Baker & McKenzie

Public Takeovers in Germany

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January 2014

Attorney Advertising

Table of Content

1.	**Introduction**	**5**
1.1.	Environment for Public Takeovers in Germany	5
1.2.	Main Features of a German Target	6
1.3.	Finding the Right Target	7
2.	**Regulatory Framework: Takeover Act**	**8**
2.1.	Principles of the Takeover Act	8
2.2.	Scope of Application of the Takeover Act	9
3.	**Types of Offers**	**10**
3.1.	Overview	11
3.2.	Attribution of Voting Rights	11
3.3.	Takeover Offers	11
3.4.	Mandatory Offers	12
3.5.	Regular Offers	13
3.6.	Choice of Type of Offer	14
4.	**Structuring an Offer**	**15**
5.	**Consideration**	**16**
5.1.	Type of Consideration	16
5.2.	Minimum Consideration offered in a Takeover Offer or Mandatory Offer	17
6.	**Stake Building and Corresponding Notification Duties**	**18**
6.1.	Notification Thresholds	18
6.2.	Deadline for Notification	18
6.3.	Duties of the Target Company	19
6.4.	Sanctions in case of Violation	19
6.5.	Further Consequences arising from Stake Building	19
7.	**Offer Process**	**20**
7.1.	Overview	20
7.2.	Preparation of the Offer/Takeover Decision	20
7.3.	Review of the Offer	24
7.4.	Acceptance Period	24
7.5.	Post-Offer Period	25
7.6.	Milestones of a Takeover Offer	26
8.	**Offer Document**	**27**
8.1.	Content	27
8.2.	Liability	27

9.	**Duties of the Boards of the Target Company**	**28**
9.1.	Overview	28
9.2.	Obligation of the Management Board and the Supervisory Board to Publish a "Reasoned Statement"	29
9.3.	Non-Frustration Rule	29
9.4.	Exceptions to the Non-Frustration Rule	29
10.	**Defence Measures**	**32**
10.1.	Overview	32
10.2.	Summary of Defence Measures	32
10.3.	Defence with Arguments	33
11.	**European Takeover Regime ("Opt-In" – "Opt-Out")**	**34**
12.	**Prohibition of Granting Unjustified Benefits to Management Board and Supervisory Board**	**35**
13.	**Legal Remedies**	**36**
14.	**Financing**	**37**
14.1.	Certain Funds	37
14.2.	Cash Offers - Financing Confirmation	37
14.3.	Refinancing	37
15.	**Post-Offer Strategies**	**38**
15.1.	Overview	38
15.2.	Domination Agreement / Profit and Loss Pooling Agreement	39
15.3.	Squeeze-Out	40
15.4.	Regular Delisting	41
15.5.	Cold Delisting	41
Services of Baker & McKenzie		**43**
Your contact		**44**
ANNEX		**45**
1.	**"The Perfect Target"**	**46**
2.	**Step Plan Public Takeover (friendly Takeover Offer with Cash Consideration)**	**47**
3.	**Selected Provisions of the German Takeover Act**	**51**
3.1	Securities Acquisition and Takeover Act	51
3.2	WpÜG Offer Ordinance	54

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1. Introduction

1.1. Environment for Public Takeovers in Germany

In Germany, as in many other countries, the acquisition of a listed entity, a so called public takeover, is regulated. Unlike the acquisition of a private enterprise, a public takeover is not merely a matter of negotiations between buyer and seller. The regulatory regime provided by the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz or WpÜG*, the "**Takeover Act**") must be observed.

The Takeover Act was introduced in 2002. Prior to 2002 takeovers in Germany were governed by the non binding "**Takeover Code**" (*Übernahmekodex*). The Takeover Code did not provide for any sanctions, and not all companies signed a voluntary declaration of adherence. The introduction of the Takeover Act was a consequence of an increasing number of public takeovers, which had been the exception in Germany until the late 1990s. Until then the German economy had been dominated by a relatively small number of key players (corporate and banks) with cross-shareholdings (so-called "Deutschland AG"). Only very few public takeovers occurred. Hostile takeovers were practically unheard of (with a few notable exceptions, namely Pirelli/Continental, Krupp-Hoesch/Thyssen). This changed in 2000 with the prominent takeover of Mannesmann by Vodafone. The volume of the transaction and the intensity of the public takeover battle raised the interest of the public in Germany and elsewhere. The legislator felt that the level of investor protection provided by the Takeover Code was insufficient and introduced the Takeover Act.

Since the introduction of the Takeover Act and up until the beginning of 2012, 344 public takeover offers involving a German target company have occurred. This includes a number of hostile takeover attempts which in most cases were successful (e.g. ACS/Hochtief, Schaeffler/Continental, Macquarie/Techem, Suzlon/REpower, Bayer/Schering, Barilla/Kamps).

Due to the worldwide financial and economic crisis in 2008/2009, the number of public takeover offers in Germany in 2009 and 2010 has declined significantly. Since then, the German economy has recovered (more so than in many other industrialized countries) and many companies are achieving high profits again. As a result, the number of takeover offers in Germany increased in 2011 and it is to be expected that German listed companies will also be perceived as very attractive takeover targets in 2012.

The purpose of this publication is to outline the main legal and practical issues in a public takeover and to provide an overview of practical solutions to these issues for potential investors. The following main questions will be addressed:

- When does the Takeover Act apply?
- What are the main principles of the Takeover Act?
- What types of public offers are available?
- How is a public offer best structured?
- What type and what amount of consideration can or must be offered?
- What are the rules for stake building?
- What does the offer process and the offer document look like?
- What are the duties of the boards of the target company?
- Are defence measures admissible?
- What are the rules in relation to the financing of an offer?
- Which post offer strategies are available?
- What offer rules are relevant for a public takeover?

1.2. Main Features of a German Target

Practically all potential German targets for public takeovers are organised as stock corporations (*Aktiengesellschaft*). There are very few listed German companies which are organised in the legal form of a "partnership limited by shares" (*Kommanditgesellschaft auf Aktien*). A potential bidder should be aware of several typical "features" of a German stock corporation very early in the process. Even after a successful public takeover, the influence of the bidder over the target company will be limited by these features and rules of German law.

One of the most significant differences between Germany and many other jurisdictions is the German **two tier board system**. In a German stock corporation, the management board (*Vorstand*) is responsible for the management of the company and its representation in dealings with third parties. The supervisory board (*Aufsichtsrat*) appoints and dismisses the members of the management board and supervises their actions. However, the supervisory board is not involved in the day-to-day management of the company. Unlike other legal entities or jurisdictions, the powers of the shareholders' meeting and of the supervisory board are rather restricted because the management board enjoys a considerable degree of independence.

Another important aspect which a foreign bidder should keep in mind, are the German rules on **employee co-determination**. The members of the supervisory board are in general elected by the shareholders' meeting. However, pursuant to German co-determination law, the supervisory board of companies which on average employ 500 or more employees consist not only of members elected by the shareholders but also of employee representatives. If the company has on average more than 500 employees and less than 2,000 in Germany (the latter figure is calculated on a consolidated basis), one third of the supervisory board members must be employee representatives. If the company has on average more than 2,000 employees in Germany, calculated on a consolidated basis, their representatives must make up half of the supervisory board. In the latter case, the chairman of the supervisory board (who is always elected by the shareholders) has a casting vote in case of a tie.

Following a successful public offer, the new majority shareholder cannot simply take control over the management in a German stock corporation and/or replace management board members unless the existing members have agreed in advance to resign. To the extent that members of the old management and/or

supervisory board do not resign voluntarily, their replacement is a rather lengthy process. The supervisory board members must be replaced by a vote of the general meeting. This in itself is quite costly and time-consuming. Only then can members of the management board be replaced by a vote of the new supervisory board. The entire process is even more complicated in case of co-determined stock corporations.

German stock corporation law provides for **different classes of shares**. Typically, German targets have issued bearer shares, i.e. there is no share register kept with the company. Companies with registered shares must keep a share register. Each transfer of shares needs to be entered into the share register in order to become effective vis-à-vis the company. In case of registered shares, the company may restrict their transferability meaning that the transfer of such shares to a third party is subject to the company's consent. Even though listed companies generally will (and have to) agree to a transfer in case of such a restriction, a takeover will only be possible in co-operation with the existing management of the target company, which makes a hostile takeover virtually impossible. However, such restrictions are very rare.

Apart from the difference between bearer and registered shares, a German stock corporation can also have **ordinary** and **preference shares**. Preference shares may be issued without voting rights. All public offers must apply to all classes of shares. However, the Bidder may offer a different consideration for each class. For example, subject to applicable minimum pricing rules, a bidder is permitted to offer a lower price for non-voting preference shares since these will not be relevant in achieving a controlling stake at the shareholders' meeting.

Finally, German corporate law contains various other provisions which complicate the effective integration of the target company with the group of a bidder even after a takeover offer has been successful. These restrictions must be taken into consideration early on by any potential bidder when structuring its offer. The available strategies are discussed in detail in Section 15 below. Further restrictions result from the strict German rules on capital maintenance which are of particular relevance for the financing of the offer (see below in Section 14.3).

1.3. Finding the Right Target

For any strategic buyer, the acquisition of a target company must obviously make sense from a strategic, economic and competitive point of view. However, in case of a listed target, there are certain additional factors which may be of relevance:

- Low share price / undervaluation at the stock exchange (low purchase price)
- Sum of all parts of the target group exceeds its current value (asset stripping)
- High potential synergies between the bidder and the target
- Large free float and/or no anchor investor

Annex 1 contains a more detailed list of factors which make a listed company a "perfect target".

2. Regulatory Framework: Takeover Act

As already mentioned, the main regulation for public takeovers in Germany is the Takeover Act of 2002. The Takeover Act was reformed in 2006 in order to implement the European Takeover Directive (Directive No. 2004/25/EC on Takeovers Bids of 21 April 2004) (cf. Section 11). However, the 2006 reform did not lead to major changes in the regulatory regime, as the German legislator had originally taken into consideration the then available draft of the European Takeover Directive when it introduced the Takeover Act. The main changes were modified rules for defensive measures and the introduction of a special post-takeover squeeze-out and sell-out regime.

Other areas of law which are always relevant in the context of a public takeover are corporate (stock corporation) law, securities law and related areas of general civil law.

2.1. Principles of the Takeover Act

The main principles of the German Takeover Act are:

- Equal treatment of all shareholders.
- Sufficient information for the shareholders and sufficient time for the shareholders to consider the offer and make an informed decision.
- The management board and the supervisory board of the company which is the subject of the offer ("**Target Company**") have to act in the best interest of the Target Company.
- The person or legal entity making the offer (the "**Bidder**") and the Target Company must execute the offer expeditiously.
- Avoidance of market disruptions in the trading of the shares of the Target Company.

The Takeover Act is accompanied by several statutory instruments, including the Ordinance on the Contents of the Offer Document (the "**WpÜG Offer Ordinance**"), which set out more detailed requirements regarding the contents of the offer document and the consideration offered to the Target Company's shareholders.

Compliance with the Takeover Act is supervised by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, the "**BaFin**"). Information regarding current and past offers may be found on the website of the BaFin (www.bafin.de).

2.2. Scope of Application of the Takeover Act

The Takeover Act applies primarily to public offers for the acquisition of shares issued by German stock corporations or partnerships limited by shares and listed on an organised market in Germany or in another member state of the European Economic Area ("**EEA**"). Part of the Takeover Act also applies to offers for non-German companies incorporated within the EEA that are listed in Germany but not in their home jurisdiction (see below). The public offer may be a cash offer or an exchange offer, typically against liquid securities issued by the bidder. The Takeover Act also applies to offers for securities that are comparable to shares (e.g. interim certificates, depositary receipts, convertible bonds and options). The only organised market in Germany is the Regulated Market segment (*Regulierter Markt*) of the German stock exchanges. On the Frankfurt Stock Exchange, there are two Regulated Market segments, the General Standard and the Prime Standard. All companies that are included in selective indices (DAX, TecDAX, MDAX) are traded in the Prime Standard segment.

The Takeover Act does not apply to securities which are traded solely over-the-counter (*Freiverkehr*) or to securities admitted only to stock exchanges outside the EEA (e.g. NASDAQ).

