

Basics of M&A transactions in Germany

By Jens Hörmann

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Germany is the largest economy in Europe and considered the world's leading exporter of merchandise, with exports accounting for more than one-third of the national output. The economy in Germany is subject to a legal framework that is more efficient, cost-effective and predictable than commonly reported, with statutory law (instead of case law) providing legal certainty. The World Economic Forum's Global Competitiveness Report 2008-2009 even showed Germany to be top-ranked in the category of 'efficiency of legal framework'.

Compared to Anglo-Saxon countries, M&A activities in Germany may not have reached their peak and have obviously suffered from the financial crisis in 2008 and 2009. However, since the end of 2009, the M&A market begins to show signs that it will probably increase again.

This article shall provide a brief general overview of M&A transactions in Germany from a legal perspective.

Share deal vs. Asset deal

When investing in German companies, one can choose either to buy shares in a certain target company or its assets. In general, share deals are seen more often. This is determined by the fact that asset deals are more complicated since any asset to be transferred must be specified in the agreement. In addition, the transfer of agreements from the seller to the purchaser requires the consent of the other contractual party. On such occasions, it can sometimes be observed that the contractual party tries to renegotiate the terms and conditions of the concerned agreement. Further, from a seller's perspective, a share deal is generally favourable from a tax perspective.

On the other hand, situations may occur in which it is more recommendable to buy assets, e.g. if the target company has filed for insolvency or if the purchaser only wants to buy a certain business unit by way of spin-off. In addition, an asset deal may be advantageous for the purchaser from a tax perspective due to a possible step up.

If the transaction is structured as an asset deal, the employees of the business unit concerned are automatically transferred to the purchaser by operation of law. However, this is provided that each employee is permitted to object to the transfer.

Sale and purchase agreements

Traditionally, commercial agreements under German law are substantially shorter than Anglo-Saxon agreements. To a certain degree, this also applies to sale and purchase agreements (SPA) relating to the acquisition of shares although the influence of Anglo-Saxon legal culture has been significant over recent decades. However, comparatively short German-style documents continue to prevail

in many all-equity-financed transactions and in many transactions involving typical German medium-sized companies.

Short German SPAs are possible since most key areas of German corporate and contract law are dominated by extensive statutes. On items like remedies for violation of warranties, and the calculation of damages caused by contributory negligence and delay, in general it is possible to rely on statutory law. Therefore, the wording of the contracts sometimes give little guidance on practical handling issues since it is to be understood within the context of statutory law and general legal principles.

Nevertheless, in general the structure of German law SPAs is similar to standards used elsewhere. Core elements of the SPA are, as in many other jurisdictions, the purchase price and respective adjustment clauses. Since the beginning of the subprime difficulties in 2007, net financial debt and working capital adjustments as of the closing date have again become more frequent. So-called 'locked box contracts' have become infrequent, i.e. agreements that provide for a fixed purchase price that is (i) determined based on past figures and (ii) not subject to adjustments. A second major part of a SPA is the paragraph dealing with representations and warranties, which are usually comparable to those used in other jurisdictions.

One major deviation from Anglo-Saxon SPAs is the distinction between the sale and the transfer of shares (or assets), which are described as two separate transactions. The 'sale' constitutes only

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the obligation to transfer the share while the transfer constitutes the actual transfer of ownership (*in rem*). Thereby, the transfer is usually subject to the closing conditions (such as antitrust clearance) and payment of the purchase price.

Another German peculiarity is that any German law agreement involving the transfer of GmbH shares (see below) or real property must be notarised. This means that the SPA itself and any ancillary agreement related thereto and all annexes (other than lists and tables to which an exception applies) must be read aloud by or in front of a notary. German notary fees are governed by a mandatory non-negotiable fee schedule and are calculated on the basis of the transaction value. Accordingly, they range from €10 (US\$13.8) to a maximum amount of approximately €55,000 (US\$75,570) (at a transaction value of €60 mio. or more). These fees are customarily borne by the purchaser.

