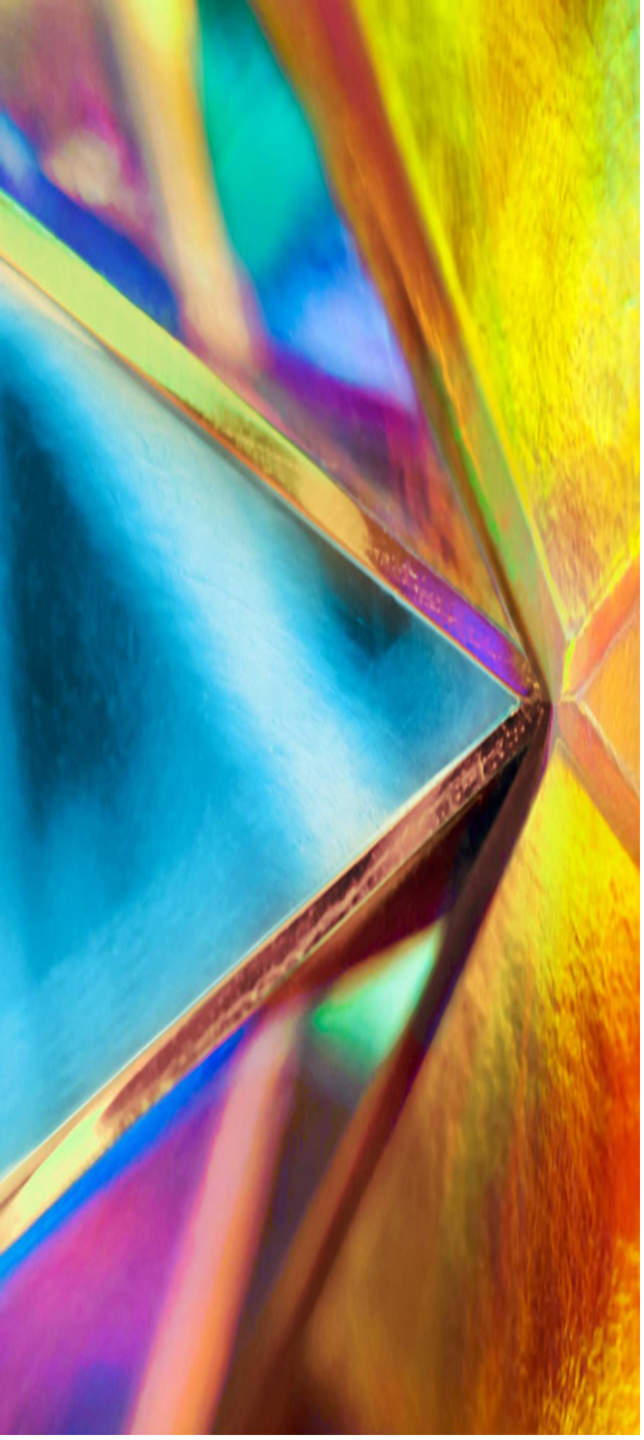

WHITE & CASE

Public to Private Deals in Germany

Six key things you need to consider

The German market in some respect follows and in others deviates from the UK market, requiring expert advice to navigate. Here are the key things you need to consider as an investor in a public to private deal ("P2P deal") where German takeover rules apply.

- Structure and Timeline
- Secrecy and Disclosure
- Financing
- Diligence
- Special Deals and Management Incentivization
- Deal Protections

Structure and Timeline

In Germany, there are different ways to implement a P2P deal and to gain access to target cash.

Public takeover offer ("PTO") combined with a subsequent squeeze-out of the minority shareholders of target.

- Key requirements: 90 percent or 95 percent shareholding in target stock after PTO for the squeeze out.
- Timeline: 3 - 4 months for PTO plus 6 - 10 months for squeeze-out = approx. 9 - 14 months total (including preparation).
- Key advantage: established route to sole ownership and full control of target.

