and **4.5 Filing/ Reporting Obligations**).

Market Abuse Regulation
Regulation 596/2014/EU (Market Abuse Regulation) and accompanying EU directives regulate insider trading (which is a criminal offence in Germany), ad hoc disclosure requirements by the target and directors' dealings. Due to the prohibition of insider trading, the target's management cannot share any inside information that makes due diligence into a publicly listed target somewhat difficult. The target may also be obliged to publish an ad hoc announcement regarding the take-over.

Stock Exchange Act (Börsengesetz) and Stock Exchange Ordinances (Börsenordnungen)
Among other subject matters, the Stock Exchange Act contains rules on a regular delisting, including the requirement of a mandatory offer in the case of a delisting from a regulated market. Furthermore, following a public-to-private transaction, the investor may seek to re-offer the shares publicly as an exit route, which would then also be governed by various statutory provisions, including the Stock Exchange Act and the Securities Prospectus Act, as well as the Stock Exchange Ordinances.

Regulating Rules for Both Private and Public M&A Transformation Act (Umwandlungsgesetz)
The Transformation Act allows statutory mergers by transferring one entity's assets to another pre-existing entity, or by transferring two existing entities' assets to a new entity. It also provides a legal framework for de-mergers (*Spaltungen*) and changes of legal form (*Formwechsel*), such as a corporation transforming into a partnership. Statutory mergers under the Transformation Act combine the selective approach of an asset deal with the universal succession of a share deal. Universal succession under the Transformation Act takes effect by way of the registration of the statutory merger with the commercial register by the competent local court. Registration with the commercial register may, however, be blocked by voidance claims initiated by activist shareholders, which in turn may be overcome via a fast-track release proceeding (*Freigabeverfahren*). The Act also contains provisions on a merger-specific squeeze-out (see **6.10 Squeeze-out Mechanisms**). In addition, the instruments contained in the Transformation Act may be used to take a target private ("cold de-listing"), such as by merging a listed target into a non-listed entity.Insolvency Act (*Insolvenzordnung*) and Voidance Act (*Anfechtungsgesetz*)

Any bidder intending to make an offer for a target or to a seller of a target which is insolvent (or close to insolvency) should consider the Insolvency Act and the Voidance Act. The Insolvency Act allows the restructuring of a target through proceedings similar to those under the US Chapter 11 rules. Under the Voidance Act, the transfer of assets to the detriment of the target's creditors may be voidable.

Commercial Code (Handelsgesetzbuch) and Civil Code (Bürgerliches Gesetzbuch)
The Civil Code governs any legal relationships between private individuals and entities. The Commercial Code adds rules specific to business entities (corporations and partnerships) and the businesses of sole proprietors. The offer to buy or exchange shares and the acceptance of such an offer, among other things, are governed by the Civil Code.

Banking Act (Gesetz über das Kreditwesen) and Insurance Supervision Act (Versicherungsaufsichtsgesetz)
With respect to regulated industries, including financial institutions and insurance companies in particular, the acquisitions of qualifying holdings have to be notified to and approved by the respective regulatory authorities before being consummated. A direct or indirect holding in an undertaking that represents 10% or more of the capital or of the voting rights, or which makes it possible to exercise a significant influence over the management of that undertaking, can already be considered as a qualifying holding. Hence,

for investments in companies that are active in regulated industries, the supervisory law has to be considered.

2.3 Restrictions on Foreign Investments

Foreign investments in target companies active in certain sectors may be subject to restrictions. The Foreign Trade Act (*Aussenwirtschaftsgesetz*) and the relevant Ordinance (*Aussenwirtschaftsverordnung*) provide for two different review mechanisms. The so-called sector-specific review mechanism mainly concerns foreign investments in domestic companies active in the military and defence sector (see **2.6 National Security Review**). Under the so-called cross-sectoral review, the Federal Ministry of Economics and Energy (*Bundesministerium für Wirtschaft und Energie*) – *BMWi*) may review any direct or indirect acquisitions of at least 25% of the voting rights in a German target by investors from outside the EU or EFTA in order to determine whether such acquisitions may endanger the public order or security in Germany. The German government may ultimately prohibit such acquisitions, or impose obligations, if this is necessary to safeguard public order or security.

Pursuant to an amendment effective since July 2017, acquisitions of German targets active in specific areas, such as critical infrastructure and the development of industry-specific software for the operation of critical infrastructure, must be notified to the BMWi. Critical infrastructure may, in particular, include the energy, water, information technology, health, financial services and insurance sectors, as well as transport and traffic.

Acquirers may apply to the BMWi for the issuance of a certificate of non-objection in order to obtain legal certainty for an investment.

2.4 Antitrust Regulations

The merger control provisions of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) apply if transactions qualify as concentrations, and the parties meet certain thresholds. If a transaction is subject to German merger control, it must be notified to the German Federal Cartel Office (*Bundeskartellamt*) and must not be consummated before clearance has been obtained. It is a particular feature of German merger control that concentrations subject to review are not limited to control acquisitions. For instance, acquisitions of 25% or 50% of the voting rights or capital interests also qualify as concentrations, as do acquisitions of a competitively significant influence.

The notification thresholds are met if the combined aggregate worldwide turnover of the involved parties exceeds EUR500 million, the German turnover of at least one involved party exceeds EUR25 million and the German turnover of another involved party exceeds EUR5 million. If the last threshold (ie, a German turnover exceeding EUR5 million) is not met by the target or another party, a notification will still be required if the value of the consideration for the transaction exceeds EUR400 million and the target has significant activities in Germany.

2.5 Labour Law Regulations

The target's management board must, without undue delay, inform the target's work' council or, if there is no works' council, the target's workforce directly of a takeover announcement, and must forward to them the public offer document. However, there is no obligation to consult the works council (or workforce) on the offer. The works' council can comment on the offer; its comments have to be attached to and published with the target's management board's reasoned opinion.

According to the German Co-Determination Act *(Mitbestimmungsgesetz)*, certain companies (stock corporations, partnerships limited by shares, limited liability companies and co-operatives) with more than 2,000 employees have to establish a supervisory board in which half of the members must be employee representatives (employees and union representatives). The same applies to companies with more than 500 employees, pursuant to the German One Third Participation Act *(Drittelbeteiligungsgesetz)*,but only one third of the members are required to be employee representatives.