Various share types

Private limited liability company (GmbH)

The form of a GmbH is by far the most frequently used corporation form in Germany. The foundation of a GmbH, as well as the transfer of shares, requires notarisation by a notary public. Provided that the nominal share capital is fully paid in after the foundation of a GmbH and is not repaid, the shareholders of a GmbH are in general not personally liable for the company's debts. The German Limited Liability Company Act provides for capital maintenance rules pursuant to which it is generally prohibited to repay the nominal share capital to shareholders.

The corporate bodies of a GmbH consist of the management and the shareholder assembly. Under German law, the managing directors may be appointed and removed relatively easily by the shareholders at any time they wish. In addition to the two mandatory bodies, the shareholders of a GmbH can opt to implement an advisory board or a supervisory board. If a certain number of employees are exceeded (500), the foundation of a supervisory board is required by mandatory labour law. The occupation and competences of the supervisory board depend on the number of employees (500/2000).

The legal regime that applies to an AG is considerably stricter than that which applies to a GmbH

Stock corporation (AG)

In addition to the GmbH, the second major type of German corporate entity is the AG. The shares in an AG may be, but must not necessarily be, publicly listed. In fact, most of the German AGs are not listed but are privately held by a small number of shareholders.

The legal regime that applies to an AG is considerably stricter than that which applies to a GmbH. As a rule of thumb, the articles of association of an AG may only contain provisions that deviate from those contained in the German Stock Corporation Act if this is expressly permitted. In contrast, the articles of association of a GmbH may contain any provision unless such provision is prohibited under the German Limited Liability Company Act. As a consequence, the flexibility in structuring an AG is quite limited – in particular with respect to its corporate governance.

The three mandatory corporate bodies of an AG are the management board, the supervisory board and the shareholders' meeting. A major difference to a GmbH is that the management board is not subject to instructions from the shareholders' meeting or the supervisory board. However, certain restrictions on the powers of representation (internally vis-à-vis the company) may be imposed, e.g. the rules of procedure of the management board.

The members of the supervisory board are elected by the shareholders' meeting unless employee representatives are required by mandatory law.

The minimum stated share capital of an AG amounts to €50,000 (US\$68,850), whereby the minimum nominal amount per share is €1. In contrast to the law governing the GmbH, the sale and transfer

of shares in an AG does not require a specific form, i.e. notarisation is also not required. However, according to the articles of association, the transfer of registered shares as opposed to bearer shares may be subject to the consent of the AG.

Any actions with respect to the shares in a listed AG must comply with insider law, the violation of which regularly constitutes a criminal offence.

Partnerships

In addition, different types of partnerships can be seen in Germany of which the limited partnership is common – in particular with a GmbH as general partner (so-called GmbH & Co. KG).

Foreign investment approvals

In addition to antitrust law, if applicable, the acquisition of companies with offices or places of business in Germany by investors with their seats or management outside the EU / European Free Trade Area is partly restricted.

Since 2009, each direct or indirect acquisition of at least 25% of the voting rights of a German company by such an acquirer may be reviewed by the German Ministry of Economics (GMoE) within three months. This begins upon conclusion of the obligation

to acquire a company, respectively upon publication of the decision to make a takeover bid or the publication that control was obtained. If the GMoE requests the delivery of documents relating to the acquisition, it has an additional two months to issue orders or prohibit the acquisition in case it endangers the public order or security of the

Federal Republic of Germany.

If no concerns exist, each acquirer has the right to issuance of a clearance certificate. The respective application requires a description of the scheduled acquisition and information about the acquirer and its businesses. Clearance certificates will be granted if the GMoE has not instituted review procedures within a period of one month beginning upon receipt of the application.

In case of the acquisition of a German company that manufactures or develops military weapons, cryptographic systems or other defence-related goods, the transaction must be announced to the GMoE as well.

Public financial control

When acquiring shares in German companies, investors are subject to various regulatory requirements if the shares are admitted for trading on regulated markets.

When acquiring or selling shares in companies admitted for trading on a regulated market, and in so doing exceeding or falling below certain thresholds in voting rights (3%, 5%, 10%, 15%, 20%, 25%, 30%, 50%, 75%), any investor must notify the company and the German financial supervisory authority (Bundesanstalt für Dienstleistungsaufsicht or 'BaFin') without undue delay, and at the latest within four trading days. A similar obligation also applies as well to warrants or financial instruments that give an unconditional right to acquire shares in such companies. Voting rights may generally not be exercised if the notification requirement has not been complied with. The suspension may last for six months if the notification was omitted due to gross negligence or willful misconduct.