Combined PTO (unconditional) and delisting offer, followed by subsequent conclusion of a domination and profit and loss transfer agreement ("DPLTA") with target.

- Key requirements: unconditional PTO and support of target management and 75 percent of votes in shareholders meeting (*i.e.*, need to be comfortable to lock in 75 percent of votes without need for minimum acceptance as offer condition).
- Timeline: 3 - 4 months for PTO/delisting offer plus 6 - 10 months for DPLTA = approx. 9 - 14 months total (including preparation).
- Key advantage: combined PTO and delisting offer allows for swift delisting; *i.e.*, it puts additional pressure on minority shareholders to sell where their investment policies do not allow them to hold private stock.

Initial PTO (conditional), conclusion of a DPLTA with target and possibly a separate delisting tender offer.

- Key requirements: 75 percent of votes in shareholders meeting.
- Timeline: 3 - 4 months for PTO plus 6 - 14 months for delisting offer and for DPLTA = approx. 9 - 18 months total (including preparation).
- Key advantage: minimum acceptance and other offer conditions can be included in offer document.

Structure and Timeline (cont'd)

Squeeze out

Squeeze-out of minority shareholders after a successful PTO can be done by way of (i) a merger squeeze-out, (ii) a takeover squeeze-out, or (iii) a regular corporate law squeeze-out.

- The **merger squeeze-out** requires only 90 percent of the share capital, whereas for the other squeeze-out routes, 95 percent is needed. In each case, it will need to be assessed if merging target into bidder has other disadvantages (*e.g.*, loss of certain permits, real estate transfer taxes triggered).
- The **corporate law squeeze-out** is a well-established method of squeezing out the minority shareholders. It requires 95 percent of the share capital and an expert opinion/company appraisal of the proposed compensation of the minority shareholders.
- The **takeover squeeze-out** can be implemented very swiftly after settlement of the PTO. It is the only squeeze out where neither a shareholders meeting nor an expert opinion/company appraisal for the calculation of the compensation of the minority shareholders is required. The offer price of the PTO is deemed to be adequate compensation. For the bidder to benefit from this assumption, 90 percent of the outstanding shares need to be tendered into the PTO, resulting in a total shareholding of 95 percent (which is why this is very rare).

DPLTA

The conclusion of a DPLTA with the target allows the bidder (once it has the required 75 percent majority in the target's general meeting) to issue instructions to the management board and to have all profits of the target transferred to it (in turn, the bidder needs to assume any losses of target, if applicable). In return, the bidder must grant the outstanding minority shareholders an option to put their shares at a fair price. For those outstanding minority shareholders that do not use the DPLTA put option, their target stock shall receive a fixed annual payment per share (the so-called "guaranteed dividend"), *de facto* making their stock a debt-like instrument.

Delisting

The delisting of target shares from the regulated market is effected by an application by the target's management board to the respective stock exchange and does not require any minimum shareholding. Where a DPLTA is in place, the bidder may simply issue a corresponding instruction under the DPLTA, to the management to apply for the delisting. Where there is no DPLTA it is advisable for the bidder to obtain an undertaking from the target that it will apply for delisting after the PTO (a delisting agreement). The delisting can be filed directly after the delisting offer; *i.e.*, after the expiry of the additional acceptance period of the combined PTO and delisting offer or the acceptance period of the subsequent and separate delisting offer.

Secrecy and Disclosure

Inside information

Information prior to a takeover may qualify as inside information and must be treated as strictly confidential. The bidder should therefore establish appropriate internal procedures. If the bidder intends to contact third parties at an early stage, this should be done exclusively under a non-disclosure agreement reflecting the specifics of P2P deals. The circle of insiders should be limited as far as possible on a need-to-know basis, but, unlike in the UK, no strict "rule of six" applies.