To increase the number of women in management positions *(Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen),* the German Federal Government passed a law in May 2015, pursuant to which listed companies subject to the Co-Determination Act have to fill vacancies in their supervisory boards with (at least) 30% women. Companies that are either listed or co-determined are obliged to set up their own targets regarding the proportion of female members in the supervisory board, the executive board and the top management level, and to inform about it in their annual report.

2.6 National Security Review

As explained above (see **2.3 Restrictions on Foreign Investments**), the sector-specific review mechanism concerns foreign investments in domestic companies that are active in certain segments of the military and defence sector, as well as providers of certain IT security products. A direct or indirect acquisition of at least 25% of the voting rights in such a company by a foreigner must be notified to the BMWi. Different from the cross-sectoral review, this notification obligation also applies to investors from other EU or EFTA member states. The German government may ultimately prohibit such acquisitions, or impose obligations, if this is necessary to safeguard essential German security interests.

3. Recent Legal Developments

3.1 Significant Court Decision or Legal Development

Two recent court cases have had some influence on the takeover landscape in the area of public M&A. In the litigation regarding the takeover offer by Deutsche Bank for the shares in Postbank AG, the Federal Supreme Court (*Bundesgerichtshof* – BGH) held that shareholders have a right to demand adequate consideration from the bidder if the consideration offered in a take-over offer is inadequate. Based on this, the Regional Appeals Court of Frankfurt/Main specified the rules on when the pre-acquisition of convertibles is to be taken into account when calculating adequate consideration according to the fair price rules of the Takeover Act, concerning the McKesson takeover of Celesio AG.

3.2 Significant Changes to Takeover Law

The German public M&A regulations have seen several major changes in recent years, mostly due to new and changing EU Regulations and Directives. The disclosure requirements for holders of shares and other instruments have become stricter, and the national rules on insider trading, the unlawful disclosure of insider information and market manipulation have been replaced by the Market Abuse Regulation. A mandatory offer to the outside or minority shareholders in case of a delisting has been introduced by an amendment to the Stock Exchange Act. The EU is currently reviewing its EU Directive 2004/25/EC on Takeover Offers (Takeover Directive), but this review has not resulted in a reform. In the first half of 2017, changes to several German capital market laws were passed to align further the German legal framework with EU Regulations and Directives. Coming into effect in 2018, the changes mostly concern the Securities Trading Act, with little direct effect on take-overs, but it should be noted that the fines to be imposed under the Securities Trading Act as well as the Takeover Act will be increased significantly.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Concealed stakebuilding has lost a lot of its practical significance as the extensive notification requirements (see **4.2 Material Shareholding Disclosure Threshold**) prevent a hidden stakebuilding. Further, stakebuilding prior to launching an offer is only possible for up to 30% of the voting rights, as a public offer then becomes mandatory. If the threshold is reached by way of a voluntary take-over offer, a mandatory offer becomes necessary. Some bidders have used this exception and launched a voluntary take-over offer for the shares of the target at the lowest permissible price, thereby acquiring only a few of the shares in the target but crossing the control threshold of 30% of the voting rights. The bidder is then free to acquire further shares in the target without need for a mandatory offer. This type of tactic is sometimes referred to as "creeping in" or "lowballing".

4.2 Material Shareholding Disclosure Threshold

Disclosure Thresholds for Publicly Listed Companies

If the company is publicly listed on an organised market, an investor must notify the target and the BaFin once it obtains or surpasses 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75% of the target's voting rights. Voting rights resulting from shares and voting rights resulting from comparable financial instruments that entitle their holders to acquire shares carrying voting rights, such as options or swaps, or that reference such shares and have a similar economic effect irrespective of whether physical delivery may be taken or not, must be aggregated to determine whether or not a notification requirement is triggered. In determining the amount of acquired voting rights, voting rights of certain associated parties must be aggregated; this includes voting rights held by subsidiaries of the investor or by third parties on account of the investor, as well as shares that are held by third parties that co-ordinate their actions with regard to the company with the investor in order to influence the target's strategic direction ("acting in concert") permanently and significantly.

The company must publish the investor's notification immediately.

If the investor fails to comply, fines of up to EUR2 million or twice the amount of the economic advantage gained by the non-compliance – whichever is higher – may be imposed against individuals. Corporations and partnerships may be fined up to EUR10 million, 5% of their revenue in the financial year previous to the BaFin ruling, or twice the amount of the economic advantage gained by the non-compliance, whichever one is higher. In addition, shareholders' rights (particularly voting rights) are suspended at least until these disclosure requirements are satisfied. This can be of major practical importance – eg, basic restructuring measures taken by the shareholders' meeting may not receive the legally required majority.

Disclosure Thresholds for Private Companies and Companies Listed in the Open Market Segment

After acquiring shares in a limited liability company (*GmbH*), a new list of shareholders has to be registered with the competent commercial register. Any new partner to a partnership needs to be registered with the competent commercial register. If more than 25% or the majority of shares in a (not listed) German stock corporation are acquired, the acquired company must be notified. The same applies in case of a shortfall of these thresholds. In the case of a failure of such requirements, the shareholder may not exercise the voting rights from its shares.

Commencing on 1 October 2017, there will be new filing requirements for the acquirers of shares pursuant to the amendment of the Money Laundering Act. All legal entities governed by private law, registered partnerships, trusts and similar legal forms will have to file certain data regarding inter alia shareholdings with the Transparency Register. Listed companies are exempt due to the equivalent filing requirements pursuant to the Securities Trading Act (*WpHG*). Exemptions also apply if the relevant data is available from other (electronic) registers. The relevant beneficial owners of a company owning more than 25% of the shares directly or indirectly, or controlling more than 25% of the voting rights or exercising control in a comparable way (eg, by voting trust or pooling agreements) have to be registered. A violation of the filing obligation is punishable by a fine.

4.3 Hurdles to Stakebuilding

A company cannot alleviate the mandatory reporting thresholds described above (see **4.2 Material Shareholding Disclosure Threshold**). Even though the target is, in principle, free to introduce stricter disclosure thresholds in its articles of association, this does not seem practical in light of the already strict mandatory disclosure thresholds.