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As of May 31 2009, any purchaser of listed shares up to or exceeding the threshold of 10% must disclose the objects of the purchase and the source of financing to the issuer within 20 trading days. Public tender offers are exempt from such disclosure, as well as purchases by investment companies regulated under the UCITS directive. The issuer is then required to publish such disclosed information to the public.

When acquiring shares in AGs not listed on a regulated market, and which exceed a threshold of more than 25% of the registered share capital, the purchaser must notify the company and the company has to publish such notification.

No similar notification requirements apply to purchases of shares or interest in companies of other legal types such as GmbHs.

Tender offer

If shares in the relevant company are admitted for trading on a regulated market, public tender offers can be made by way of two main types of offers, namely voluntary offers and mandatory offers. Voluntary offers aimed at the acquisition of control over a company are so-called 'takeover offers'. As opposed thereto, a 'mandatory offer' must be made to all outside shareholders upon the acquisition of control in any way other than by a takeover bid. For example, control can be gained through an off-market purchase of shares (block sale), purchases from the stock exchange, subscription in a capital increase, or a merger.

Control is established by directly or indirectly holding 30% or more of the voting rights in the target AG. To determine whether the 30% threshold has been met, the voting rights directly held by shareholder and certain voting rights imputed to him must be combined. For example, voting rights that are owned by a subsidiary – or by a third party for the account of the shareholder – shall be deemed to be voting rights of the relevant shareholder. In particular, the voting rights of a third party with whom a shareholder coordinates its conduct with respect to the AG are imputed to the shareholder (acting in concert). This is with the exception of agreements in individual cases. Coordination between the shareholder and a third party shall be deemed to exist in cases in which they agree on the exercise of voting rights or otherwise act together with the purpose of affecting permanent and significant changes to the company's business approach.

Once the bidder has decided to make a takeover offer or once the 30% control threshold has been met, the bidder must immediately publish the decision or announce that the control threshold has been met. Thereafter, as a rule, the bidder has a period of four weeks to prepare an offer document containing the full terms of the offer and to submit the document to BaFin for verification. Upon approval of the document by BaFin, the bidder must immediately publish the offer. The acceptance period that starts with the publication may not generally be less than four weeks and not more than 10 weeks. In certain cases, the acceptance period extends by operation of law.

For both voluntary and mandatory offers, the consideration to be offered to all other shareholders must at least be equal to the higher of:

- (i) the highest consideration that the bidder (or certain persons related to or acting together with) has granted or promised to pay for the acquisition of shares – during a period of six months preceding publication of the offer document; or
- (ii) the weighted average domestic stock market prices of the shares during the three month period preceding publication of the bidder's decision to make a takeover offer or of the bidder's attainment of the 30% threshold.

The consideration will be adjusted to a higher price if the bidder (or certain persons related to or acting together with) acquires further shares. This can either be during the acceptance period or, by way of an off-market transaction, within one year after the lapse of the acceptance period – and for a consideration exceeding the value of the consideration specified in the offer. An exception thereto exists for the acquisition of shares in connection with a statutory obligation to grant compensation to shareholders of the target company.

Control is established by directly or indirectly holding 30% or more of the voting rights in the target AG

Takeover offers and mandatory offers basically follow the same legal regime. An important deviation, however, is that a mandatory offer may not be made subject to conditions precedent, whereas for voluntary offers conditions precedent are generally permissible. In practice, voluntary offers may sometimes be subject to the achievement of certain acceptance thresholds in order to ensure that a certain percentage of voting rights is obtained.

Based on the fact that a mandatory offer cannot be made subject to conditions precedent, an attempt is often made (and it is possible) to structure the transaction in order to have a voluntary offer rather than a mandatory offer. This may be achieved by a combination of a private transaction comprising 30% or more of the voting rights together with a voluntary offer.