With regard to companies that have their registered seat in one country within the EU and their listing in another country of the EU/EEA the following applies:

If the Target Company has its registered seat in Germany but is admitted to trading only outside Germany on one or more EEA organised markets, the provisions of the Takeover Act concerning company law apply. These provisions include the control threshold and the obligation to make a mandatory offer following acquisition of control, as well as the exemptions relating thereto. They further affect the permissibility of frustrating action by the management of the Target Company and all other internal issues within the Target Company. However, the details of the takeover procedure, i.e. the competent authority and the content of the offer document, especially the consideration, are governed by the jurisdiction of the country where the Target Company is listed.

If the Target Company is listed only in Germany but has its registered seat in an EEA country other than Germany, the provisions of the Takeover Act concerning the takeover procedure apply. These provisions in particular determine the competent authority, the content of the offer document and the type and amount of consideration. The provisions of the Takeover Act concerning company law do not apply.

If the Target Company is listed both in Germany and in another EEA country, but its registered seat is in a third EEA country (being different from the countries of its listings), the provisions of the Takeover Act concerning company law do not apply. The Target Company can choose to adopt the provisions concerning the takeover procedure in either of the two countries in which it is listed (Germany or the other EEA country). The Target Company must notify the BaFin of its choice and must publish its decision.

3. Types of Offers

3.1. Overview

The Takeover Act distinguishes between three types of offers:

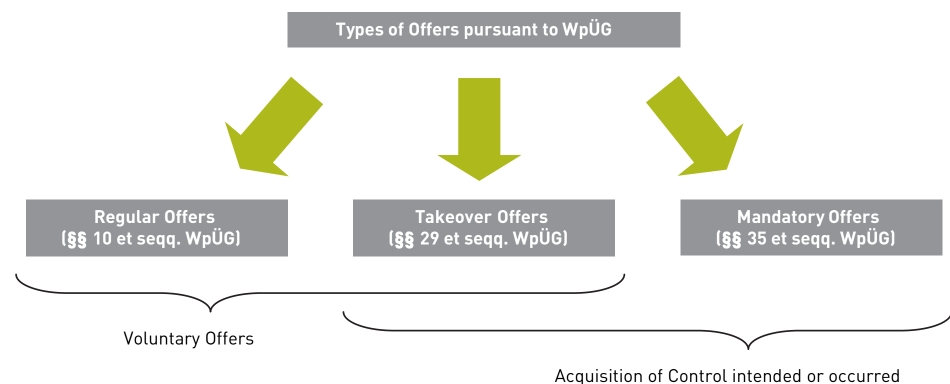
- **“Regular Offers”**
- **“Takeover Offers”**
- **“Mandatory Offers”**

Regular Offers fall under a more liberal legal regime, while Mandatory Offers are subject to the strictest level of regulation.

The main difference between the three types of offers relates to the principle of “acquisition of control”. For the purpose of the Takeover Act, “acquisition of control” occurs if a Bidder acquires at least 30 % of the voting rights in a Target Company (**“Control”**). For purposes of determining whether Control has been acquired, extensive attribution rules apply (see Section 3.2 below).

In Regular Offers, the acquisition of Control is not intended and does not occur. The Bidder makes an offer to acquire a stake below 30 % or already has Control and merely increases his stake. In a Takeover Offer, the acquisition of Control is the goal of the offer, i.e. the Bidder intends to acquire Control through or in conjunction with the offer. In a Mandatory Offer, the acquisition of Control precedes the offer and triggers an obligation to make the Mandatory Offer.

The types of offers can be illustrated as follows:



3.2. Attribution of Voting Rights

As already mentioned the concept of acquisition of Control is of crucial importance throughout the Takeover Act. In addition to voting rights held directly by the Bidder, an acquisition of Control may occur because shares held by another entity or person, are "attributable" to the Bidder (mainly to prevent circumventions of the rules on Mandatory Offers). The Takeover Act stipulates that the following voting rights are attributed to the Bidder:

1. Voting rights from shares which are held by a direct or indirect subsidiary of the Bidder;
2. Voting rights from shares which are held by a third party and for the account of the Bidder;
3. Voting rights from shares which the Bidder has transferred to a third party as collateral, unless the third party is authorised to exercise the voting rights from these shares and announces his intention to exercise the voting rights independently of the Bidder's instructions;
4. Voting rights in respect of which a usufructuary right has been granted in favour of the Bidder;
5. Voting rights from shares which the Bidder may acquire by unilateral declaration; or
6. Voting rights from shares which are entrusted to the Bidder or whose voting rights can be exercised by the Bidder as an agent, to the extent that he can exercise the voting rights from these shares at his own discretion, provided that there are no particular instructions from the shareholder.

With regard to the attribution set out above pursuant to numbers 2 to 6, direct and indirect subsidiaries of the Bidder are deemed equivalent to the Bidder. Voting rights of the subsidiary are fully attributed to the Bidder.

The attribution rules set out above also apply to persons "acting in concert". Acting in concert is not limited to the coordinated exercise of the voting rights at the shareholders' meeting. It may also result from other concerted actions which serve to influence the strategic direction of the company on the basis of a long term planned strategy for the joint pursuit of changing entrepreneurial goals. However, co-ordinated shareholders' behaviour in a single case is exempted, e.g. a co-ordinated vote regarding resolutions on individual structure measures or the nomination of individual members to the supervisory board (unless part of an overall strategy).

3.3. Takeover Offers

Takeover Offers are offers made by a Bidder who does not yet have Control over the Target Company, but aims to acquire Control over the Target Company through or in conjunction with the offer. Takeover Offers are voluntary offers. They must apply to 100 % of the outstanding shares of the Target Company, but otherwise benefit from a somewhat more flexible regime compared to the one applicable to Mandatory Offers. Most importantly and unlike Mandatory Offers, Takeover Offers may be subject to the fulfilment of certain conditions. In practice, the most frequently used condition (besides merger control clearance) is a so called minimum acceptance threshold (the Bidder can define a certain acceptance rate, e.g. a minimum of 75 % of the shares of the Target Company; if this threshold is not met, the offer lapses). It is also possible to make a Takeover Offer subject to a material adverse change condition, which will allow the Bidder to withdraw from the offer if certain (clearly defined) adverse events occur.

However, the Bidder must not be able to withdraw from the offer at his own discretion. Therefore, conditions are only admissible if the Bidder has no direct influence on their fulfilment and if they are so clearly defined that there is no room for interpretation as to whether the conditions are met or not.

The Bidder can waive the conditions during the offer period. For example, a Bidder may waive the minimum acceptance threshold.

As mentioned, a Takeover Offer must always apply to all issued shares of the Target Company. Therefore, as a matter of principle, a Takeover Offer must also be addressed to shareholders with a domicile outside Germany. This can imply an obligation on the Bidder to observe the takeover laws of other jurisdictions in addition to German law. The BaFin can however allow the Bidder upon his request to exempt shareholders from the offer who are domiciled in certain jurisdictions outside the EEA. However, such an exemption is in practice only rarely granted.

3.4. Mandatory Offers

The obligation to make a Mandatory Offer arises if a Bidder acquires Control over the Target Company outside of a Takeover Offer. The provisions for Mandatory Offers ensure that all holders of shares of the Target Company have the opportunity to sell their shares for adequate consideration in case of a change of Control. Mandatory Offers are subject to the strictest regulation regime. Like Takeover Offers, Mandatory Offers must always apply to 100 % of the outstanding shares of the Target Company. However, unlike Takeover and Regular Offers, Mandatory Offers cannot be made subject to any conditions. For example, the Bidder may not set a minimum acceptance threshold.

3.4.1. Exemptions from the Obligation to make a Mandatory Offer

A Mandatory Offer is not required if the Bidder has obtained Control on the basis of a Takeover Offer or if the BaFin has granted an exemption. There are two different ways in which a Bidder may be exempted even though he holds 30 % or more of the voting rights.

Firstly, the BaFin may decide that some or all of the voting rights are not to be taken into account when calculating whether the 30 % threshold has been reached or not. However, this exemption is only available if the Bidder has acquired the relevant voting rights by way of

- Inheritance, donation between near relatives
- Change of the legal form
- Restructuring measures within the group of companies that the Bidder belongs to.

Secondly, upon written request, the BaFin may exempt the Bidder from the obligation to submit a Mandatory Offer in certain cases, which are provided for in the WpÜG Offer Ordinance. The BaFin may take this decision at its own discretion. In particular, an exemption will be considered if:

- The Bidder has acquired Control by way of inheritance or donation from someone who is not a relative.
- The Bidder intends to recapitalise a Target Company in financial difficulties.

- The Bidder has only indirectly acquired Control through the acquisition of another company (holding a controlling stake in the Target Company), **and** the book value of the stake in the Target Company held by the other company amounts to less than 20 % of the entire book value of its assets.
- The Bidder has acquired the controlling stake only as a security.
- The acquisition of Control was triggered by a reverse share split of the Target Company.
- Another Shareholder holds a higher stake in the Target Company than the Bidder.
- On the basis of the attendance at the last three general meetings of the Target Company, it is unlikely that the Bidder will have more than 50 % of the voting rights at the next general meeting.
- The Bidder's stake has fallen below the 30 % threshold immediately after it was reached.

3.4.2. Sanctions

If a shareholder does not submit a Mandatory Offer although he has acquired Control, the rights deriving from his shares are suspended for as long as he fails to fulfil his obligations. This suspension of rights also applies for the shares which are owned by a third party but attributed to the Bidder pursuant to the rules set out above. Even if the stake held directly and indirectly subsequently falls below the 30 % threshold again, the rights will remain suspended until the Mandatory Offer is made.

3.5. Regular Offers

Regular Offers are all other offers within the scope of the Takeover Act. Basically, two different kinds of offers are covered:

- Offers to obtain less than 30 % of the voting rights in a Target Company to build up a non-controlling stake
- Offers to obtain further shares by a shareholder who already has Control (so-called add-on offers). For example, such add-on offers occur if a Bidder makes a public offer to increase his stake to 90 % or rather 95 %, enabling him to squeeze out the remaining minority shareholders.

The provisions of the Takeover Act on Regular Offers are less strict than those on Takeover and Mandatory Offers. For example, the Takeover Act does not restrict the Bidder's choice of the type and amount of consideration for a Regular Offer.

Unlike Takeover and Mandatory Offers, a Regular Offer need not extend to all shares of the Target Company. The Bidder may set a maximum offer volume. This is strongly recommended in order to avoid the Bidder crossing the 30 % threshold, which in turn would trigger an obligation to make a Mandatory Offer. In case the offer is accepted for more shares than the maximum, the volume of acceptances may then be reduced proportionally for each shareholder to ensure equal treatment.

A Regular Offer may also be made subject to other conditions. The only restriction is that the Bidder may not have a direct influence on the fulfilment of these conditions.

3.6. Choice of Type of Offer

The main characteristics of the three types of offers can be summarised as follows:

	Regular Offer	Takeover Offer	Mandatory Offer
Type of Consideration	No restrictions	Cash and/or Shares*	Cash and/or Shares*
Amount of Consideration	No restrictions	Statutory minimum price depending on average share price/advance acquisitions	Statutory minimum price depending on average share price/advance acquisitions
Conditions admissible (e.g. acceptance threshold)	Yes	Yes	No
Amount of shares to be covered	max. < 30 % or add-on acquisitions	always 100 %	always 100 %
Possible Sanctions against the Bidder (cf. Section 6.4)	Administrative Fine	Administrative Fine	• Suspension of shareholder's rights • Administrative Fine • Payment of interest on consideration • Action for damages
Additional Acceptance Period (cf. Section 7.4)	Yes	Yes	No

* A cash consideration is mandatory in case of prior cash purchases of more than 5% of the shares or voting rights of the Target Company.

4. Structuring an Offer

Most Bidders will, in practice, prefer to make a Takeover Offer rather than a Mandatory Offer as it is permissible to include conditions to the offer, in particular the minimum acceptance threshold. Most Bidders will only be interested in an acquisition if they actually achieve a certain degree of Control over the Target Company. Some Bidders may aim for a simple majority of 50%, allowing them to pass standard resolutions of the shareholders' meeting, for example on the appropriation of profits. Other Bidders may aim for a three quarter majority. A three quarter majority would allow them to resolve structural measures, in particular various forms of integration of the Target Company into the Bidder's group. In particular, the integration of the Target Company with a profit transfer agreement may be important for financing the public offer (cf. Section 14). However, in certain circumstances, a Mandatory Offer may have advantages over a Takeover Offer. Therefore, it is imperative to give careful consideration to the structuring of the offer very early in the process.