4.4 Dealings in Derivatives

Dealings in derivatives are allowed but need to be disclosed if the thresholds are exceeded or fallen below, as described above (see **4.5 Filing/Reporting Obligations**).

4.5 Filing/Reporting Obligations

With respect to disclosure requirements, derivatives may be subject to the disclosure requirements applicable to shares if they fall within the criteria set out above (see **4.2 Material Shareholding Disclosure Threshold**). This is the case, for example, when dealing in cash-settled equity derivatives. Ultimately, each derivative requires careful case-by-case analysis with respect to disclosure and competition law requirements.

4.6 Transparency

Investors reaching 10% of the voting rights in a listed company in the organised market have to inform the target company of their intended objectives and their source of funding, within 20 trading days. The investor must specify if it intends to (i) pursue strategic goals or returns from investing, (ii) acquire additional voting stock in the next 12 months, (iii) exert influence on the company's management or supervisory board, and (iv) substantially modify the capital structure of the company. In addition, in a public offer, the offer document has to set out the bidder's intentions with regard to the target (see **5.5 Definitive Agreements**). In turn, the target needs to disclose such information to the public.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

In principle, the ad hoc publicity rules of the Market Abuse Regulation require an immediate so-called ad hoc announcement when the target becomes aware of insider information (ienot publicly known information of a precise nature) that would likely and significantly affect the share price of the target were it made public. Any intermediate step in a protracted process (like a transaction) may constitute inside information, making several ad hoc announcements necessary. As a result, an ad hoc announcement on the M&A activities surrounding the target company could become necessary at a very early stage of a transaction (if considered to be insider information).

Because early disclosure may interfere with the offer, the target's management board may delay an ad hoc announcement if the target exempts itself from the ad hoc requirement. This is permissible where (i) immediate disclosure is likely to prejudice the legitimate interests of the target, (ii) delay of disclosure is not likely to mislead the public, and (iii) the target is able to ensure the confidentiality of that information.

The ad hoc rules of the Market Abuse Regulation also provide for exemptions with respect to a so-called "market sounding", giving limited opportunities to disclose possible inside information to possible investors in order to assess the probability of a successful offer.

Lastly, under certain circumstances, the target may disclose inside information to explore possible defensive measures such as searching for another bidder – a so-called "white knight".

The management board of a target company is advised to seek expert legal advice regarding the company's duty of ad hoc announcement and possible self-exemptions in order to avoid fines imposed by BaFin.

With regard to private M&A transactions among non-listed entities, there is no obligation for the participating companies to disclose a deal.

5.2 Market Practice on Timing

It is difficult to establish market practice on timing of the disclosure of an offer due to different legal requirements. However, the target and the bidder will attempt to structure their actions in a manner that avoids early disclosure and maintains confidentiality as long as legally possible, commonly making use of self-exemptions. It should be noted that the bidder (not the target) is required to announce its decision to make an offer (ie, once decided), without delay, under the Takeover Act.

5.3 Scope of Due Diligence

Due diligence in public takeovers – even in a friendly scenario – is usually subject to legal and timing constraints. Even a co-operative target is restricted in providing information to the bidder. The management may only disclose information if such disclosure is in the company's best interests. It is further limited by insider trading, data protection and antitrust law. In practice, management is more willing to provide sensitive information to a favoured bidder, and currently there is no clear legal obligation for the management to provide due diligence information equally to all bidders. Hence, the scope of a due diligence exercise will depend heavily on the circumstances of each transaction.

Furthermore, a bidder may try to obtain information from shareholders. It can be in the shareholders' interest to fill any information gaps if the bidder is thus likely to raise the offer price.

In a hostile scenario, the bidder needs to rely primarily on publicly available sources, because the management is free not to co-operate with the bidder, provided that this does not violate its duty not to impede an offer or its fiduciary duty to act in the best interest of the company.

In Germany, various third-party or public sources provide essential due diligence information, including the following:

- **Electronic business register:** Information can be obtained (in German) from the electronic business register at www.unternehmensregister.de, including (i) information entered into the relevant registers, such as the commercial register (*Handelsregister*), (ii) information contained in mandatory filings or announcements to the relevant authorities, such as the BaFin, and (iii) information published in the electronic Federal Gazette (*Bundesanzeiger*).
- **Electronic commercial register** : Information filed at the relevant commercial register is available (in German) at www.handelsregister.de, including financial statements and core legal corporate information, including the name, seat and business object of the company, the amount of its registered share capital, its representation, its incorporation documents, changes to the articles, and a list of shareholders.
- **Land register** : Information on real property, including legal ownership and encumbrances, can be obtained at the local land register (*Grundbuch*). Information on public law encumbrances which are not entered into the local land register is available at the local register of public encumbrances (*Baulastenverzeichnis*).
- **IP register** : Information on domestically registered IP rights (patents, utility models, trade marks and design models) can be retrieved online from the database of the Patent and Trade Mark Office (*Deutsches Patent- und Markenamt*) at www.dpinfo.dpma.de.
- **Annual financial statements** : The annual report of any German-listed company must contain information on defence structures in the management report (*Lagebericht*). The supervisory board has to comment on this information in its report for the shareholders' meeting. The reports are available on the electronic business register (see above).
- **Homepage of the company:** The target company has to publish certain information on its website, particularly if it is publicly listed. Usually, relevant information is found under "Investor Relations".
- **Shareholders' forum** : Shareholders can exchange information and, in particular, co-ordinate the exercise of their voting rights in an online shareholders' forum (to register, see https://publikations-plattform.de/shareholder/sp/account?page.navid=to_reg_shareholder_start&global_data.designmode=eb&global_data.menumode=no_menu).

5.4 Standstills or Exclusivity

Standstills are inherently not used in the field of private M&A. Depending on the circumstances of the relevant transaction, it may be advisable from the buyer's side to conclude an exclusivity agreement with the seller(s) to obtain assurance that there are no further negotiations with other interested buyers.

