Mergers and Acquisitions in Germany

Rosengarten / Burmeister / Klein

3rd revised edition 2020
ISBN 978-3-406-74918-6
C.H.BECK

schnell und portofrei erhältlich bei
beck-shop.de

Die Online-Fachbuchhandlung beck-shop.de steht für Kompetenz aus Tradition. Sie gründet auf über 250 Jahre juristische Fachbuch-Erfahrung durch die Verlage C.H.BECK und Franz Vahlen.
beck-shop.de hält Fachinformationen in allen gängigen Medienformaten bereit: über 12 Millionen Bücher, eBooks, Loseblattwerke, Zeitschriften, DVDs, Online-Datenbanken und Seminare. Besonders geschätzt wird beck-shop.de für sein umfassendes Spezialsortiment im Bereich Recht, Steuern und Wirtschaft mit rund 700.000 lieferbaren Fachbuchtiteln.

Similarly, instruments indirectly held by a person are attributed to such person for purposes of the notification requirements.

For so long as a notification has not been made, the rights relating to the relevant shares owned by such shareholder or by enterprises controlled by the shareholder are forfeited (Securities Trading Act, s. 44, para. 1, sentence 1). If the notification has been omitted due to gross negligence or wilful misconduct, the rights of the subject shares may even continue to be suspended for a period of six months following the correction of the non-compliance (Securities Trading Act, s. 44, para. 1, sentence 3). An exception to the forfeiture applies for the right to dividends and the right to liquidation proceeds, provided that the notification has not been omitted intentionally and is made at a later date (Securities Trading Act, s. 44, para. 1, sentence 2). Furthermore, non-compliance with the notification requirements is subject to administrative fines of, for a natural person, up to € 2 million and, for a legal entity, up to the higher amount of either € 10 million or 5 % of the legal entity's total turnover (Securities Trading Act, s. 120, para. 2, lit. d) in connection with para. 17).

Persons acquiring 10 % or more of the voting rights in a listed corporation will also be required to disclose their investment objectives as well as the source of funds used to acquire the shares to the issuer (unless the 10 % threshold is reached or exceeded following a public tender offer). They have to disclose whether (i) they are pursuing either strategic objectives or general trading profits, (ii) they intend to obtain further voting rights within a period of 12 months, (iii) they plan to influence the composition of the administrative, management or supervisory board of the issuer, (iv) they intend to effect a material change in the capital structure of the issuer.[27] The disclosure has to be made within 20 trading days after having reached the 10 % threshold (Securities Trading Act, s. 43). Notably, the law does not provide for any sanctions in the case of non-compliance.

beck-shop.de
DIE FACHBUCHHANDLUNG

6. Notification of Share Transfers; Registration

When registered shares in a stock corporation are transferred, the company must be notified of the transaction. Such notification is not a requirement for the validity of the transfer. However, the company must continue to treat the transferor as the shareholder (particularly for voting and dividend purposes) and cannot recognise the transferee as the new owner until the new shareholder is registered in the share register (Stock Corporation Act, sec. 67). For this reason, a purchaser of registered shares should notify the target company of its completed acquisition as soon as possible.

The registration of a GmbH shareholder in a shareholders' list *(Gesellschafterliste)* and the submission of such list to the commercial register are a prerequisite for the exercise of shareholder rights in a GmbH (GmbH Act, s. 16, para. 1). In addition, the GmbH Act recognises the possibility of a good faith *(bona fide)* acquisition of title to shares or rights in such shares from a seller who is not the legal owner, but registered as shareholder of the respective share in the shareholders' list (GmbH Act, s. 16, para. 3) (see E.III.5., below). A new shareholder should therefore take care that the acting notary performs his or her duty to submit an updated shareholders' list to the commercial register promptly after the notarisation of the share transfer.

[27] An exemption applies to certain asset management and investment companies provided that certain requirements are met. Furthermore, this disclosure requirement does also not apply if the constitutional documents of the listed corporation provide for an exemption.

7. Disclosure to Commercial Register and Transparency Register

There are also substantial disclosure obligations vis-à-vis the commercial register (see B.IV.1., above). Non-compliance with such disclosure obligations may result in different legal consequences. Whereas in some cases the transaction to be disclosed does not become effective until its disclosure, in other cases the relevant transaction does become effective, even without disclosure, but the commercial register can impose administrative fines for non-disclosure. In other instances, non-disclosure has no consequences at all.

Non-disclosure of the beneficial owner in the transparency register (see B.IV.3., above) may result in substantial regulatory fines.