Mandatory Offers may have certain strategic advantages in specific situations. For example, Porsche decided to structure its takeover of Volkswagen as a Mandatory Offer. Due to its acquisition plans, Porsche anticipated the sharp increase of Volkswagen's share price and chose an early date for crossing the 30 % threshold which led to a minimum consideration being lower than the later Volkswagen share price during the acceptance period. Accordingly, only 0.06 % of Volkswagen's shareholders tendered their shares. As a result, Porsche fulfilled its obligation under the Takeover Act at a very low cost. Porsche was then free to acquire further shares on the stock exchange without triggering the requirement to make another offer. Achieving this result in the course of a Takeover Offer could have been far more expensive.

As long as the Bidder structures the transaction adequately, the Bidder can determine the type of the offer. Prior to a takeover, the Bidder normally clarifies the willingness of major shareholders to sell their shares. If major shareholders are willing to sell more than 30 % of the shares in the Target Company to the Bidder, the Bidder may decide to acquire these shares through a Takeover Offer (rather than buying a stake of more than 30 % prior to the offer). By doing this, the Bidder avoids a Mandatory Offer in favour of a Takeover Offer as he acquires Control only by way of the Takeover Offer and may make it subject to certain conditions. However, if he acquires Control in advance by way of an acquisition of equity stakes or by attribution of voting rights, the Bidder has to submit a Mandatory Offer and loses strategic and economic flexibility. Alternatively, the major shareholders may also be asked to contribute their shares in future Takeover Offers (Irrevocable Undertaking or Tender Offer Commitment, cf. Section 7.2).

5. Consideration

The type and amount of the consideration offered by the Bidder is of particular significance in deciding whether or not to accept the offer. In case of Regular Offers, there are no restrictions in determining the consideration as long as the Bidder treats all shareholders of the same class equally. In case of a Takeover Offer or Mandatory Offer, the Bidder's choice in the type and amount of consideration is limited by the Takeover Act.

5.1. Type of Consideration

In principle, the Bidder can choose whether he would like to acquire the securities of the Target Company against cash ("**Cash Offers**") and/or against shares ("**Exchange Offers**"). However, the Bidder has to make a Cash Offer if he has purchased 5 % or more of the Target Company's shares for cash within a period starting 6 months prior to the publication of the Offer Decision and ending at the end of the Acceptance Period.

Exchange Offers are quite rare because of their complexity in terms of documentation and possible obligations to prepare separate prospectuses in other jurisdictions. For example, the exchange offer document prepared by ACS for Hochtief comprised of more than 1200 pages. A Cash Offer document usually consists of 35-60 pages. Furthermore, the securities offered in an Exchange Offer need to meet certain criteria. In particular, these securities must be liquid shares admitted to trading on an organised market within the EEA. If, however, shares are offered only as an alternative to a cash payment, these criteria do not have to be met.

The advantages and disadvantages of the different types of consideration can be illustrated as follows:

	Advantages	Disadvantages
Cash Offer	▸ Offer Document less complex ▸ No share issue required	▸ Financing costs ▸ Confirmation by financial institution required
Ex-change Offer	▸ No financing costs as Offer is "financed" by dilution	▸ Creation / admittance of new shares ▸ Regularly requires a resolution of the general meeting ▸ More complex offer document ▸ Success also depends on (relative) price movement of bidder's shares compared to the Target Company Shares
Combined Cash/ Ex-change Offer	▸ Lower financing costs as Offer is partly "financed" by dilution ▸ Authorised capital could possibly be used	▸ Confirmation by financial institution required ▸ Creation / admittance of new shares ▸ More complex offer document

5.2. Minimum Consideration offered in a Takeover Offer or Mandatory Offer

In case of a Takeover Offer or Mandatory Offer, the Takeover Act provides for a minimum offer price which must at least equal the higher of:

(i) The volume weighted average stock exchange price of the shares of the Target Company within the last three months prior to the publication of the Takeover Decision or the acquisition of Control; or
(ii) The highest consideration paid by the Bidder for such shares in the last six months and may have to be increased as a result of further purchases of shares (see below for more detail).

In case of an Exchange Offer, the value of the Bidder's shares offered is calculated by the same method.

The applicable minimum offer price is calculated by the BaFin on a regular basis. A Bidder who has published a Takeover Decision or the acquisition of Control can retrieve the applicable minimum price on the BaFin's website.

Besides the three-month average share price, all pre-, parallel- and post-offer-acquisitions of the Bidder are taken as a reference for the adequateness of the consideration as follows:

- The consideration must at least equal the value of the highest consideration guaranteed or agreed upon by the Bidder within the last six months prior to the publication of the offer document.

- The consideration increases if, during the acceptance period, the Bidder acquires shares of the Target Company outside of the offer at a higher consideration than the consideration offered in the offer.

- Over-the-counter acquisitions, where the Bidder agrees upon a higher consideration than that in the offer, and which are executed within one year following the expiry of the Regular Acceptance Period are also taken into account. In this case, all shareholders who have accepted the Bidder's offer during the acceptance period are entitled to subsequent payment.

The minimum consideration is to be determined separately for each class of shares. For example, lower minimum consideration often applies to non-voting shares than to ordinary shares.

6. Stake Building and Corresponding Notification Duties

The German Securities Trading Act (*Wertpapierhandelsgesetz*, "**WpHG**") provides for a notification obligation of any shareholder who holds a certain percentage of voting rights in a listed company. The notification obligation facilitates the surveillance of share ownership. The building of larger equity stakes (also by several cooperating shareholders) becomes transparent.

6.1. Notification Thresholds

Anyone who reaches, exceeds or falls below the thresholds of 3, 5, 10, 15, 20, 25, 30, 50 and 75 % of voting rights in a listed company is obliged to make a notification to the BaFin and the concerned company (Section 21 WpHG). Notification duties may also be triggered by attribution of voting rights (Section 22 WpHG). The attribution rules of the WpHG are very similar to the attribution rules of the Takeover Act (cf. Section 3.2).

There is a separate duty of notification for the holding of certain financial or other instruments which give a right to demand physical delivery of shares (e.g. call options settled in shares, return rights to shares or repo transactions), which is triggered by reaching or exceeding certain thresholds starting with the 5 % threshold (Section 25 WpHG). For the purposes of determining whether a threshold has been met, the holding of the financial instruments will be cumulated with the holding of actual voting shares.

Since February 2012, the notification requirements also apply to so called "synthetic shareholdings" (such as cash settled equity swaps or cash settled options) (Section 25a WpHG). The new disclosure rule is intended to prevent hostile bidders from circumventing the notification requirements through so-called creeping in tactics, as in particular happened in the Schaeffler/Continental case. At the heart of the new regulation is a disclosure requirement which sets a reporting threshold starting with 5% for the disclosure of "financial or other instruments whose structure enables (but does not grant a right to) the holder to acquire voting shares". Share acquisition is deemed to be "enabled" in particular if "the counterparty of the holder could exclude or reduce risks arising from these instruments by holding shares". The duty of disclosure also applies if instruments grant a right or create an obligation to acquire shares.

6.2. Deadline for Notification

The notification to the BaFin and the Target Company must be made by the holder of the securities (and the persons to which they are attributable) in writing without undue delay, and, at the latest, four business days after having reached, exceeded or fallen below any one of the mentioned thresholds.

[1] The new notification requirements introduced by the AnsFuG are expected to come into effect at the beginning of 2012.

6.3. Duties of the Target Company

The Target Company must publish the notification and file it with the Register of Enterprises (*Unternehmensregister*) without undue delay and, at the latest, three business days after receipt of such notification. The Target Company must also provide the BaFin with proof of this publication.

6.4. Sanctions in case of Violation

Violations of the notification obligations by the holder of the securities (or any person to which they are attributable) will result in the loss of rights from the shares for the period of the violation. This comprises both the voting rights and – in the case of wilful breach – the dividend rights and the rights to share in the liquidation proceeds. The rights emanating from the shares reinstate upon fulfilment of the notification duty. However, the voting rights from the shares can only be once again exercised in the future, and not in retrospect. In case of a wilful or gross negligence breach, the rights are not reinstated until 6 months following fulfilment of the notification duty.

The BaFin monitors the fulfilment of such obligations closely and will prosecute violations. Violations of the notification obligations are also subject to fines of up to EUR 1 million.

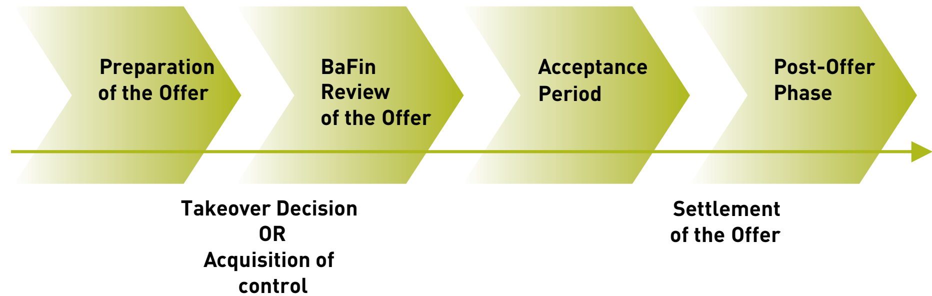
6.5. Further Consequences arising from Stake Building

There is no deadline by which a potential Bidder must clarify his intentions in relation to a Target Company. German law does not contain an obligation of a potential Bidder to publish a "put up" (firm offer announcement) or "shut up" (no intention to bid) statement. However, since May 2009, any shareholder who exceeds the 10% notification threshold or any higher threshold of voting rights must make a detailed statement of his intentions in relation to the Target Company. The Target Company must publish that statement (or the fact that a 10% shareholder has failed to make such a statement).

7. Offer Process

7.1. Overview

The offer process can be divided into four phases:



• Due Diligence • Negotiations with major shareholders • Structuring • Stake Building	• Filing/Approval of the offer	• Acceptance Period: 4 - 10 weeks • Additional Acceptance Period: 2 weeks	• Measures depend on level of shareholding (post offer)

7.2. Preparation of the Offer/Takeover Decision

In the preparation phase, the Bidder structures the offer. The Bidder may also wish to conduct a due diligence investigation of the Target Company (see Section 7.2.1 below). Depending on the shareholder structure of the Target Company, the Bidder may enter into negotiations with its main shareholders or with the Target Company itself (see Section 7.2.3). The preparation phase ends with the Bidder reaching a firm decision to either make a Takeover Offer or to acquire Control over the Target Company.

7.2.1. Due Diligence / Sources of Information about the Target Company

If a sales process is organised by the Target Company or its main shareholder(s), the Target Company will usually make available a data room and allow a due diligence process. However, before this can happen, the management will have to conclude that the due diligence is in the best interest of the Target Company, so as to overcome the management board's statutory duty of secrecy. The Bidder should also be wary that any inside information revealed in the course of the due diligence may limit his ability to acquire shares on the stock market or to proceed with the offer before such information has been published by the Target Company. A confidentiality agreement is required. In most cases a letter of intent is also signed.

Prior to getting in touch with the Target Company (or if a hostile takeover is anticipated), the Bidder will have to rely on public information. In the case of a listed company, the following information is generally available:

- **Website**: Due to the listing requirements imposed by the German stock exchanges, all listed companies within the scope of the WpÜG need to disclose their annual financial statements, interim reports and most other capital markets communication on their website.

- **Public Registers**: In addition to financial statements, German stock corporations are required to file extensive corporate information with the commercial register (www.handelsregister.de) as well as the electronic Federal Gazette (www.ebundesanzeiger.de) and the companies' register (www.unternehmensregister.de). Anyone may access these registers electronically for a fee. The commercial register can also be inspected locally for free. It is kept at the local court, competent for the district in which the registered seat of the Target Company is located. All information contained in public registers is in German.