In public M&A, a target may try to negotiate "standstill" provisions that prohibit the bidder from acquiring shares at the stock exchange or in block trades without its consent, often in the context of a non-disclosure agreement. These provisions will usually lapse after a specified time. In principle, such agreements are permitted under German law, but they may be called into question if the standstill period is too extensive or a consideration is given for the agreement. To secure its side of the transaction, the bidder may seek exclusivity from the target. As the management of a listed company is obliged to act in the best interest of the target, it is not easy for it to follow this common request, but if it is advantageous the target may at least enter into exclusivity agreements with a limited term.

5.5 Definitive Agreements

The Takeover Act requires the preparation of two main documents that include all relevant terms and conditions in public transactions:

- **Offer Document:** The public offer document is intended to be the one exhaustive statement containing all information needed by the target's shareholders for the evaluation of the offer. The required content of the offer is specified in the Takeover Act Offer Ordinance. In addition to the essential details of the offer (such as consideration, conditions and offer period), the offer document must contain information on (i) the possible effects of a successful offer on, in particular, the financial position of the bidder and the target, (ii) the bidder's intentions with regard to the target and its own business after the takeover, (iii) bonus packages that have been granted or promised to the target's management and supervisory board members, (iv) if a cash offer is made, a statement by a financial services provider confirming that the bidder has taken measures to ensure that financing will be available if and when the offer is accepted (see **6.3 Consideration**), and (v) the applicable law and competent courts for any dispute between the bidder and the target's shareholders.

The bidder is responsible for the offer document, and liable for its correctness and completeness. Any shareholder of the target accepting the offer may claim damages resulting from errors or omissions in the offer document, unless the bidder can prove that it was unaware of such error or omission and was not grossly negligent in not knowing. Claims are time-barred after one year from the moment the shareholder ought to have had knowledge of the error or omission, and in any event after three years from the publication of the offer document.

- **Target's reasoned opinion:** In response to the offer document, the target's management board and supervisory board must each publish statements evaluating the offer. As a minimum, these statements must comment (giving reasons for each statement) on (i) the type and amount of consideration, (ii) the potential consequences of a successful offer for the company and its employees, (iii) the bidder's objectives, and (iv) whether board members who are also shareholders of the target intend to accept or reject the offer.

The role of the target's management is often difficult. While they normally only owe a duty of care with respect to the target's corporate interests (see **8.1 Principal Directors' Duties**), this arguably changes when making the reasoned statement, as the management could be said to become a custodian of its shareholders' financial interest. The response should therefore provide all additional information regarding the target that the shareholders need to evaluate the offer and decide whether or not to sell (basically removing any information gap between the target's management and the target's shareholders). While some years ago response statements tended to be short and superficial, at least in large take-over offers, elaborate statements that rival the offer document in length have become market practice. The target's management will also often seek an independent fairness opinion and publish its results in order to be in a position to comment adequately on the fairness of the offer price.

6. Structuring

6.1 Length of Process for Acquisition/Sale

With respect to public M&A, once the intention of the bidder to make an offer has been announced, the process normally takes about 12 weeks (maximum 22 weeks). The duration of possible stakebuilding measures or a due diligence review before the announcement of an offer under the Takeover Act varies widely, depending on the individual circumstances, such as company size, business complexity, prior knowledge of and relationship with the target and secrecy rules. Finally, German and European antitrust and other clearance periods may further prolong the process (see **2.4 Antitrust Regulations**).

In private M&A, the duration of a transaction (including the planning phase and post-closing measures) varies from a few weeks up to several months, also depending on individual circumstances like company size, transactional structure, time pressure on the buyer's or seller's side, and if antitrust (or other) clearance is necessary.

6.2 Mandatory Offer Threshold

Any person directly or indirectly acquiring 30% or more of a listed (on an organised market) stock corporation's voting rights must make a mandatory offer to the remaining shareholders of the target to acquire their shares (see **4.1 Principal Stakebuilding Strategies**).

BaFin may grant exemptions from the mandatory public offer requirement under certain circumstances, examples of which are given in the Offer Ordinance. For instance, exemptions may apply in connection with a financial rehabilitation of the target company, or where voting rights are acquired following a change in the target's legal form.

6.3 Consideration

In principle, the consideration for a public take-over offer may be in cash, shares or a mix of both. All shareholders of the target must receive the same consideration for each share belonging to the same class. Shareholders of different classes of shares may be treated differently. In practice, public takeovers by German bidders are almost exclusively made for cash consideration; foreign bidders are more likely to opt for shares or a mix of a cash and share consideration.

Shares that are part of the consideration must have voting rights if the target's shares are voting shares, and must be admitted to trading on an organised market in the EEA. The bidder must offer a cash consideration (at least as an alternative to a share offer) to all shareholders of the target if it acquires 5% or more of the target's shares for a cash consideration over a period beginning six months before the take-over announcement.

When making a public take-over offer or mandatory take-over offer, the consideration offered by the bidder is subject to the minimum pricing rules of the Takeover Act and the Offer Ordinance. The offer price must be at least equal to both (i) the value of the highest consideration paid or agreed to by the bidder, a person acting in concert with the bidder or any of their subsidiary undertakings for the acquisition of shares in the target within the six months period prior to the take-over announcement, and (ii) the weighted average price of such shares on the stock exchange during the last three months before the take-over announcement.

An exception to these pricing rules applies if stock exchange prices for the target's shares were fixed on less than one third of all trading days during the three months before the take-over announcement, and if the stock exchange prices fixed on a number of successive occasions differed from one another by more than 5%. In these cases, the consideration must correspond to the intrinsic value of the business.

If the bidder acquires shares or options in shares in the target for a higher price than the offer price either during the course of the public offer or within one year from the end of the offer period, all shareholders who tendered their shares can claim the difference.

6.4 Common Conditions for a Takeover Offer

In contrast to mandatory take-over offers, voluntary take-over offers can be made subject to any conditions that are beyond the bidder's control. Typical conditions that are required include merger clearance and a certain level of acceptance for the offer (minimum acceptance conditions). However, the offer cannot be made conditional on the following:

- obtaining sufficient financing for the transaction (except for approval by the bidders' shareholders to create shares to be exchanged as part of the offered consideration; restrictions apply to this);
- achieving a maximum acquisition quota (any takeover offer must be for all shares of the target); and
- potestative conditions.