德国并购交易的基本规范

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德国是欧洲最大的经济体系，被视为全球领先的商品出口国，出口总值占全国产量三分之一以上。德国经济在一个高效率、符合成本效益和稳定可测的法律框架下运作，而实际情况亦比一般报道更为理想。这个法律框架以成文法(代替判例法)为基础，提供了法律的确定性。世界经济论坛(World Economic Forum)的2008-2009年全球竞争力报告(Global Competitiveness Report)甚至指出：德国在“法律框架效率”的类别中名列前茅。

与盎格鲁-撒克逊(Anglo-Saxon)国家相比，德国的合并收购活动可能仍未达到最活跃的程度，同时亦明显受到了2008-2009年金融危机的重创。然而，自2009年年底起，合并收购市场已经开始出现可能回复增长的迹象。

本文从法律的角度简单介绍在德国进行合并收购交易的概况。

股份买卖和资产买卖的比较

在投资德国公司时，一般可以选择买入目标公司的股份或其资产。大多数情况下，股份买卖较为常见。这是由于事实上资产买卖比较复杂，因为有关协议必须详细说明任何将予转让的资产。此外，协议从卖方转移到买方的过程中，必须得到另一个契约方的同意。在这种情况下，有时候甚至会发现，另一个契约方会设法重新协商有关协议的条款和条件。再者，卖方往往认为，从税收的角度来看，股份买卖通常比较有利。

另一方面，在某些情况下，却较为值得建议进行资产购买。举例而言，当目标公司已经申请破产，又或者如果买方只想通过分拆的方式来购买某项业务。此外，由于可能会出现增值的情况，所以从税收的角度来看，资产买卖可能对买方较为有利。

如果交易以资产买卖的结构进行，依照法律规定，有关业务的员工便会自动转职到买方。不过，条件是必须允许员工反对这种转职安排。

买卖协议

传统来说，按照德国法律订立的商业协议，在篇幅上都大大短于盎格鲁-撒克逊协议。在某程度上，这种情况亦见于收购股份的股份买卖协议(SPA)，纵使盎格鲁-撒克逊法律文化在近几十年来的影响力重大，不过，篇幅较短的德国风格文件仍旧普遍见于许多完全透过股本融资进行的交易，以及许多涉及德国典型中型企业的交易。

由于德国公司法和合同法中最主要的部分都受到范围更广的成文法所规范，所以，篇幅较短的德国买卖协议还是切实可行的。诸如违反保证条款的补救措施，以至因共同过失和延迟造成的损害赔偿估算事项，一般都可以依赖成文法的条文执行。因此，合同的字眼有时候只提供极少的指导去实际处理各种事情，因为这些事情都可以按成文法和一般法律原则的文义进行理解。

然而，一般来说，德国法买卖协议的结构与其他地方采用的标准相类似。正如在许多其他司法权区一样，买卖协议的核心元素是购买价格和相关的调整条款。自从2007年的次贷危机开始以来，截至结账日期的净财务负债和营运资本调整再次变得日

益频繁。所谓的“锁箱合同”(即规定固定购买价格的协议)亦变得甚为罕见，这种协议的购买价格是(i)基于以往的数字来决定，且(ii)不得予以调整。至于买卖协议的第二个主要部分，即有关陈述和保证的段落，它们的内容一般与其他司法权区使用的相若。

与盎格鲁-撒克逊买卖协议比较，其中一个主要的分别在于，出售和转让股份(或资产)之间的区别，两者被描述为两项独立的交易。“出售”只构成转让股份的责任，而转让构成所有权的实际转让(对物)。因此，转让通常需要达成完成条件(如反垄断核准)和支付购买价格。

德国的另一个特别之处在于，任何涉及有限责任公司(GmbH)股份(见下文)或房地产转让的德国法协议都必须经过公证过程。这意味着，买卖协议本身及其相关的任何附属协议和所有附件(特例情况适用的清单和表格除外)都必须由公证人或公证人面前大声读出。德国公证费按照一个强制性不可议价的费用标准计算，而且是按成交价值的基础进行计算。因此，德国公证费从10欧元(13.8美元)到最高金额约55,000欧元(75,570美元)不等，而成交价值最小为60欧元或以上，这些费用惯常由买方承担。