- **Shareholder Structure**: As set out above, any shareholder who reaches, exceeds or falls below the thresholds of 3, 5, 10, 15, 20, 25, 30, 50 and 75 % of voting rights in a Target Company is obliged to make a notification to the BaFin. These notifications can be viewed on the BaFin website (although the database maintained by the BaFin is not always reliable) or researched through public websites. Shareholders holding less than 3 % of voting rights can only be identified if the respective shareholder has attended a shareholders' meeting.

- **Annual Document**: German stock corporations falling within the scope of the Takeover Act must publish a so-called "annual document" on their website referring to all information regarding listing requirements and capital market legislation, e.g. the information set out above. Very often the annual document contains web links to the respective information.

- **Articles of Association**: The articles of association of the Target Company inter alia contain information on authorisations to increase the capital of the company or to issue convertible bonds. The articles of association are often published on the Target Company's website and can always be inspected at the commercial register. A Bidder can also verify the existence of other authorisations for defence measures (which are not contained in the articles of association but simply resolved by the general meeting) from the minutes of the general meetings, which are available from the commercial register.

- **Annual Report**: The Annual Financial Statements must contain a section on all takeover impediments outlining inter alia:
  - Voting restrictions (including voting restrictions from shareholders' agreements to the extent known to the management board);
  - Direct or indirect holdings of 10 % or more of the voting rights;
  - Restrictions contained in the articles regarding the replacement of members of the management and regarding the alteration of the articles of association;
  - Authorisation of the management board to issue or buy back shares of the Target Company;
  - Material agreements including change-of-control clauses and "golden parachutes" agreed by the Target Company with members of the management board or employees applicable in takeover offers.

7.2.2. Structuring the Offer

After gathering preliminary information, the rough structure of the offer can be drafted, i.e. selecting the type of offer and reasonable closing conditions, anticipating defence measures and preparing countermeasures (in the case of a hostile offer). As the costs of the offer will be one of the most important aspects, the amount of consideration and the financing concept required should also be discussed at this early stage.

In case the Bidder has identified major issues of a legal nature, he may decide to contact the BaFin prior to the submission of the offer document (possibly on a no-name basis). The BaFin will usually take a very co-operative and helpful approach in such cases. However, the BaFin will not conduct a preliminary review of the draft offer document or issue a statement that the draft documents meet all the legal requirements.

7.2.3. Pre-Offer Agreements with Major Shareholders and/or the Target Company

An offer to the public is often preceded by (negotiations on) the acquisition of blocks of shares that are held by major shareholders who are willing to sell. Which approach is appropriate depends on the number of shares that can be acquired from the major shareholder(s).

One possible situation is that a major shareholder is willing to sell a controlling stake of more than 30%. In this case, the Bidder and the major shareholder may agree upon a so-called "block acquisition" prior to a public takeover procedure. Once this acquisition of a controlling stake is consummated, the Bidder has acquired Control and triggers the obligation to submit a Mandatory Offer for all remaining shares. However, the acquisition of Control only takes place when the shares are actually acquired (which is usually at the "closing" of the transaction, rather than the "signing"). If the Bidder triggers a Mandatory Offer in this manner, the consideration offered has to equal at least either the (highest) consideration paid to the major shareholder(s) or the volume weighted average stock exchange price for the shares in the last three months prior to the acquisition of Control (see Section 5.2). Therefore, if the transaction becomes public prior to its closing (which will inevitably happen if, for example, merger control clearance is required), the offer price may be increased significantly through market speculation between signing and closing.

However, there are several ways to avoid the risk of an increase in the offer price and the restrictions applying to Mandatory Offers, but to still be able to secure the acquisition of all shares held by major shareholders in advance. In particular, this is of great importance if the major shareholder's stake is not sufficiently large to ensure that all relevant decisions can be taken by the Bidder after the offer. In such cases, the Bidder might only be willing to acquire the block of shares if he is sure that he obtains the intended majority. This is possible by defining an Acceptance Threshold for the public offer (which is, however, not admissible in the course of a Mandatory Offer).

The first possibility to avoid a Mandatory Offer is to make the block acquisition subject to the condition precedent that the subsequent Takeover Offer is successful and results in the desired majority. As a consequence, the block acquisition becomes effective when the Bidder has already acquired Control in the course of the Takeover Offer.

Another possibility is a so-called "**Irrevocable Undertaking**" by which the major shareholder(s) irrevocably undertakes to tender his/their shares into the Takeover Offer. The main difference from a block acquisition is that the Bidder does not acquire the major shareholder's stake separately but rather in the course of the Takeover Offer.

In addition to agreements with the shareholders of the Target Company, it is also increasingly common that the Bidder concludes a so called "**Business Combination Agreement**" directly with the Target Company and the selling shareholders. This agreement will stipulate the key facts and the strategy for the future combination process (e.g. time schedule, consideration, conditions).

7.2.4. Takeover Decision

A significant intermediate step in the preparation phase of a Takeover Offer is the decision of the Bidder to launch an offer ("**Takeover Decision**") or, in the case of a Mandatory Offer, the date of the acquisition of Control.

The Takeover Decision or the acquisition of Control have to be published immediately and notified in writing to the management board of the Target Company without undue delay (so-called "**Section 10 Notification**"). If a Bidder does not contact the management board of the Target Company prior to a Takeover Offer, the management board will find out about the offer for the first time through the Section 10 Notification. Immediately prior to publication, the Bidder must inform the BaFin and the relevant stock exchanges. The Section 10 Notification is published on the Internet and via an electronically operated information system. Proof of the publication must be sent without undue delay to the BaFin and the stock exchanges as referred to above.

The date of the publication of the Takeover Decision is of great importance as it is the trigger date for the computation of the three-month volume weighted average price, which is one of the elements of the minimum consideration payable in a Takeover or Mandatory Offer (cf. Section 5.2). Takeover rumours prior to the publication may lead to speculation and an increase in the Target Company's share price, making the offer far more expensive.

Determining the point in time at which the obligation to publish the Takeover Decision arises can sometimes be difficult, especially in the case of staggered decision-making processes by certain bodies of the Bidder. The Takeover Act specifies that the Takeover Decision can not be postponed merely because the approval of the Bidder's shareholders' meeting has not already been given.

A stake building by the Bidder as a component of his takeover strategy may or may not be regarded as a Takeover Decision. Carrying out a due diligence review of the Target Company is usually not regarded as constituting such a clear decision.

In practice, a Bidder should initiate the structuring and financing of the offer as soon as possible. In addition, the entire decision making process should be documented in order to avoid later controversy with the BaFin.

The publication of the Section 10 Notification marks the beginning of a four-week deadline for the Bidder to prepare the offer document (cf. Section 8) and to submit it to the BaFin for its review and approval.

The question sometimes arises, whether a Bidder can withdraw his offer after the publication of the Section 10 Notification. It is certain that at this point, the shareholders of the Target Company have no enforceable claim against the Bidder to pursue the offer. Furthermore, in the case of a Takeover Offer, the BaFin does not have any means to enforce the making of an offer and therefore will usually accept a withdrawal (at least if there is a good reason for it). The withdrawal may, however, be considered an administrative offence, unless justified by specific reasons. After the offer document has been published and the acceptance period has begun, the Bidder can no longer withdraw.

7.3. Review of the Offer

After submission of the offer document by the Bidder, the BaFin has a period of ten business days to review and approve or reject the offer document. The BaFin reviews the formal conformity with the provisions of the WpÜG and the WpÜG Offer Ordinance as well as formal completeness, consistency and comprehensibility of the offer document. The BaFin does not review the offer document for material accuracy and completeness. However, the BaFin expects detailed and well explained information throughout the entire offer document. The review period may be (and is regularly) extended by the BaFin by up to five business days. The offer is usually either expressly approved or rejected within the review period. If the BaFin fails to react in the specified period, the offer will be deemed approved.

In practice, the BaFin's first comments on the offer document can already be obtained several days following its submission. A detailed discussion between the Bidder and the BaFin usually takes place after one week. In the case of objections, the BaFin regularly extends the review period by three to five days to allow the Bidder to amend the offer document.

Following the approval of the offer document (or once the review period has lapsed without the BaFin having prohibited the offer), the Bidder must publish the offer document on the internet and in the electronic version of the Federal Gazette (*elektronischer Bundesanzeiger*). Immediately following publication, the offer document must be forwarded to the management board of the Target Company which in turn must forward the offer document to the works council.

Based on the Directive concerning Takeover Bids, an offer approved by the competent authority within the EU or EEA will be valid in any other member state without any further approval proceedings ("**European Passport**").

7.4. Acceptance Period

After this publication, the offer may be accepted by the outstanding shareholders of the Target Company. The Bidder can set a period of between four (minimum) and ten weeks (maximum) as the time during which the offer may be accepted ("**Acceptance Period**"). The Acceptance Period will be extended (a) in the event of a competing offer with a longer Acceptance Period or (b) if the Target Company calls a general meeting or (c) if the offer is amended in the last two weeks of the Acceptance Period.

The steps required to accept the offer are described in the offer document. Typically, the shareholders will instruct their bank, who will in turn handle the technical details free of charge for the customer.

In case of successful Takeover Offers, a supplementary two-week acceptance period applies after publication of the result of the regular or extended Acceptance Period ("**Additional Acceptance Period**"). During this time, shareholders who did not accept the offer have a second opportunity to tender their shares. If the offer fails because the Bidder did not reach the minimum acceptance threshold set out in the offer document, there is no Additional Acceptance Period. Nor is there an Additional Acceptance Period in Mandatory Offers.

7.5. Post-Offer Period

The post-offer period starts upon the expiry of the regular Acceptance Period.

For a period of one year after the offer has ended, additional purchases of shares of the Target Company by the Bidder (or an entity whose shareholding is attributable to the Bidder) may still trigger an obligation to increase the offer price. During this time, the Bidder must publish further acquisitions of shares and must notify the BaFin thereof. If the shares are acquired at a higher price than the offer price, the Bidder must make an additional payment to former shareholders who have accepted the offer. However, a number of exemptions apply, most notably for shares acquired on a (regulated) stock exchange.

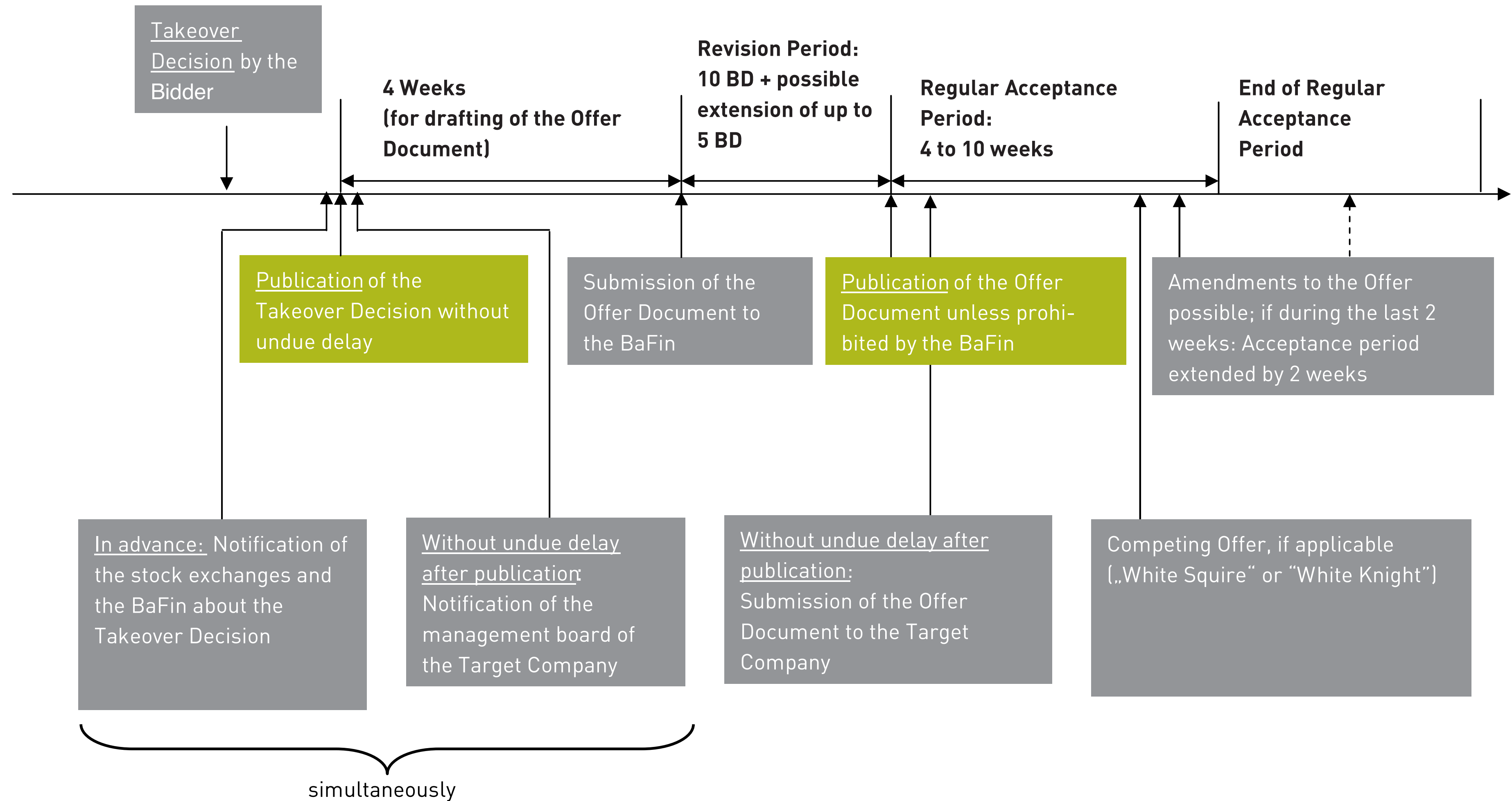
Depending on the number of shares held by the Bidder following the offer, different options may be available to the Bidder to increase his control over the Target Company.