Material adverse change conditions and conditions referring to satisfactory due diligence are difficult areas, and care must be taken to link such conditions to objective criteria. Mandatory take-over offers may not be subject to conditions other than those required by law, eg, merger control.

6.5 Minimum Acceptance Conditions

Due to the corporate majority requirements for fundamental decisions in the target, bidders generally require acceptance levels of 75% or 50% (+ 1 share/vote), depending on the level of comfort or security desired. The general rule is that corporate resolutions are taken with a simple majority (representing 50% of the votes cast at a shareholders' meeting + 1 share/vote). However, resolutions on capital measures – at least in the exclusion of subscription rights – and amendments to the key elements of the target's statutes in general require a qualified majority (votes representing 75% of the nominal capital or votes cast). If the bidder manages to acquire 90% of the shares in the target, he or she can initiate a merger-specific squeeze-out. 95% of the shares entitle the bidder to a takeover-specific squeeze-out or a general corporate squeeze-out (see **6.10 Squeeze-out Mechanisms**).

6.6 Requirement to Obtain Financing

Under the Takeover Act, a business combination in a public takeover cannot be conditional on the bidder obtaining financing. Before publishing the offer document, the bidder must ensure that sufficient means (cash or paper) are available when due. When a cash offer is made, an independent financial services institution – such as an investment bank – must confirm in writing that the bidder has sufficient available funds. The bank may be held liable if the bidder is then unable to pay for the shares obtained under the offer.

6.7 Types of Deal Security Measures

In general, the bidder may agree on anything with a seller, but faces restrictions regarding agreements with the target because the management board may only agree on terms that are in the best interest of the target, and must further obey insider trading rules, ad hoc requirements and the prohibition on taking actions that may jeopardise an offer.

However, break-up fees agreed between the bidder and the target are increasingly frequent, especially when non-German companies are involved. The target's ability to pay a break-up fee is restricted by statutory law, and it must be in the target's best interest to agree to a break-up fee. The benefits to the target of a completed take-over and the risk that an offer will not be made without a break-up fee must be weighed against the restrictions and financial burden imposed. If the break-up fee is in the target's best interest, it must obey financial assistance rules. The events triggering the break-up fee depend on the agreed terms, but generally this is the case either if the management board does not recommend the offer in order to pursue a competing bidder's offer, or if the target does not undertake certain actions required by the agreement. It is in the target's best interest to agree on a payment amount that is proportionate to the benefits expected from the takeover and that does not jeopardise its financial soundness. Generally, a fee not exceeding 1% (or 2% in special circumstances)of the transaction value is considered proportionate. However, it is important to note that break-up fee arrangements have not been the subject of court decisions, and their enforceability therefore remains uncertain.

Other deal protection measures must adhere to the limits set out at the beginning, and especially must be in the best interest of the target. This also applies to so-called Business Combination Agreements, which feature various measures depending on the circumstances of the transaction and therefore need to be drafted with great care. This is especially true as a highly controversial court ruling called the validity of such an agreement into question because the court found it to infringe on the division of powers between the management and the shareholders.

6.8 Additional Governance Rights

With respect to public companies, there are very limited means to obtain additional governance rights in excess of the voting rights attached to the shareholding. The bidder may seek to obtain a seat in the supervisory board, and furthermore may enter into pooling agreements with other shareholders. However, the latter enables the shareholder to increase its say in the election of members of the supervisory board but not its influence on the management board. The management board is controlled by the supervisory board exclusively, and does not have to answer to the shareholders' meeting or individual shareholders as long as it acts in the target's best interest.

6.9 Voting by Proxy

Shareholders may appoint attorneys in fact and vote by proxy.

6.10 Squeeze-out Mechanisms

The bidder can compulsorily buy the shares of the remaining minority shareholders under the following separate legal procedures:

- Takeover-related squeeze-out: this procedure allows a bidder holding at least 95% of the target's voting share capital following the take-over offer to purchase the remaining voting shares within three months of the end of the offer period, by filing an application to the Regional Court in Frankfurt. The bidder may also compulsorily purchase any remaining non-voting shares if he or she holds at least 95% of the registered share capital of the target. Even if the original offer by the bidder was for consideration in shares, the minority shareholders can opt for an equivalent cash payment instead. If the public take-over offer was accepted by 90% or more of the registered share capital subject to the offer, the offer price of the take-over is deemed to also be an appropriate compensation in the squeeze-out. However, it is not entirely clear whether this presumption is rebuttable. The squeeze-out becomes effective once the court decision becomes final (*rechtskräftig*). If the acceptance quota is lower, the squeeze-out consideration is not specified by law and is currently uncertain due to lack of case law. In this case, resulting extensive legal proceedings regarding the adequacy of the compensation make the takeover-related squeeze-out inefficient, and are the reason why it has not yet gained significant practical relevance.

Corresponding to the introduction of the takeover-related squeeze-out, the remaining minority shareholders can tender their shares on the terms of the public offer within three months of the end of the offer period.

- General corporate squeeze-out: the bidder can use this procedure at any time if it holds at least 95% of the target's registered share capital (including non-voting preference shares). However, a corporate squeeze-out requires registration into the commercial register of the target, based on a shareholders' resolution which the minority shareholders may challenge, thereby blocking registration of the squeeze-out, and a fair market valuation of the company (which is subject to judicial review) in a separate appraisal proceeding following registration of the squeeze-out. There is a fast-track process (*Freigabeverfahren*) to overcome the blocking effect of court challenges of the squeeze-out, which typically lasts three to six months. Because any disputes over the adequacy of the compensation do not affect the effectiveness of the squeeze-out once it is registered, the general corporate squeeze-out is the preferred squeeze-out mechanism.
- Merger-specific squeeze-out: under the Third Amendment Act to the German Transformation Act (*Drittes Gesetz zur Änderung des Umwandlungsgesetzes*), the required percentage of shareholding for effecting a squeeze-out was lowered from 95% to 90% of the stated share capital, provided that the squeeze-out is carried out in the context of an upstream merger with another stock corporation, partnership limited by shares or SE; that is, if the resolution by the majority shareholder on the squeeze-out is adopted within three months of the conclusion of the merger agreement (which has to contain the prospect of a future merger-specific squeeze-out). The squeeze-out enters into force only if and when the merger is conducted and registered with the commercial register. This is intended to prevent misuse of the now-required percentage of shareholding of 90% only. A further shareholders' resolution accepting the merger is not necessary.
- Delisting: the bidder may consider a delisting of the target company or a delisting by way of merger or change of legal form, or to merge the target company into a non-listed company as the surviving company, both of which require a 75% vote by the shareholders. In a delisting from a regulated market, the Stock Exchange Act now requires an offer to all shareholders prior to the delisting. The requirements closely resemble those of a takeover offer under the Takeover Act. In cases where the delisting is achieved through corporate restructuring (eg, merger, change of legal form), the Restructuring Act imposes a mandatory offer and compensation regime for shareholders who objected to the restructuring measure and wish to tender their shares.

