Banking & Finance

P2P Financings in Germany

The late-2022 rally in stock markets could have been expected to dampen the appetite for take-privates in private equity (PE) circles. However, that did not seem to happen. Public-to-private (P2P) transactions show few signs of slowing any time soon following another busy few months.

When financing a German P2P transaction, certain characteristics should be taken into account. We highlighted below some key differences between German P2P Financings and other types of acquisition financings.

(Limited) Access to the Target's Assets

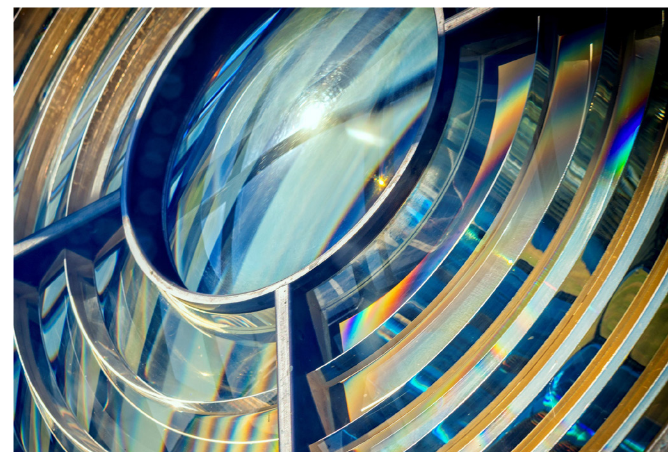
In a private acquisition financing, the purchaser typically obtains access to the target company's financial resources and the target usually accedes to the acquisition financing and grants transaction security. In a German P2P transaction, the purchaser (initially) lacks access to the target company's own financial resources. Further, German stock corporations are prohibited from granting financial assistance for the acquisition of its own shares. Providing security for the takeover financing at a later stage is also complex. This is because German stock corporations (*Aktiengesellschaften*) are subject to very strict equity protection rules which are stricter than the capital maintenance rules applicable to German limited liability companies (*Gesellschaften mit beschränkter Haftung*). There are certain structures that we can help implement to address this point and to grant the lenders (more) valuable security interests. However, such structures require, among other steps, the approval of the target company's general meeting with a qualified majority. This makes securing and refinancing public takeovers far more time-consuming and complex than private transactions.

(Limited) Control over the Target

In a private acquisition, the purchaser typically gains full control over the target company upon completion of the acquisition. In a German P2P transaction, even after a successful takeover, the purchaser does not have unrestricted control over the target company – at least during a transition period. This is because the target company's management board remains solely responsible for managing the company, even if the purchaser has acquired the majority of the registered share capital. The purchaser will only gain the right to issue instructions to the target company's management board if and when it enters into a control agreement with the target company or implements a squeeze-out that includes converting the target company into a German private limited company (*Gesellschaft mit beschränkter Haftung, GmbH*). All of these measures require, among other things, the approval of the target company's general meeting with a qualified majority. Implementing the measures is time-consuming, and the details and tax consequences can often only be worked out after the takeover has been completed. For this reason, takeover financings often contain obligations regarding conduct that differ from those in private transactions.

Interaction with the Cash Confirmation Provider

Another point to note is the required interaction with a cash confirmation provider. A cash confirmation is required if a takeover offer will be settled in cash (whether in whole or in part). The cash confirmation needs to be provided by an investment services company that is independent from the purchaser. This usually requires a debt financing agreement that complies with special takeover law requirements to be agreed before the commitment letter is issued, except insofar as the purchaser is able and willing to pay the maximum amount of cash consideration from cash reserves already available to it. To ensure that the required cash confirmation can be issued, the conditions precedent set out in the takeover financing agreement need to be very limited and need to be within the purchaser's control. In addition, the availability period and the conditions precedent must be aligned with the steps envisaged for the offer so that the committed financing is actually available when the offer consideration is due to be paid.



WHITE & CASE

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Practice Area News

Restructurings. Due to a hike in interest rates and a slow-down in many businesses (some of which were only recovering from Covid related business effects), we see many borrowers requesting that their lenders waive financial covenant breaches and lenders considering whether or not to terminate and enforce the relevant loans. We have now also seen the first restructurings of 2023 and expect more to come in the next two years.

StaRUG. In 2021, Germany implemented a new pre-insolvency restructuring proceeding under the German Corporate Stabilisation and Restructuring Act ("**StaRUG**"). StaRUG enables debtors to restructure debt and processes on the basis of a restructuring plan with the consent of the majority of its creditor. We have already seen the first StaRUG cases and expect that this will be a major trend over the coming years.

(No) Negative Interest. The German Federal Court of Justice ruled that interest on floating rate loans (i.e., the sum of the floating rate and the applicable margin) may not become negative. Hence, lenders are not required to pay negative interest to borrowers, even where borrowers have not agreed to a zero floor. The ruling will, in light of increasing interest rates, become less relevant, but does provide answers to ongoing disputes and guidance for the future.

ESG Link. A growing number of German financings (including bonds) are linked to an environmental, social and governance framework (together "ESG"). Currently, ESG linked financings typically include interest rate adjustments dependent on ESG performance in relation to certain key performance indicators. Since ESG links are more and more relevant for the lenders' ability to invest into and to syndicate loans, we expect this trend to continue and ESG links to become market standard.

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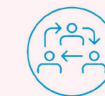

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