- If the Bidder holds at least 90/95 % of the share capital of the Target Company, he may initiate a "squeeze out" of the remaining other shareholders. There are currently three different procedures for a squeeze out under German law. One is a squeeze out by court decision, whereas the other two squeeze-out procedures require a decision of the general meeting.

- If the Bidder holds less than 90/95 % of the share capital, but has a majority of at least 75 % in the shareholders meeting of the Target Company, he may initiate other structural measures, such as the conclusion of a domination and/or profit and loss transfer agreement or a change of legal form.

It should be pointed out that, while these structural measures are necessary to achieve an effective (financial) integration of the Target Company into the Bidder's group, they are also invariably subject to legal challenge by other remaining shareholders. Therefore, the implementation of post-offer integration measures is often time-consuming and costly and needs to be taken into consideration at a very early stage in structuring the offer.

7.6. Milestones of a Takeover Offer



8. Offer Document

8.1. Content

The offer document must contain all the information that is necessary to enable the shareholders of the Target Company to make an informed decision on the offer. The offer document must be written clearly and comprehensibly in the German language. However, in case of an international shareholder base, it is also common to provide an English translation. The offer document must include basic information regarding the offer, for example:

- Name, domicile and legal form of the Bidder and of the Target Company;
- The securities for which the offer is made;
- The type (cash or shares) and amount of consideration;
- Any conditions to the offer; and
- The beginning and the end of the acceptance period.

Additionally, the offer document must outline:

- The measures taken by the Bidder to ensure that the Bidder will be able to fully pay the offered consideration to accepting shareholders;
- The effects of the offer on the financial situation of the Bidder;
- The intentions of the Bidder with regard to the future business activities of the Target Company; and
- Any benefits which the Bidder grants or promises to the members of the management board or supervisory board of the Target Company.

In the case of an Exchange Offer, the offer document must include all the information which is required under the German Securities Prospectus Act (*Wertpapierprospektgesetz*). The time constraints of a takeover process are often difficult to reconcile with the effort required to produce such an offer document. This is one reason why Exchange Offers are rather rare (cf. Section 5.1).

8.2. Liability

All information given in the offer document must be correct and complete. Anyone who has assumed responsibility for the offer document or initiated its issue will be liable for its contents, but only to those shareholders who accepted the offer.

Contrary to the situation under prospectus liability, the banks involved in an offer under the Takeover Act will not be liable per se for the accuracy and completeness of the offer document. It is not even necessary to involve a bank (other than for the technical settlement of the offer). However, in case of a cash offer, the offer document must be accompanied by a written confirmation from a bank that the Bidder has taken all measures to be able to pay the consideration when due ("**Financing Confirmation**") (cf. Section 14.2). The Financing Confirmation does not constitute a guarantee that the Bidder will perform his obligations. However, the bank issuing such confirmation will be liable to the shareholders for damages if the confirmation was inaccurate and the shareholders do not receive the consideration for that reason.

9. Duties of the Boards of the Target Company

9.1. Overview

The Takeover Act also provides for certain obligations on the boards of the Target Company. These obligations involve in particular the duty of the management board and the supervisory board to promptly and publicly comment on the offer in a formal statement (cf. Section 9.2). In addition, the management board is bound by a non-frustration rule (misleadingly referred to as "obligation of neutrality") (cf. Section 9.3). Finally, the following additional obligations must be observed by the management board (and partially by the supervisory board). These obligations can be derived from the general principles explained in Section 2.1:

- **Equal treatment of all shareholders**: The principle of equal treatment prevents the management board from circulating information selectively, i.e. only to certain shareholders or groups of shareholders.

- **Transparency requirement**: Due to the transparency requirement, the management board is obliged to provide comprehensive information to all shareholders in a formal statement.

- **Prevention of market distortions**: The management board and the supervisory board must not influence the share price by circulating incorrect or incomplete information, rumours, or by other actions.

- **Acting in the interest of the Target Company**: The management board and the supervisory board shall act in the best interest of the Target Company. They shall in particular pay attention to the interests of the shareholders, the employees and the company itself. These interests have absolute priority over self-interest of the management board and the supervisory board. The management board must not be paid by third parties for its consent to the offer, e.g. by a "golden handshake" or other "unjustified" advantages. If the offer is in the interest of the management board or even if the management board cooperates with the Bidder (e.g. in a "Management Buy-Out"), the management board must document every decision it takes in connection with the Takeover Offer by explaining why the decision is (also) in the interest of the Target Company. If not all managing directors are subject to a conflict of interest, the management board may also have to set up a committee of independent or neutral members. All steps should also be communicated openly to the supervisory board.

- **Internal reporting duties**: Upon notification of the Takeover Decision or the acquisition of Control and upon the submission of the offer document, the management board is obliged to inform the works council and the supervisory board.

9.2. Obligation of the Management Board and the Supervisory Board to Publish a "Reasoned Statement"

Under the Takeover Act, the management board and the supervisory board of the Target Company are required to publish a statement on the offer which should include a recommendation for the shareholders either to accept or to reject the offer (the so-called "**Reasoned Statement**"). If the offer is amended, the statement by the boards must be updated. It has become increasingly more common for the boards to obtain a fairness opinion from a third party on the valuation of the Target Company in order to back their recommendation. If the competent works council forwards a statement to the management board, the management board has to enclose it in the Reasoned Statement published by itself and the supervisory board.

The Reasoned Statement forms the counter-piece to the Bidder's offer document, counterbalances the unilateral information by the Bidder and (ideally) creates a balanced basis of decision-making for the shareholder. In this statement, the shareholder is not only informed of the position of the management board but, due to the statement of the works council, is also informed of the opinion of the employees on the Takeover Offer. The statement of the management board and the supervisory board is of great significance in case of hostile Takeover Offers. In these cases, it serves as an important defence weapon. In the statement, the management of the Target Company is able to disclose the disadvantages of the Bidder's offer and try to convince the shareholders of the superiority of its corporate concept.

9.3. Non-Frustration Rule

The Takeover Act prohibits the management board of the Target Company from carrying out any actions that could prevent the success of the offer from the time of publication of a Takeover Decision or the acquisition of Control until the publication of the takeover result. It is irrelevant whether the action has indeed prevented the offer or whether it is merely intended as a frustration mechanism.

The non-frustration obligation applies from the time of publication of the Takeover Decision or the acquisition of Control. As the management board can only fulfil obligations it has knowledge of, it is also necessary for the validity of the non-frustration rule that the management board knows about the existence of the offer. Even if the management board has already been informed of the Takeover Decision prior to its publication, the non-frustration rule does not apply to the period before publication. The non-frustration rule does not prohibit any pre-emptive defence measures. Prior to publication, the management board is only subject to the duties set forth pursuant to stock corporation law. By its nature the non-frustration rule ends after the publication of the takeover result.

9.4. Exceptions to the Non-Frustration Rule

Extensive exceptions apply to the non-frustration rule. Examples of admissible actions are:

- Actions of an ordinary and prudent manager,
- Search for a competing Bidder (White Squire or White Knight),
- Actions with the approval of the supervisory board, and
- Actions upon authorisation by the general meeting.

9.4.1. Actions of an ordinary and prudent manager

The non-frustration rule does not apply to actions which an ordinary and prudent manager of a company not affected by a Takeover Offer would have taken. Such measures are, in particular, actions within the course of ordinary business and the pursuit of corporate strategies already embarked on.

The management board is not limited to the conduct of the current business and the fulfilment of agreements already concluded. Other commitments that fit in the corporate strategy – even beyond the ordinary course of business – can also be entered into. In order to avoid a conflict with the non-frustration rule, the management board may only commence extraordinary transactions if these transactions form part of a corporate strategy already embarked on. In this context, it is in particular required that an existing corporate strategy be documented sufficiently, to avoid circumventions of the non-frustration rule. In cases of doubt, the approval of the supervisory board should also be obtained.

The actions of an ordinary manager are not limited to measures that the management board performs on the basis of its own corporate powers. It also includes measures based on powers given by the shareholders' meeting, such as the use of authorised capital or the acquisition and the sale of own shares.

9.4.2. Search for a competing Bidder (White Squire or White Knight)

Another defensive measure which is admissible is the search for a Bidder willing to submit a competing Takeover Offer. Adding another Bidder enables the Target Company to guarantee the most favourable terms of offer in the best interest of all shareholders. If the shareholders decide to sell their shares, they can choose the offer that seems to be the most favourable to them. The management may also search for competing Bidders. Further actions to enhance the success of the competing offer are inadmissible. It is, for example, not allowed to issue shares from the authorised capital, excluding the subscription right, as a "jump start" for the competing Bidder. Financial assistance rules under stock corporation law prohibit the granting of financial support to the competing Bidder for the acquisition of shares. However, it is admissible to use company funds with respect to the search for a competing Bidder. It would be allowed, for example, to commission an investment bank to search for a competing Bidder.

The difficulty in searching for a competing Bidder is the available timeframe. Depending on the length of the acceptance period (cf. Section 7.4), the Target Company has between six and 16 weeks to find a competing Bidder. Therefore, the search for a competing Bidder is normally only a promising defence measure if this search was prepared as a pre-emptive defence measure prior to the Takeover Offer (cf. Section 10.1).

9.4.3. Actions with the Approval of the Supervisory Board

Actions of the management board are also admissible if they are taken with the prior approval of the supervisory board. Thus, the management board and supervisory board of the company are authorised to take comprehensive defence measures that are not covered by the existing corporate strategy without the consent of the general meeting. This, however, is only applicable for such actions that are taken in the interest of the Company, do not harm the Company and are within the management powers of the management board stipulated by stock corporation law.

The supervisory board must approve the defence measures before they are implemented. A subsequent ratification is not sufficient. The approval must refer to a specific measure. A "blank authorisation" of defence measures of any kind is not admissible. The supervisory board decides with a simple majority. The supervisory board may delegate its power of decision to a committee.

9.4.4. Actions upon Authorisation by the General Meeting

The management board of the Target Company is also authorised to take such measures which have been expressly authorised by the general meeting. The authorisation by the general meeting may be granted either prior to the announcement of an offer ("**Shelf Resolutions**") or during a pending offer ("**Ad-hoc Approval Resolutions**").

Shelf Resolutions shall specify the admissible actions "by their nature". They must be passed with a 75 % capital majority and may grant an authorisation for the defence of Takeover Offers for up to 18 months. Actual defence measures by the management board based on such authorisation require the prior approval of the supervisory board. In practice, Shelf Resolutions have not yet been of practical significance. Measures with the approval of the supervisory board (cf. Section 9.4.3) can be implemented faster and more efficiently. Furthermore, by adopting such a Shelf Resolution, the Company sends a clear signal to the market that it sees itself as a takeover target.