6.11 Irrevocable Commitments

It used to be common practice in Germany to seek undertakings from key shareholders to sell their shares to the bidder. In general, shareholders and bidders are free to agree on terms or the nature of such agreement, unless a public offer is made or is mandatory. However, as of 1 February 2012, this practice has lost some of its significance as a stakebuilding measure, since irrevocable commitments above the 3% reporting threshold trigger the disclosure obligations to the target and BaFin (see Question 13). To the extent practised, shareholders generally require the right to accept a better offer, and the shareholders' management board must ensure that this is not restricted unless it is in the shareholders' best interest. Key shareholders also typically ask for what is known as a "drop-dead" date for the announcement of the potential bidder's decision to launch a public offer, after which any undertaking ceases to be binding on them.

7. Disclosure

7.1 Making a Bid Public

The Takeover Act distinguishes between acquisition offers, voluntary take-over offers and mandatory take-over offers (see **2.2 Primary Regulators**). Acquisition offers, take-over offers and mandatory take-over offers are subject to specific timetable rules.

Take-over Announcement

The bidder must notify the relevant authority and publish its decision to make a public offer (for acquisition and take-over offers) or that it obtained control of the target (for mandatory take-over offers), without undue delay (such notification is called an offer or takeover announcement). Notifications must be made to the BaFin and to the managers of all stock exchanges on which are listed the target's shares, or derivatives that reference the shares that are part of the offer. The subsequent publication must be made in German on both the internet and an electronic system for distributing information that is widely available to financial institutions (for example, Reuters and VWD Bloomberg). After publication of the announcement, the bidder has to inform the target's management board in writing, without undue delay. Other than the above, there are no legal requirements as to the content of the announcement. However, in practice, the bidder almost invariably includes at least the offer price to curb speculations in its own and in the target's shares. Both the target and the bidder may have to make ad hoc disclosures to the financial markets regarding a take-over offer at the time of announcement, and sometimes even before that. The details are complex and a case-by-case analysis is required well in advance of making the take-over announcement.

Offer Document and Offer Period

The bidder must prepare and publish an offer document (see also **5.5 Definitive Agreements**), which has to be filed with the BaFin within four weeks of the announcement. The BaFin may grant an extension of up to four weeks in certain limited circumstances (for example, complexity owing to a cross-border transaction involving various regulators, or the need to seek shareholders' approval for funding). After filing the offer document, the BaFin has ten working days to review it and can then either (i) allow the offer's publication, (ii) prohibit the offer's publication, (iii) grant an extension of five working days to correct mistakes, or (iv) let the review period lapse without taking action. Once the offer document has been approved or the review period has expired without action by the BaFin, the offer document has to be published immediately and sent to the target. Publication must be made both on the internet and in the electronic Federal Gazette. Instead of publication in the electronic Federal Gazette, the bidder can hold the offer document ready for inspection at suitable places in Germany (usually German banks and their branches) while publishing a note in the electronic Federal Gazette giving details. The offer period can be fixed by the bidder at between four and ten weeks from the publication of the offer document. Special rules apply if the original offer is amended, if the target convenes a shareholders' meeting to vote on a defensive action, or if a competing offer is made.

Target's Response

After receiving the offer document, the target's management and supervisory board must publish a reasoned opinion on the offer, without undue delay (see **5.5 Definitive Agreements**). The BaFin requires a speedy response and considers up to two weeks as a normal response time (depending on the complexity of the case).

Amendments to the Offer

At any time (and repeatedly) until one working day before the offer period expires, the bidder can (i) improve its consideration, (ii) offer alternative consideration, (iii) lower the required level of acceptances (in a take-over offer), or (iv) waive conditions for the offer. If the offer is amended within the last two weeks of the offer period, the offer period is extended by another two weeks, during which no further changes to the offer can be made. Any changes to the offer (particularly a higher consideration) also have to be offered to any shareholders who had previously accepted the offer, who are entitled to withdraw their acceptances until the offer period expires.

Competing Offers

If competing offers are made during the offer period, the bidder can either pursue its original offer or improve the initial offer. In any event, the offer period for the first offer is extended until the competing offer expires. The target's shareholders may withdraw their acceptance of the first offer made before the announcement of the competing offer until the offer period of the first offer expires.

Defensive Action by the Target
If the target convenes a shareholders' meeting to vote on a defensive action, the offer period is automatically extended to ten weeks.

Extended Offer Period and Takeover-Related Put Option
Following the end of the offer period of a takeover offer, the target's shareholders can tender their shares within another two weeks from the publication of the results of the offer (the extended offer period). Under certain circumstances, they may also tender their shares within three months of the end of the offer period, under the takeover-related put option.

7.2 Type of Disclosure Required
In practice, public take-overs by German bidders are almost exclusively made for cash consideration. However, if shares are publicly offered, then the disclosure and prospectus requirements mirror those of other public share offerings, and the German Securities Prospectus Act (*Wertpapierprospektgesetz*) needs to be adhered to.

7.3 Producing Financial Statements
In the event of cash offers, the bidders need to disclose and report that they have obtained sufficient financing. In paper offers, the requirements under the German Securities Prospectus Act (*Wertpapierprospektgesetz*) and its respective ordinance may need to be complied with. Otherwise, annual financial statements of German corporations or limited liability companies need to be filed with the Commercial Register on an ongoing basis and are, as such, publicly available information.