Targets may opt to self-exempt from the obligation to publish the status of ongoing discussions regarding the PTO under the ad hoc disclosure rule.

Announcement of the decision to launch an offer

As soon as the bidder confirms its firm intention to launch an offer, it must publish this information immediately. Under the minimum pricing rules, the date of announcement is the reference date for the determination of the three (or in case of a delisting offer, six) months volume weighted average price of the shares of the target.

In the event of a leak, an announcement may be required providing details of the status of negotiations even where the target (and/or listed bidder) is self-exempt from the ad hoc disclosure rule.

There is no equivalent to the UK's "active consideration" concept or "put up or shut up" rule.

Financing

Certain funds

There must be absolute certainty that the PTO consideration will be available to shareholders in the event that the offer is successful. Accordingly, prior to the publication of its intention to launch an offer (but in any event no later than publication of the offer document), the bidder must have "certain funds".

For the publication of the offer document, a confirmation from a European bank ("Cash Confirmation Bank") that the bidder has made the necessary arrangements to ensure that it has at its disposal the necessary resources to perform the offer in full ("Cash Confirmation") is required.

The Cash Confirmation Bank will undertake detailed diligence of the bidder's financing arrangements (equity and debt) to ensure there is sufficient cash available to the bidder to satisfy full acceptance under the takeover offer before issuing the Cash Confirmation.

Club deals

Under German takeover law, pre-, parallel- and post-bid acquisitions by "persons acting jointly" with the bidder are deemed equivalent to acquisitions by the bidder for the purpose of calculating the minimum price. Thus, in a club deal, the acquisition of only one share in the target company by one of the other consortium members at a price higher than the price stipulated in the offer document could automatically lead to an increase in the offer price, which would then affect all consortium members in proportion to their consortium quota.

Careful thought needs to be given to what extent consortium members and their group companies qualify as "persons acting jointly" (or if this can be avoided) and, in such case, to ensure that none of these companies have entered or will enter into pre-, parallel- or post-bid acquisitions at a price higher than the offer price.

In the interest of transparency, any persons acting jointly on behalf of all consortium members must also be disclosed in the offer document.

Diligence

Diligence in P2P deals typically starts with the review of information that is publicly available due to general ongoing disclosure obligations of the target under applicable capital market laws.

Access to confidential information on targets can be more limited in P2P deals compared to private M&A deals and ultimately depends on what target management, in its discretion, deems to be in the best interest of the company. In practice, this means that it can choose to refuse access altogether or allow a limited due diligence, depending on the potential bidder and its view of the transaction's logic.

Unlike in the UK, no rule exists that information provided to one bidder must equally and automatically be provided to another bidder. Target management can decide based on what it considers to be in the best interest of the company.

Special Deals and Management Incentivization

Management incentives that are agreed with the bidder prior to the publication of the offer document have to be disclosed both in the offer document and in the reasoned statement on the PTO that target management needs to publish during the acceptance period of the offer.

Where the bidder wants to agree with management and/or existing shareholders a (partial) reinvestment or roll-over of their existing shareholding into the bidder structure, special consideration must be given to the minimum pricing rules. Under the principle of equal treatment, agreements to acquire target shares for a price higher than the offer price would automatically lead to a corresponding increase of the offer price. Hence, it is important for bidders to ensure that the reinvest or roll-over is done at the right and fair valuation.

Deal Protections

In addition to offer conditions (*e.g.* minimum acceptance threshold), it is common practice in Germany for bidders to enter into certain arrangements to protect their offers. These might include the following:

- **Irrevocable undertakings**: binding commitments under which shareholders irrevocably commit to tender their shares into the offer.
- **Business combination agreement** or **investment agreement**: an agreement under which the bidder and the target agree on the terms and conditions, subject to which target management will generally support the offer.
- **Delisting agreement**: an agreement under which the management of the target commits itself –as far as legally permissible– to apply for the delisting of the target after the successful completion of the offer.