In order to allow the Target Company to make an Ad-hoc Approval Resolution, the convening of a general meeting during a pending offer is subject to a simplified procedure. As the Bidder and the content of the offer are already known, the Ad-hoc Approval Resolution has to specify concretely the relevant defence measure. In practice, like the Shelf Resolution, the Ad-hoc Resolution has not been of practical significance so far.

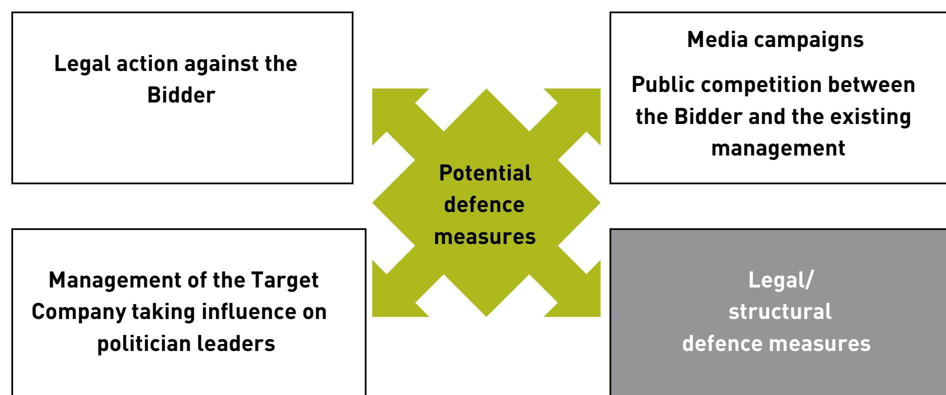
9.4.5. Sanctions for the Violation of the Non-Frustration Rule

In case of an intentional or negligent infringement of the non-frustration rule the BaFin may impose an administrative fine of up to EUR 1 million. Moreover, the managers who violate their duties make themselves personally liable for compensation to the Company for any damage suffered. The same applies to the members of the supervisory board as they are also subject to the non-frustration rule.

10. Defence Measures

10.1. Overview

In case of a hostile takeover, the Bidder has to anticipate the defence measures which will be initiated by the management of the Target Company. In general, there are a number of different strategies to fend off a hostile takeover. Most often, the management of the Target Company will follow a combined approach. The following chart illustrates the possible elements of such a combined approach and highlights the most common strategies apart from structural measures: The main difference between the latter and all other defence measures is that structural measures need to be prepared prior to a hostile takeover attempt. Other measures, such as trying to fend off the offer through media campaigns and/or influence on political leaders or by taking legal action against the Bidder are more reactive in nature, but may not be a sufficient defence against a well prepared takeover attempt.



A summary of potential defence measures is provided below. For some defence measures, there are (to some extent significant) concerns with respect to their legality (most often under general stock corporation law) and/or effectiveness. Hostile Takeovers have been the exception in Germany so far. Therefore, defence measures are more often a matter of (controversial) discussion in legal literature than in practice. Except for a few individual cases, case-law dealing with defence measures is very rare.

10.2. Summary of Defence Measures

The legal defence measures can be classified into six groups:

- **Search for a competing bidder (White Squire or White Knight)**

- **Increase of the offer volume / price increase of the offer**: issuance of new shares from capital increase, disposal of own shares, issuance of options or convertible bonds or acquisition of own shares.

- **Consolidation of shareholders**: placement of shares to shareholders with long-term relationships with the Target Company by issuance of shares from capital increase, disposal of own shares or issuance of option or convertible bonds, each in exclusion of the subscription right, to one or more major shareholder(s) ("Anchor Investor" or "White Squire") or another company for the establishment of reciprocal shareholdings or issuance of shares / share options to the management board and employees.

- **Complication of obtaining Control**: rights for individual shareholders to nominate members of the supervisory board, staggered terms of office for the members of the supervisory board ("Staggered Board").

- **Reducing the attractiveness of the Target Company for the Bidder**: disposal of important company assets ("Sale of Crown Jewels"), creation of antitrust issues, change of the financing structure, counter-offer to the takeover of the bidder ("Pac Man" defence), severance payments for members of the management board ("Golden Parachutes") or agreement on change of control clauses.

Given the tight timeframe of the takeover process, in most cases defence measures are only effective if they have been implemented or at least prepared prior to the offer ("**Pre-emptive Defence Measures**"). Pre-emptive Defence Measures need to be validated primarily against the stock corporation law. Each measure has to be in the best interest of the company. It has to be agreed upon and implemented by the competent organ. Defence measures during takeover procedures need to be compatible with stock corporation law (competence / interest of the company) and the Takeover Act. Defence measures are admissible pursuant to the Takeover Act if they do not violate the non-frustration rule (e.g. a resolution of the supervisory board is available).

10.3. Defence with Arguments

The obligation of the management board and the supervisory board to issue a reasonable statement on the Takeover Offer shows that the management board is entitled to defend itself "with arguments" against the Takeover Offer. The management board can choose various platforms for this defence (e.g. letter to the shareholders, advertisement, interviews, special events for investors) and present its corporate concept for the future of the company. The defence with arguments is the core element for fending off an offer. Regardless of whether the Target Company has implemented defence measures prior to or during takeover procedures, it may oppose the offer with all arguments available. The objective is to demonstrate that the offer is highly unattractive for the shareholders. The shareholders need to be convinced that the existing strategy and management of the Target Company carries higher yields than the sale to the Bidder. If the shareholders can successfully be convinced, the Target Company has realistic chances of fending off a hostile Takeover.

11. European Takeover Regime

("Opt-In" – "Opt-Out")

Since the implementation of the European Directive on Takeover Bids, the German Takeover Act provides for two different sets of rules regarding frustrating actions for German companies; an "Opt-Out" and an "Opt-In" regime.

The Directive on Takeover Bids is a so-called minimum harmonisation directive. Stricter rules may apply only if the relevant member state has generally opted into the regime prescribed in the directive. Germany has not opted into the EU regime and applies more liberal standards, but in line with the directive, German law allows German companies to voluntarily "opt in" to apply the stricter rules under the Directive.

As long as the German Target Company does not expressly opt-in to the restrictions on frustrating actions imposed by the European Directive, German law applies as set out above in Section 10. It is expected that German companies will be reluctant to opt in to the more restrictive European regime on frustrating action.

If a company decides to opt into the European Regime, the management board is obliged to notify the BaFin of this decision and the respective amendment of its articles of association or the presence of a conditional resolution of the general meeting.

12. Prohibition of Granting Unjustified Benefits to Management Board and Supervisory Board

The Bidder and persons acting in concert with the Bidder are prohibited from granting or promising unjustified cash benefits or other monetary benefits to members of the management board and the supervisory board of the Target Company.

The Bidder shall not cause a conflict of interest for the members of the management board or the supervisory board by granting or promising cash or monetary benefits. In case of an offer, the management board and the supervisory board shall be independent and not exposed to the monetary influence of the Bidder. "Unjustified" are thus benefits that (shall) have an influence on the behaviour of the members of the management board and the supervisory board which is not in the interest of the Target Company.
Justified and thus admissible benefits are benefits that are objectively comprehensible from the point of view of the Target Company and its shareholders. If, for example, the Bidder sees the quality of the existing management as a key factor for the future concept of the Target Company, a job guarantee for the management board, a moderate salary adjustment or the promise of a "usual" bonus could be fair benefits.

Any benefit granted or promised to the members of the management board and the supervisory board are to be disclosed in the offer document.

13. Legal Remedies

The legal remedies of the persons and entities involved in a public Takeover Offer can be classified into three groups:

- Legal remedies under administrative law against actions and decisions taken or prohibited by the BaFin. In particular, the Bidder might seek such legal remedies if the BaFin prohibits the offer.

- Legal remedies with respect to civil law before ordinary courts. In contrast to legal remedies against public authorities, ordinary courts have jurisdiction for claims between the Bidder and certain shareholders of the Target Company or the Target Company itself or its competitors. Such claims can inter alia be based on (i) claims from offences, (ii) claims from the violation of pre-contractual trust agreements, civil prospect liability or share purchase agreements concluded between the Bidder and the shareholders of the Target Company, all subject to the law of obligations, (iii) claims subject to competition law, and (iv) individual claims subject specifically to takeover law (e.g. the claim for the Consideration or claims arising from liability for the offer document).

- Remedies against claims subject to law governing administrative offences, such as decisions by the BaFin imposing fines.

14. Financing

14.1. Certain Funds

An offer must not be conditional on financing. By the time the offer document is published, the required financing has to have been arranged. The Bidder has to outline in the offer document how the offer will be financed. To the extent that the offer is not financed by the Bidder's own funds, he must make sure that credit facilities arranged to finance the offer do not contain any conditions which can be influenced by him or do not match the conditions of the offer ("**Certain Funds**").

14.2. Cash Offers - Financing Confirmation

To the extent that the consideration offered in the offer contains a cash element, a confirmation letter by an independent bank from an EEA country is required (the Financing Confirmation, see also Section 8.2 above). The Financing Confirmation is published as part of the offer document. Therein, the bank has to confirm that the Bidder has taken the steps necessary to ensure that he will be able to pay the consideration to the accepting shareholders when due.

14.3. Refinancing

German stock corporation law restricts the use of the Target Company's assets and liquid funds for refinancing the offer. The Target Company and its subsidiaries are prohibited from granting any financial assistance to the Bidder with regard to the shares acquired by him. This applies to assistance both prior to and after the acquisition of shares. A further restriction under German law states that a stock corporation may not grant any benefits to its shareholders other than a dividend. The only ways in which a more flexible restructuring may be achieved are (a) by concluding domination and/or profit and loss pooling agreements between the Bidder and the Target Company (cf. Section 15.2), (b) a merger between the Bidder and the Target Company or, (c) by changing the legal form of the Target Company into an entity with fewer restrictions on the use of its assets.

15. Post-Offer Strategies

15.1. Overview

Following the settlement of the offer, the Bidder has several options by which to integrate the Target Company into his own company or group. The choice between these options is mainly driven by the number of shares held by the Bidder after the offer and the intentions of the Bidder. All forms of integration require compensation for the remaining minority shareholders. Depending on the level of shareholding and the type of compensation, the options can be summarised as follows:

Structural Measure	Legal Consequences	Required Stake in the Company/ Required Majority at the General Meeting (GM)*	Type of Consideration
Squeeze-Out	• Delisting • Bidder obtains 100 % stake	90% or 95 % stake	• Cash
Domination Agreement	• Refinancing of the Offer becomes more flexible	75 % majority resolution at GM	• Guarantee dividend
Profit and Loss Agreement	• Refinancing of the Offer becomes more flexible	75 % majority resolution at GM	• Guarantee dividend
Delisting	• Delisting	50 % majority resolution at GM	• Cash
Merger with Bidder	• Delisting • Refinancing of the Offer becomes more flexible	75 % majority resolution at GM	• Shares • Cash
Change of Legal Form	• Delisting • Refinancing of the Offer becomes more flexible	75 % majority resolution at GM	• Shares • Cash
Sale of Whole Business to the Bidder	• Delisting • Bidder obtains 100 % stake • Refinancing of the Offer becomes more flexible	75 % majority resolution at GM	• Cash
Integration into the Bidder	• Delisting • Bidder obtains 100 % stake • Refinancing of the Offer becomes more flexible	95 % stake	• Shares • Cash
("Super") Dividend	• Refinancing of the Offer becomes more flexible	50 % majority resolution at GM	no consideration required

** provided that the Target Company's articles of association do not provide for stricter requirements/thresholds*

The most common post-offer strategies are briefly set out below. However, it has to be mentioned that each of these strategies offers significant obstruction potential to minority shareholders. It has become very common in Germany in the last years that activist shareholders initiate litigation against practically all structural measures and try to extract money from the Target Company or Bidder by leveraging of this obstruction potential. This phenomenon needs to be taken into consideration early on.

15.2. Domination Agreement / Profit and Loss Pooling Agreement

A domination agreement may be entered into between the Bidder and the Target Company. The Target Company becomes a "dependent company" dominated by the Bidder, who can give binding instructions which have to be followed by the management of the dependent company.