股份类别

有限责任公司(GmbH)

有限责任公司的形式是目前为止德国最常采用的企业形式。有限责任公司的成立及股份的转让，都必须经过公证员进行公证程序。只要在有限责任公司成立之后，缴纳足额的注册资本，而且没有将股本还清，则有限责任公司的股东一般毋须亲自承担公司的债务。《德国有限责任公司法》(German Limited Liability Company Act)订有资本保全规则，据此，在一般情况下禁止将注册资本还清给股东。

有限责任公司的公司组织包括管理层和股东大会。根据德国的法律，股东可以随时相对容易地任免董事总经理。除了这两个强制性组织之外，有限责任公司的股东可以选择设立咨询委员会或监事会。如果雇员人数超过某个数目(500)，则按照强制性劳动法必须成立监事会。监事会的职责和权力视乎员工人数(500/2000)而定。

股份公司(AG)

除了有限责任公司之外，德国企业实体的第二大类型是股份公司。股份公司的股份可以但不一定要上市。事实上，大部分德国股份公司都没有上市，而是由少数股东私人持有。

相比于有限责任公司而言，适用于股份公司的法律机制更加严格。按实际经验来看，只有是明文允许的情况下，股份公司的公司章程才可以载有偏离《德国股份有限公司法》(German Stock Corporation Act)所载的规定。相反地，有限责任公司的公司章程可以载有任何规定，除非《德国有限责任公司法》严禁有关规定。因此，股份公司的结构灵活性相当有限，尤其是在企业管治方面。

股份公司的强制性公司组织有三个：管理委员会、监事会和股东会议。与有限责任公司的主要区别在于，管理委员会毋须

听从股东会议或监事会的指示。不过，股份公司可能会对代表权(面对公司时)施加某些限制，如订立管理委员会会议事规则。

除非法律强制性要求有员工代表，否则，监事会的成员可以是经股东会议挑选。

股份公司的最低股本为50,000欧元(68,850美元)，而每股股份的最低面额为1欧元。与监管有限责任公司的法律相比，股份公司的股份出售和转让毋须以特定形式进行，即是并不需要进行公证程序。不过，根据公司章程的规定，与不记名股份不同，转让注册股份时须取得股份公司的同意。

任何与上市股份公司的股份有关的行动，都必须遵循内幕交易法进行，违反内幕交易法一般会构成刑事罪行。

合伙企业

此外，在德国还可以见到不同类型的合伙企业，当中常见的是有限合伙企业，尤其是一些由有限责任公司作为一般合伙人的有限合伙企业(所谓的“有限两合公司”)。

外国投资许可

除了反垄断法之外，在适用的情况下，所在地或管理部门设置在欧盟/欧洲自由贸易区(European Free Trade Area)以外的投资者，对在德国设有办事处或营业场所的公司进行收购时，会受到一些限制。

自2009年起，上述收购方每次直接或间接收购任何德国公司至少25%的表决权时，均可以在三个月内获得德国经济部(GMoE)的审核，有关审核在完成收购一家公司的责任之后开始，分别在公布收购出价的决定或公布取得控制权之后开始。如果德国经济部要求提交有关收购的文件，它便获得额外两个月的时间，在收购危害德国联邦共和国的公共秩序和安全的情况下，发出命令或阻止收购。

如果不存在任何问题，每个收购方都有权发给核准证明。有关申请必须说明计划收购详情及关于收购方及其业务的资讯。如果德国经济部在收到申请之后起计的一个月内没有启动审核程序，便会授出核准证明。

如果收购的德国公司生产或开发军事武器、加密系统或其他与国防有关的商品，有关交易必须上报德国经济部。

政府金融管制

当收购德国公司的股份时，如果股份获准在受管制的市场上进行买卖，则投资者必须遵守各种规管法规。

如果收购或出售获准在受管制的市场上进行买卖的公司股份，并因而导致超过或低于某个表决权的门槛(3%、5%、10%、15%、20%、25%、30%、50%、75%)，则有关投资者必须通知有关公司和德国金融监管局(Bundesanstalt für Dienstleistungsaufsicht或‘BaFin’)，不得无故拖延有关通知，并且最迟在四个交易日之内进行。类似的责任也适用于获赋予无条件权力收购此类公司股份的认股权证或金融票据的情况。如果不符合通知要求，一般不获行使表决权。如果由于重大过失或不正当行为而忽略通知要求，则暂停期可长达6个月。