7.4 Transaction Documents
Except for the transaction documents described below, no other documents need to be disclosed. The offer document and the reasoned opinion of the target have to be disclosed in full. There is no difference between the documents for a recommended offer and a hostile offer, although the depth of information provided may differ. In detail, the following documents need to be disclosed in connection with public acquisitions in Germany:

- the bidder's offer document; and
- the target's response consisting of the reasoned opinion of the target's management and executive board (see **5.5 Definitive Agreements**) (often including a statement by the target's works council).

Furthermore, the bidder must publish the number of shares and voting rights tendered in response to the offer, as well as the number of shares and voting rights held by the bidder in total. This includes voting rights allocated to the bidder as well as financial instruments requiring notification under the Securities Trading Act (see **4.1 Principal Stakebuilding Strategies**). This information is to be published on a weekly basis (daily during the last week of the offer period). The bidder must also publish this information without undue delay (i) after the end of the offer period, (ii) after the end of the extended offer period, and (iii) when it reaches the 95% shareholding required for a takeover-related squeeze-out (see **6.10 Squeeze-out Mechanisms**).

8. Duties of Directors

8.1 Principal Directors' Duties
Public companies in Germany (with the exception of the one-tier SE) have a two-tier board system consisting of the management board (*Vorstand*), which runs the company, and the supervisory board (*Aufsichtsrat*), which supervises the actions of the management board. With respect to a business combination, the management board shall refrain from any frustrating actions that might obstruct the offer process unreasonably, and also from accepting any unjustified benefits. However, it may exercise any rights granted to it (inter alia under the Stock Corporation Act and the Takeover Act – see **8.4 Independent Outside Advice** and **8.5 Conflicts of Interest**). Furthermore, the management board must always act in the target's best interest (which may differ from the shareholders' or other stakeholders' interests). In addition, the management board has to publish a reasoned opinion on the offer (see **5.5 Definitive Agreements**). The same applies to the supervisory board.

The management board of private companies (eg, a limited liability company) does not face such restrictions. Within the capital maintenance rules, the management board is free to act, and shareholders are able to directly instruct the management board.

8.2 Special or Ad Hoc Committees
It is not common for management boards to establish special or ad hoc committees in business combinations, but companies with large supervisory boards usually establish committees to facilitate faster and more efficient decision-making processes. In a take-over scenario, it is common practice for such companies to empower committees to prepare and provide the board's reasoned opinion on the tender offer.

8.3 Business Judgement Rule
In general, the business judgement rule applies to decisions of the management board by law, ie, the directors are obliged to use the care of a prudent businessperson in their decision-making. Unlike typical Anglo-Saxon jurisdictions, the German jurisdiction follows the so-called stakeholder model, which requires the management to act in the best interest

of the company itself, not the shareholders as such. If a conflict of interest seems possible, or if the duty of loyalty to the company may be called into question, the management board may first have to refute this allegation in order for the business judgement rule to apply. However, in takeover scenarios, the rule not to frustrate the offer under the Takeover Act takes precedence - as lex specialis - over the general legal principles, and governs the actions and measures of the board of directors. Under this rule, the management of the target is obliged to refrain from any actions that might have a negative impact on a mandatory offer of a controlling shareholder (unless one of the exceptions to the rule applies).

8.4 Independent Outside Advice

The Takeover Act does not oblige the management board or the supervisory board to take independent, outside advice. However, it is advisable for the boards to take outside legal advice in order to fulfil their duty to (reasonably) review the offer document. The management board and/or the supervisory board should obtain a fairness opinion on the value of the target, especially in situations where there might be a conflict of interest or competing offers.

8.5 Conflicts of Interest

While shareholders are, in principle, free to pursue their own interests, the members of the management board and the supervisory board of the target are, as outlined, obliged to act in the best interest of the company. In a (mandatory) take-over offer setting, special rules exist where the bidder seeks to incentivise the members of either board in order to generate a co-operative environment. Such incentives, such as cash payments, are intrinsically prone to causing a conflict of interest. The Takeover Act therefore addresses the wish for incentives, and prohibits *unjustified* (non-cash) benefits. This implies that *justified* benefits are permissible. The criteria to assess whether a benefit is justified or unjustified are subject to debate and depend on a case-by-case analysis. A benefit that serves to deter the members of the target's boards from fulfilling their obligation to act primarily in the best interest of the company will likely be unjustified. In general, the rules of the Stock Corporation Act continue to apply and will influence the decision on whether a benefit is justified or unjustified.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile offers are allowed but are rarely undertaken. The last major hostile takeover attempt was Vonovia's offer for Deutsche Wohnen in 2016, which ultimately did not go through. One of the reasons for the rare occurrence of hostile offers is the intrinsic impediments in applicable takeover and corporate law (eg, the duty of board members of the target to act in the target's best interest).

9.2 Directors' Use of Defensive Measures

The management board is allowed to take pre-bid defensive measures as well as certain post-bid defensive measures in accordance with the Takeover Act and the Stock Corporations Act (see also **9.3 Common Defensive Measures**).

9.3 Common Defensive Measures

Even though defensive measures may be employed, their use is subject to legal restrains, and stock corporation law in particular provides some intrinsic protection that may alleviate the need for specific measures.

Pre-Bid Defences

The Takeover Act does not prohibit any defensive actions before the take-over announcement, so the management board may employ defensive measures if they are in the best interest of the company, and if they adhere to all further rules of the Stock Corporation Act. This may include negotiating change of control clauses in the company's contracts if such clauses are within its best interest, or limiting access during due diligence to a minimum. Furthermore, German stock corporations may choose to undertake corporate restructuring to achieve some protection against hostile offers, egby issuing non-voting preference shares, employing asset lock-ups or equity carve-outs, but these mechanisms have only played a limited practical role so far and should therefore be considered on a case-by-case basis. The target's shareholders' meeting can also authorise the management board to take actions that fall within the competence of the shareholders, specifically to prevent the success of any take-over offer, subject to approval of a defensive action (if and when taken) by the supervisory board, but this option has also scarcely been used.