From the Bidder's perspective, the main advantage of such binding instructions is that the strict standards of the maintenance of capital set out by the German Stock Corporation Act are reduced. Once the domination agreement has become effective, the Bidder has far more options for refinancing the prior offer. For example, the dependent company may transfer assets to the dominant shareholder, whereas otherwise such a transfer would be prohibited as disguised distribution of profits (cf. Section 14.3). As dominating shareholder, the Bidder may also receive goods and services from the dominated Target Company under preferential conditions.

Before a domination agreement becomes effective (with its registration at the commercial register of the dependent company), the following major steps are required:

- Shareholder resolution by shareholders of the Target Company with at least a 75 % majority of the share capital represented at the shareholders' meeting.

- The domination agreement has to include an offer to acquire the shares of the dominated company which are held by minority shareholders at a fair market price. In case the dominating shareholder is not a German stock corporation, the consideration must be in cash.

- The dominating shareholder has to pay a guarantee dividend to the remaining minority shareholders of the Target Company.

- During the term of the domination agreement, the dominating shareholder has to make good any annual loss suffered by the Target Company.

In addition to a domination agreement, a profit and loss pooling agreement may be entered into. It is concluded the same way as a domination agreement and usually is agreed upon at the same time.

The legal consequences of a profit and loss pooling agreement are similar to those of a domination agreement. The main advantage of entering into a separate profit and loss pooling agreement is that, for corporate income tax purposes, the dependent company is not treated as a separate legal entity any more. On a cross-border basis, however, such structures are only recognised by German tax authorities if the foreign dominating company has a domestic branch holding the shares in the dominated company. As a consequence, separate profit and loss agreements are rather unusual after cross-border takeovers.

15.3. Squeeze-Out

German law provides for three different procedures to squeeze-out minority shareholders once a shareholder holds a majority of 90 % or rather 95 % ("**Squeeze-Out**").

15.3.1. Squeeze-Out pursuant to the Takeover Act

Under the Takeover Act, a Squeeze-Out is possible if, following a Takeover or Mandatory Offer, the Bidder holds at least 95 % of all voting rights or shares in the Target Company. The remaining shares are transferred by a court decision upon the Bidder's request. However, the Bidder has to file this request within three months after the end of the acceptance period. The Bidder is not required to already hold the 95 % stake at this time. Rather it is sufficient that the offer has been accepted to an extent that the 95 % threshold will be reached when the offer is finally executed and all tendered shares are transferred to the Bidder.

A significant advantage of the Squeeze-Out under the Takeover Act is that in some cases the amount of compensation to be paid to the minority shareholders is equal to the consideration paid under the offer. The compensation is deemed to be adequate if at least 90 % of the shares that were subject to the offer have been tendered. In case the Bidder granted only a Share-for-share Consideration within the offer, he has to, for the purpose of squeeze-out, offer alternative cash compensation. If the 90 % target is not met, it is not recommendable to use the post-takeover squeeze-out procedure.

15.3.2. Squeeze-Out pursuant to the Stock Corporation Act

This Squeeze-Out procedure is always applicable if a shareholder holds 95 % or more of the registered capital. Once the Bidder has reached this threshold, he can request to convene a general meeting to resolve that all shares of the minority shareholders are transferred to him. However, the transfer of shares does not become effective until the resolution has been entered into the commercial register. A Squeeze-Out under stock corporation law requires the majority shareholder to pay cash compensation to the minority shareholders, which must reflect the fair value of their shares. Typically the adequacy of the compensation is challenged by minority shareholders. The compensation is then reviewed in court appraisal proceedings.

The Stock Corporation Act Squeeze-Out is more complex than a Squeeze-Out under takeover law, particularly as the major shareholder has to prepare a specific report in anticipation of the general meeting and as the amount of compensation has to be reviewed by an auditor appointed by the court. Dissenting shareholders may be successful in blocking the effectiveness of the squeeze-out by court action at least for some time.

15.3.3. Squeeze-Out pursuant to the Transformation Act

Since July 2011, the German Transformation Act (*Umwandlungsgesetz*, the "**Transformation Act**") allows a majority shareholder to implement a Squeeze-Out with a holding of only 90 % or more of the registered capital. The Squeeze-Out under the Transformation Act is subject to the condition that it is implemented in connection with a merger (*Verschmelzung*) between the majority shareholder and the stock corporation, meaning that the resolution on the Squeeze-Out has to be adopted within three months of the signing of the merger agreement. Furthermore, the Squeeze-Out under the Transformation Act is only possible if the majority shareholder is a German stock corporation (*Aktiengesellschaft*), a German partnership limited by shares (*KGaA*) or an European stock corporation (*SE*). Apart from that, the procedure for this Squeeze-Out is very similar to the Squeeze-Out under the Stock Corporation Act.

Given the 90 % threshold value, the Squeeze-Out pursuant to the Transformation Act offers Bidders additional structuring options in connection with a public takeover offer. In order to be able to take advantage of these options, Bidders should consider using special purpose vehicles in the appropriate corporate form if they envisage the implementation of a Squeeze-Out pursuant to the Transformation Act.

15.4. Regular Delisting

The key benefit of terminating the listing of the Target Company is that the costs resulting from the various obligations of listed companies (e.g. publications, notifications) are reduced.

A delisting can be resolved by the Target Company's general meeting with a simple majority of the registered capital represented at the meeting. In the case of a low presence of minority shareholders, the Bidder could obtain the required majority even if he holds less than half of the Company's capital. However, a regular delisting only becomes effective after the admission of the shares to trading has been revoked by the relevant stock exchange(s). In practice, for reasons of investor protection, German stock exchanges only do so if the stake held by free float shareholders amounts to less than 10 %. Therefore, the Bidder needs to hold a 90 % majority stake for a regular delisting unless there are further major shareholders along with the Bidder lowering the free float.

Moreover, following a Supreme Court decision, the Bidder has to make an offer to the minority shareholders to acquire their shares for fair consideration in cash. The adequacy of the consideration is subject to review by court appraisal proceedings.

15.5. Cold Delisting

Beside a Regular Delisting, there are several structural measures which terminate the listing in an indirect way ("**Cold Delisting**"). Beyond that, each of the following structural measures has specific characteristics that could be desirable for the Bidder's post offer strategy.

An upstream merger between the Bidder (or its acquisition vehicle, if appropriate) and the Target Company is a very important example of a structural measure with the additional effect of a "cold delisting" since the listed Target Company ceases to exist.

A merger between the Bidder and the Target Company can have several advantages. In particular, it can enable the Bidder to obtain access to the assets of the former Target Company for refinancing purposes.

A merger is possible if the Bidder is incorporated in Germany or in another EEA country. It requires a resolution of the Target Company's general meeting with a 75 % majority of the registered capital represented at the meeting. A similar resolution might be required by the Bidder's shareholders (depending on the governing jurisdiction and legal form).

As consideration, the minority shareholders of the Target Company receive shares of the Bidder as the surviving company. If the latter is not organised as a stock corporation or is not domiciled in Germany, the minority shareholders are entitled to compensation in cash.

Each merger is very complex in terms of documentation and can not be realised as a short-term measure.

Another measure which has the effect of a "Cold Delisting" is a change in the legal form of the Target Company. In terms of the legal consequences, the Majority required and the types of Consideration, this structural measure is very similar to a merger as set out above. The same applies for the advantages/disadvantages. However, unlike a merger, both the Bidder and the Target Company continue to exist.

Upon resolution of a 75 % majority of the capital represented at the general meeting, the whole business of the Target Company can be sold to the Bidder. However, this transaction has to be at arms' length conditions, i.e. the Bidder is to be treated like a third party holding no shares. Usually, the Bidder cannot take significant advantages of such a transaction, particularly as they regularly have adverse tax consequences.

If the Bidder is a German stock corporation and holds 95 % of the registered shares, it can integrate the Target Company into its own business. The main advantage of this measure is that, unlike a squeeze-out (cf. Section 15.3), the minority shareholders are compensated with shares of the Bidder instead of cash. However, in case the Bidder is a subsidiary of another company (which might be the case following a takeover by a non-German Bidder who has used a German stock corporation as a bidding vehicle) the shareholders of the Target Company have the option to choose a cash compensation instead of shares in the Bidder. It is likely that the same applies if the Bidder is not listed on a stock exchange. As the remaining shareholders are entitled to compensation in cash, there are no significant differences to a squeeze-out as set out above.

Services of Baker & McKenzie

Baker & McKenzie provides the full range of legal services required in the context of a public takeover in Germany. In particular, Baker & McKenzie regularly renders the following services in connection with public offers and notification obligations:

- Advice to (potential) Bidders on the development of takeover strategies.
- Legal and tax advice in connection with the implementation of tender offers, including the drafting of transaction agreements, offer document and corporate documents necessary for a tender offer
- Advice on defence mechanisms in articles of incorporation.
- Advice to Target Companies on defence strategies and takeover attempts.
- Advice to shareholders and companies with regard to notification obligations.

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ANNEX

1. "The Perfect Target"

Review criteria:

Shareholders

- Major Shareholders (Shareholding > 25 %)
- Substantial Shareholders (Shareholding > 5 %)
- Shareholders with considerable shareholding (Shareholding > 0.5 %)
- Board members as shareholders
- Employees as shareholders
- Reciprocal Shareholdings
- Pooling Agreements
- Lock-up Agreements

Shares

- Preference Shares
- Registered Shares
- Restriction on Transferability

Capital

- Authorised Capital (with exclusion of the subscription right)
- Contingent Capital (with exclusion of the subscription right)
- Authorisation to acquire own shares
- Authorisation to issue warrant or convertible bonds

Takeover Defence Shelf Resolutions (Section 33 para. 2 WpÜG)

Supervisory Board

- Delegation Right
- Staggered Terms of Office
- Complicated Revocation
- Co-Determination

Important Agreements

- Change-of-control clauses
- Management contracts (golden parachutes)

Employees

- Employment agreements impeding restructurings
- Employment participation (Stock Option Plans, etc.)

2. Step Plan Public Takeover (friendly Takeover Offer with Cash Consideration)

*Certain important steps are highlighted in **Bold**; sequence of steps may vary*

	Type of Action	Timing
1.	Non-Disclosure Agreement with the Target Company to allow a Due Diligence	Prior to Takeover Offer
2.	If necessary, agreement on exclusivity with possible sellers of large stakes and/or the Target Company and/or conclusion of a (non-binding) letter of intent	Prior to Takeover Offer
3.	Due Diligence (possibly in several steps, in particular if Bidder is a competitor.)	Following step 1.
4.	Contract negotiations with major share-holders (if any) on sale of their stake (subject to the condition precedent of a successful execution of a Takeover Offer) or irrevocable undertaking to accept the Takeover Offer for their stake	Following step 3.
5.	Contract negotiations with the Target Company on an agreement containing the conditions under which the Company can approve the Takeover and its boards can issue a positive statement on the offer ("Business Combination Agreement")	Following step 3.
6.	If necessary, contract negotiations with banks on acquisition financing	Following step 3, but preferably prior to step 10, whereas pursuant to the legal wording the financing has not to be in final form prior to step 26, in practice however preferably at step 23.
7.	If applicable, negotiations with the financing banks or another bank on a financing confirmation.	Following step 3 and preferably prior to step 10.
8.	Negotiations with a bank (part of the German depository system) on the technical handling the offer.	Preferably prior to step 10, theoretically possible until of step 21.
9.	Reservation of an internet address and setting-up website under which the offer will be published.	Prior to step 14.