截至2009年5月31日，任何购买达到或超过门槛10%上市股份的买方，必须在20个交易日内向发行人披露购买的目标及融资来源。不过，公开竞价要约及受可转让证券集体投资计划(UCITS)指令管制的投资公司的购买活动则豁免遵守该等披露规定。接著，发行人便须向公众公布有关披露资料。

如果收购尚未在受管制的市场上市的股份公司的股份，而收购的股份超过注册资本25%以上的门槛，则买方必须通知有关公司，而有关公司亦必须公布此通知。

无类似的通知要求适用于其他合法类型公司(如有限责任公司)的股份或权益购买活动。

作者简介



JENS HÖRMANN

合伙人

Jens Hörmann是P+P在慕尼黑的合伙人，擅长合并及收购和私募股本事务，尤其集中处理私募股本交易、合资企业及资本市场法。Jens在德国康斯坦茨修读法律。

竞价要约

如果相关公司的股份获准在受管制的市场上进行买卖，可通过两种主要的要约类型进行公开竞价要约，即自愿要约和强制要约。自愿要约旨在取得公司的控制权，即是所谓的“收购要约”。与此相反的话，以任何方式(除了收购出价)取得控制权之后，则必须对所有的外部股东提出“强制要约”。举例而言，可以通过场外购买股份(大宗销售)、从证券交易所购买、增资认购或合并等方式来取得控制权。

通过直接或间接持有目标股份公司30%或以上的表决权，便可确立控制权。为了确定是否达到30%的门槛，必须将股东直接持有的表决权及某些应归于股东的表决权一并计算。例如子公司拥有的表决权，又或者由第三方代表股东拥有的表决权，一概都应被视为是相关股东拥有的表决权。尤其是那些会与股东协调作出与股份公司有关的行动的第三方的表决权亦应归于股东(一致行动)，惟于个别个案达成的协议除外。下列的情况中，股东和第三方之间的协调行动应被视为存在：他们就行使表决权达成一致意见或采取一致行动，目的是影响公司业务策略的任何永久重大变动。

如果收购人决定提出收购要约，或者一旦达到30%的控制权门槛，则收购人必须立即公布该决定或者宣布已达到控制权门槛。按照规则，收购人之后会有4个星期可以准备载有所有要约条款的要约文件，并将文件提交德国金融监管局审核。文件得到德国金融监管局批准之后，收购人必须立即刊发有关要约。从刊发日期开始计算的接纳期限一般不得少于4个星期，也不得多于10个星期。在某些情况下，可依照现行法律延长接纳期限。

就自愿要约和强制要约而言，向所有其他股东提出的约价必须至少相等于下列两者中的较高者：

- (i) 在刊发要约文件之前的六个月期间，收购人(或某些相关人或某些共同行动的人)就收购股份提出或承诺支付的最高约价；
- (ii) 在公布收购人提出收购要约的决定或公布收购人达到30%门槛之前三个月期间，股份在国内的加权平均股价。

如果收购人(或某些相关人或某些共同行动的人)收购更多的股份，则约价会调整至更高价格。调高价格可以在接纳期限内进行，也可以在接纳期限失效后的一年内，通过场外交易调高价格，而且调高后的约价可以超过要约规定的约价价值。为补偿目标公司的股东而进行与法定责任有关的股份收购，则列作例外情况。

收购要约和强制要约基本上按相同的法律机制进行。不过，当中的重大差异在于：强制要约不得按先前条件提出，而自愿要约一般是容许提出先前的条件。实际上，自愿要约有时候会受到需要达到某些接纳门槛的制约，从而确保取得某百分比的表决权。

基于强制要约事实上不得按先前条件提出，投资者通常会尝试(而且很有可能)改动交易的结构，从而进行自愿要约，而不是强制要约，方法是将占30%或以上表决权的私人交易结合自愿要约进行。