Post-Bid Defences

After the takeover announcement, the Takeover Act requires the management board to refrain from taking any action that might impede the offer. However, the management board can seek alternative offers (white knight defence) or take actions that a prudent and conscientious director of a company not subject to a public take-over offer would have taken. Moreover, it can take defensive actions approved by the target's supervisory board (respectively approved by the shareholders' meeting before the take-over announcement and approved by the supervisory board before being implemented), or call a shareholders' meeting following the take-over announcement to vote on the defensive action. The notice periods are significantly shorter than with regard to ordinary shareholders' meetings. If this meeting is convened, the offer period is extended to ten weeks to allow the shareholders' meeting to take place before the offer expires. Finally, the boards can influence the shareholders to refuse a hostile take-over offer when giving their reasoned opinion. In this respect, the board of managing directors and the supervisory board must consider the transparency principle and avoid misleading statements.

Even though a German target may opt out of the German rules regarding defensive action and opt in to the rules set out in the Takeover Directive (Directive 2004/25/EC), this has gained very little practical significance.

Publication of Defence Mechanics
All listed German stock corporations must give detailed information on all existing defence mechanics in the management report (*Lagebericht*) that forms part of the company's annual financial statements. The supervisory board must comment on this information in its own statement for the annual general meeting (*Bericht des Aufsichtsrats*).

9.4 Directors' Duties
The management board must always act in the target's best interest (see **2.2 Primary Regulators**, **5.4 Standstills or Exclusivity** and **6.7 Types of Deal Security Measures**).

9.5 Directors' Ability to "Just Say No"
The management board may influence the outcome of the offer by giving its reasoned opinion or obtaining informal backing from the main shareholders. However, it may not frustrate a public offer unreasonably. Accordingly, it may have to justify its decision, so it is advisable to seek advice from independent outside advisers and document the reasons for the decisions.

10. Litigation

10.1 Frequency of Litigation
Litigation is still not common in connection with public M&A (especially not between bidder and target company) and is mostly the result of claims of minority shareholders against certain corporate taking-private transactions, such as squeeze-out or delisting resolutions, with an aim of receiving additional compensation. As described in **11.1 Shareholder Activism** such litigation is mostly manageable, taking the special release proceedings (*Freigabeverfahren*) into account.

A civil action may also be brought in the event that the consideration in a takeover offer is not adequate (see **3.1 Significant Court Decision or Legal Development**). Despite this, courts have held in several decisions that BaFin is the primary competent authority to enforce the provisions of the Takeover Act and that, subsequently, the shareholders of the target do not have the right to claim compensation where a mandatory offer is – wrongfully – not published. They also do not have the right to challenge BaFin decisions.

In private M&A, there are often disputes between the contracting parties about different topics, such as the due date of variable purchase price payments, compensation for breach of warranties or the effectiveness of the Sale and Purchase Agreement in general, etc. Nevertheless, there are only a few published court rulings regarding M&A transactions, because most of the relevant agreements contain arbitration clauses, and arbitration awards are generally not published. Negotiations before state courts are often concluded with a settlement, so there are also no published rulings.

10.2 Stage of Deal
Since most litigation in connection with public M&A is the result of claims of minority shareholders against the validity of respective squeeze-out or delisting shareholder resolutions, it is commonly filed following the squeeze-out resolution by the shareholders' meeting as a blocking measure against registration with the commercial register. Challenges with respect to the compensation in such a squeeze-out scenario do not impede the effect of the squeeze-out itself (except for the takeover-related squeeze-out).

In private M&A transactions, there are different possible stages for disputes. In the run-up to a transaction, there may be disputes on break-up fee clauses, for example. Litigation may also arise subsequent to the conclusion of the Sale and Purchase Agreement or even subsequent to Closing, when, for example, warranty claims are asserted by the buyer.

11. Activism

11.1 Shareholder Activism
Shareholder activism is still less common in Germany than in other jurisdictions, but is expected to grow in importance as the capitalisation of activist funds increases.

It must be differentiated from notorious claimants (*Berufskläger*), who used to be a major issue in Germany, as professional minority shareholders took advantage of legal procedures under which even individual shareholders could file a suit to set aside a shareholders' resolution for violating the law or the articles of association. The registration of substantial corporate transactions such as statutory mergers, domination and profit and loss transfer agreements or squeeze-out resolutions, which require registration with the German commercial register in order to be effective, could be blocked by shareholder claims of one single minority shareholder. However, after the implementation of the EU Shareholders' Rights Directive, strengthening the position of the company vis-à-vis the individual shareholder, the special court procedure to overcome the blocking effect of shareholder actions (*Freigabeverfahren*) is now an efficient tool and reduced the leverage of minority shareholders considerably.

Shareholder activism in contrast is generally a more constructive but agenda-driven approach, seeking short-term gains in many cases. To pursue their agenda, shareholders utilise minority rights guaranteed under the Stock Corporation Act (eg, the right to make counter proposals at shareholders' meetings or commence litigation against board members or majority shareholders) but also the aforementioned possibilities to attack shareholders' resolutions (at times with similar effect as notorious claimants). The motives of activist shareholders are diverse and their approach varies accordingly, ranging from limited activism to aggressive interaction with the company.

11.2 Aims of Activists

As each shareholder's agenda is unique, a generalisation is difficult. However, in the past, shareholder activism in Germany, inter alia, has also been aimed at corporate strategy and restructuring measures (eg, Bilfinger and ThyssenKrupp), as well as takeover offers (eg, Deutsche Börse, Celesio and, most recently, Stada). In Celesio, for example, an activist shareholder acquired a significant stake in Celesio to force the bidder to increase the consideration offered.

11.3 Interference with Completion

Typically, activism does not endanger the completion of announced transactions themselves per se, but this may be different if the bidder makes an offer with the condition of a certain acceptance quota and an activist shareholder brings him or herself into a position where he or she can control whether the condition is met and therefore influence the offer conditions. More often, activist shareholders and notorious claimants may interfere with corporate measures (see **11.2 Aims of Activists**) after a transaction, thereby affecting the decision to launch an offer in the first place. With an expected increase in activist shareholding, future public transactions may be prone to a higher risk in that regard, and companies should seek expert advice to minimise their exposure.

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