	Type of Action	Timing
10.	Signing of • Share purchase agreements, • Business Combination Agreement, • Financing Agreements, • Request for Financing Confirmation, • Instruction to transacting bank	After conclusion of steps 5.-8., subject to the condition precedent of step 11, unless already executed.
11.	Board approvals of the Bidder, the Seller and the Target Company (in particular resolution passed by supervisory board, Board of Directors or comparable boards)	Shortly prior to or after step 10.
12.	**Takeover Decision.**	**(Inevitably) connected at the latest either with step 10 or step 11, depending on which event will occur.**
13.	Notification to BaFin and the stock exchange(s) regarding the Takeover Decision.	Immediately prior to step 14.
14.	**Publication of the Takeover Decision via an electronic information system.**	**Immediately following step 12.**
15.	Possible ad-hoc notification by the Target Company (re Business Combination Agreement or Directors' Dealings) or by sellers of share-packages if they are listed on the stock exchange.	Immediately following step 12, for convenience however not purposes earlier than step 14.
16.	Notification to the stock exchange and to BaFin regarding the publication.	Immediately following step 14.
17.	Notification to the Target Company on the Takeover Decision.	Immediately following step 16.
18.	Target Company informs the works council or the employees.	Immediately following step 17.
19.	Draft of the required applications with respect to merger control law.	Following step 12.
20.	Determination of the settlement procedure and draft of the technical guidelines for the depository banks.	During step 22.
21.	Inquiry via the Wertpapiermitteilungen, a securities data base in Frankfurt am Main ("WM"), to the depository banks in order to determine the edition volume for the offer document.	During step 22.
22.	**Preparation of offer document and submission to BaFin.**	**Within 4 weeks after step 14.**
23	Submission of the signed financing confirmation.	At the same time as step 22.
24.	Review of the offer document.	10 business days (including Saturdays)

25.	BaFin a) identifies insufficiencies with respect to thecontent of the offer document b) permits publication (if necessary after correction of the identified insufficiencies) c) refrains from issuing a rejection order within the 10-day revision period (or within its extension).	a) Extension of the revision period of up to 5 business days in order to enable Bidder to adjust the offer b) Bidder immediately has to publish the offer document c) Bidder is obliged to immediately publish the offer document after expiry of the revision period even without express permission.
26.	**• Publication of the offer document on the internet and** **• Publication of a reference notification in the electronic federal gazette, indicating where the offer document is available (alternatively entire offer document can be published – uncommon), and** **• Making available printed offer document free of charge in Germany.**	**Immediately following steps 25 b) or c).**
27.	Provide evidence of the publication to BaFin.	Immediately following step 26.
28.	Publication of the technical guidelines for the depository banks in the securities journal (Wertpapiermitteilungen).	Electronically shortly after step 26, in print a few days after step 26.
29.	Provide a copy of the offer document to the Target Company.	Immediately following step 26.
30.	Provide the offer document to the works council or, if no works council exists, to the employees.	Immediately following step 29.
31.	**The Target Company publishes reasoned statement by the management board and the supervisory board with respect to the offer.**	**Immediately following step 30.**
32.	Provide evidence of publication to BaFin	Immediately following step 31.
33.	**Acceptance period of the offer**	**4 to 10 weeks after step 26.**
34.	**In case** **a) of a competing offer** **b) the general meeting of the Target Company is convened (not likely in the event of a friendly Takeover)** **c) of an amendment of the offer by the Bidder within the last 2 weeks of the acceptance period (for the last time possible one business day prior to the expiry of the acceptance period)**	a) the acceptance period is extended until the end of the acceptance period of the competing offer **b) the acceptance period is extended to the maximum period of 10 weeks** **c) the acceptance period is extended by further 2 weeks**

	Type of Action	Timing
35.	Publication of the amount of securities held by and shares tendered to the Bidder in the Target Company (*Wasserstandsmeldungen*) on the website of the Bidder.	Weekly during the acceptance period (and daily during the last week of the acceptance period) and one time immediately after its expiry.
36.	If applicable, fulfilment of conditions precedent of the offer, in particular merger clearance and respective publication.	Can only occur prior to the expiry of the acceptance period, with the exception of the clearance pursuant to merger control law.
[37.	End of acceptance period]	
37.	**Fulfilment of the purchase agreements concluded upon acceptance of the offer by payment against supply of the securities, typically at the same time fulfilment of possibly concluded share purchase agreements („Settlement“ or „Closing“)**	**After expiry of the acceptance period, but not prior tostep 36.**
38.	**Further acceptance period of 2 weeks in the event of Takeover Offers („Additional Acceptance Period“), (but not, if a certain minimum threshold has not been reached)**	**Upon publication of the notification pursuant to § 23 para. 1 sentence 1 no. 2 German Securities Acquisition and Takeover Act (“WpÜG”)**
39.	**Fulfilment of the purchase agreements concluded upon acceptance of the offer in the course of the Additional Acceptance Period by payment against supply of the securities**	**Immediately after expiry of step 38.**
40.	Another final Wasserstandsmeldung	Immediately after expiry of step 38
41.	Blocking period of one year in case a) the offer is rejected, b) the minimum acceptance rate is not reached	One year as of a) the day of the rejection b) the day of the notification pursuant to § 23 para. 1 sentence 1 no. 2 WpÜG
42.	End of the post-offer period for subsequent increases of the offer price as a result of over-the-counter acquisitions by the Bidder	One year as of the day of the notification pursuant to § 23 para. 1 sentence 1 no. 2 WpÜG

3. Selected Provisions of the German Takeover Act

3.1 Securities Acquisition and Takeover Act

§ 10
Publication of the Decision to Make an Offer

(1) The bidder is required to publish its decision to make an offer without undue delay in accordance with paragraph 3 sentence 1. The obligation pursuant to sentence 1 shall exist even if a resolution of the shareholders' meeting of the bidder is necessary for the decision pursuant to sentence 1 and such resolution has not yet been passed. Notwithstanding sentence 2, the Federal Agency may, upon application, permit the bidder not to effect a publication until after the resolution of the shareholders' meeting, if the bidder ensures by means of suitable arrangements that there is no reason to fear market distortions as a result of this.

§ 11
Offer Document

(1) The bidder is required to draw up and publish a document about the offer (offer document). The offer document must contain the information which is necessary in order to be able to make an informed decision about the offer. The information must be correct and complete. The offer document must be drawn up in the German language and in a form which facilitates its comprehensibility and evaluation. The bidder is required to sign it.

§ 12
Liability for the Offer Document

(1) If information in an offer document which is material for the evaluation of the offer is incorrect or incomplete, the person who has accepted the offer or whose shares have been transferred to the bidder pursuant to § 39a may demand
1. from those who have assumed responsibility for the offer document, and
2. from those who have initiated the issuing of the offer document, as joint and several debtors, compensation of the damage incurred by him as a consequence of his acceptance of the offer or the transfer of his shares.

(2) Claims under paragraph 1 cannot be brought against anyone who proves that he was not aware of the incorrectness or incompleteness of the information in the offer document and that such lack of awareness was not due to gross negligence.

(3) A claim under paragraph 1 does not exist if
1. the acceptance of the offer was not based on the offer document,
2. the person who accepted the offer was aware of the incorrectness or incompleteness of the information in the offer document at the time when he made his declaration of acceptance or

3. a clearly formulated correction of the incorrect or incomplete information was published in Germany in a publication pursuant to § 15 of the Securities Trading Act or a comparable announcement prior to the acceptance of the offer.

§ 13
Financing of the Offer

(1) Prior to publication of the offer document the bidder is required to take such measures necessary to ensure that at the time at which the claim for the consideration falls due it has at its disposal the means necessary for full performance of the offer. In the event that the offer provides for a cash payment as consideration, a securities services enterprise which is independent of the bidder shall confirm in writing that the bidder has taken measures necessary to ensure that the means necessary for full performance of the offer are available at the time at which the claim for the cash payment falls due.

(2) If the bidder has not taken the measures which are necessary pursuant to paragraph 1 sentence 2 and if for that reason it does not have at its disposal the necessary means at the time at which the claim for the cash payment falls due, any person who has accepted the offer may demand from the securities services enterprise which issued the written confirmation compensation of the damage incurred by him as a result of the incomplete performance.

§ 29
Definitions

(1) Takeover offers are offers aimed at the acquisition of control.

(2) Control means the holding of at least 30 per cent of the voting rights in the target company.

§ 31
Consideration

(1) The bidder is required to offer the shareholders of the target company adequate consideration. In determining the adequate consideration, the average stock market price of the shares of the target company and acquisitions of shares of the target company by the bidder, persons acting in concert with it or subsidiaries of the latter shall generally be taken into account.

(2) The consideration must consist of a cash payment in euros or of liquid shares which are admitted to trading on an organised market. If holders of voting shares are offered shares as consideration, such shares must also grant voting rights.

(3) The bidder is requires to offer the shareholders of the target company a cash payment in euros if it, persons acting in concert with it or subsidiaries of the latter have, in the six months prior to the publication in accordance with § 10 para. 3 sentence 1 and until expiry of the acceptance period, acquired a total of at least 5 per cent of the shares or voting rights in the target company in return for a cash payment.

(4) If the bidder, persons acting in concert with it or subsidiaries of the latter acquire shares in the target company after publication of the offer document and before the publication pursuant to § 23 para. 1 sentence 1 no. 2, and if the consideration provided or agreed therefore is higher in value than that specified in the offer, the consideration owed to the recipients of the offer within the relevant class of shares shall increase in value by the amount of the difference.

(5) If the bidder, persons acting in concert with it or subsidiaries of the latter acquire shares in the target company off-market within one year after the publication pursuant to § 23 para. 1 sentence 1 no. 2 and if the consideration provided or agreed therefore is higher in value than that specified in the offer, the bidder shall be obliged vis-à-vis the holders of shares who have accepted the offer to make a cash payment in euros in the amount of the difference. Sentence 1 shall not apply to the acquisition of shares in connection with a statutory obligation to make a settlement payment to shareholders of the target company and to the acquisition of the assets or of parts of the assets of the target company through merger, demerger or transfer of assets.

§ 35
Obligation to Publish and to Make an Offer

(1) Any person who directly or indirectly attains control of a target company is required, without undue delay and at the latest within seven calendar days, to publish this fact in accordance with § 10 para. 3 sentences 1 and 2, stating the size of his proportion of voting rights. The period shall begin to run at the time the bidder becomes, or should under the circumstances have become, aware of the fact that it has attained control of the target company. In the publication the voting rights attributable pursuant to § 30 shall be set out separately for each ground of attributability. § 10 paras. 2, 3 sentence 3 and paras. 4 to 6 shall apply accordingly.

(2) Within four weeks after publication of the attainment of control of a target company the bidder is required to transmit an offer document to the Federal Agency and publish an offer in accordance with § 14 para. 2 sentence 1. § 14 para. 2 sentence 2, paras. 3 and 4 shall apply accordingly. The target company's own shares, shares in the target company which belong to a dependent or majority-held enterprise of the target company and shares in the target company which belong to a third party but are held for the account of the target company or of a dependent or a majority-held enterprise of the target company shall be exempt from the obligation pursuant to sentence 1.

(3) If control of the target company is acquired as a result of a takeover offer, the obligations pursuant to paragraph 1 sentence 1 and paragraph 2 sentence 1 shall not apply.

3.2 WpÜG Offer Ordinance

§ 4
Taking Account of Previous Acquisitions

The consideration for the shares in the target company must be at least equal to the value of the highest consideration provided or agreed by the bidder, a person acting in concert with it or subsidiaries of the latter for the acquisition of shares in the target company within the last six months prior to the publication pursuant to § 14 para. 2 sentence 1 or § 35 para. 2 sentence 1 of the Securities Acquisition and Takeover Act. § 31 para. 6 of the Securities Acquisition and Takeover Act applies accordingly.

§ 5
Taking Account of Domestic Stock Market Prices

(1) If the shares of the target company are admitted to trading on a domestic exchange, the consideration must be at least equal to the weighted average domestic stock market price of such shares during the last three months prior to the publication pursuant to § 10 para. 1 sentence 1 or § 35 para. 1 sentence 1 of the Securities Acquisition and Takeover Act.

(2) If at the time of the publication pursuant to § 10 para. 1 sentence 1 or § 35 para. 1 sentence 1 of the Securities Acquisition and Takeover Act the shares of the target company have not yet been admitted to trading on a domestic exchange for three months, the value of the consideration must be at least equal to the weighted average domestic stock market price since introduction of the shares to trading.

(3) The weighted average domestic stock market price is the average price, weighted according to turnover, of the transactions notified to the Federal Financial Supervisory Authority (Federal Authority) as exchange transactions pursuant to § 9 of the Securities Trading Act

(4) If during the last three months prior to the publication pursuant to § 10 para. 1 sentence 1 or § 35 para. 1 sentence 1 of the Securities Acquisition and Takeover Act stock market prices have been determined for the shares of the target company on less than a third of the exchange days and if several stock market prices determined one after another differ from each other by more than five per cent, then the amount of the consideration must correspond to the value of the business enterprise calculated on the basis of a valuation of the target company.

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