8. Financial Disclosure

The Commercial Code requires, as a rule, that all corporations make their annual and semi-annual financial statements publicly available. The extent to which this must be done depends on the classification of the corporation as large, medium-sized or small, this classification being uniform in all EU member states. Certain commercial partnerships have been subjected to the same disclosure obligations as corporations. The commercial partnerships subject to such disclosure obligations are both general partnerships and limited partnerships, provided that they do not have at least one partner who is subject to unlimited liability and who is either an individual or a partnership with an individual as a partner who is subject to unlimited liability (Commercial Code, s. 264a, para. 1). Exemptions apply in particular for corporations and commercial partnerships that are subsidiaries and are included as such in the consolidated financial statements of their parents (Commercial Code, s. 264b, no. 1).

Large corporations must submit their financial statements (balance sheet *(Bilanz)*, profit and loss statement *(Gewinn- und Verlustrechnung)* and annex of notes *(Anhang)* including the declaration of remuneration of members of the management board (Commercial Code, ss. 266 et seq., 275 et seq. and 284 et seq.)), together with the auditor's certificate or statement of refusal, the business report, the report of the supervisory board and certain other financial information to the operator of the electronic Federal Gazette in a form that allows them to be published (Commercial Code, s. 325). After publication, the electronic Federal Gazette is in charge of transmitting the documents to the provider of the electronic company register *(Unternehmensregister)* for publication therein, where it is subject to inspection by the public (Commercial Code, s. 8b, para. 2, no. 4). Large corporations are those which exceed at least two out of the following three criteria in two consecutive business years (Commercial Code, s. 267, para. 3):

- € 20,000,000 balance sheet total *(Bilanzsumme)*;
- € 40,000,000 in sales; and
- an annual average of 250 employees.

In addition, a corporation is always deemed to be large if its shares, or other securities issued by it, are admitted to an 'organised market' as defined in s. 2, para. 11 of the Securities Trading Act, or if admission to such a market has been applied for. If the company is listed on a stock exchange in Germany, the annual report must also be made accessible for review on the Internet (Securities Trading Act, s. 114, para. 1).

Further, AGs, SEs or KGaAs whose voting shares are admitted to an 'organised market' as defined in s. 2, para. 7 of the Takeover Act must disclose in their business report potential defence mechanics which could become relevant in the context of a public tender offer, such as limitations of voting rights, share transfer restrictions, direct and indirect shareholdings, authorisations to repurchase own or issue new shares, material agreements

beck-shop.de
DIE FACHBUCHHANDLUNG

which contain a change-of-control clause (unless such disclosure constitutes a material hardship to the company), and severance agreements with members of the management board or employees in the case of a takeover offer (Commercial Code, s. 289a).

Since the introduction of the directive (EU) 2014/95 regarding Corporate Social Responsibility (CSR), large companies whose shares are admitted to, or have applied for admission to, an 'organised market' and whose number of employees exceeds 500 must add a non-financial statement to their management report (Commercial Code, ss. 289 et seq.) The non-financial statement must contain, *inter alia*, a brief description of the company's business model and a reference to environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters. *Medium-sized corporations* must file the same documents with the electronic Federal Gazette as large corporations, except that they enjoy some relief with regard to the required contents of the balance sheet and the annex of notes (Commercial Code, s. 327). These documents must also be made available for public inspection in the company register and, in case of listed corporations, also on the Internet. Medium-sized corporations are those which qualify as neither large nor small corporations (Commercial Code, s. 267, para. 2).

Small corporations are subject to more limited financial disclosure requirements. They need to submit only their balance sheet and annex of notes, but not their profit and loss statement to the operator of the electronic Federal Gazette (Commercial Code, s. 326, para. 1). Small corporations are those which do not exceed at least two of the following three criteria in two consecutive business years (Commercial Code, s. 267, para. 1):
– € 6,000,000 balance sheet total;
– € 12,000,000 in sales; and
– an annual average of 50 employees.

A German parent corporation of a group of companies *(Konzern)* is in general required to prepare and disclose consolidated financial statements and a consolidated business report covering all of its subsidiaries on a world-wide basis[28] (Commercial Code, ss. 290 et seq., 325 et seq.). Such statements must be drawn up according to the International Financial Reporting Standards (IFRS) (Commercial Code, s. 315e). The consolidated business report of a parent company whose voting shares are admitted to an 'organised market' as defined in s. 2, para. 7 of the Takeover Act must also contain the information relevant in the context of a public tender offer described above (Commercial Code, s. 315a). Additionally, such parent corporations must add a non-financial statement as also described above (Commercial Code, ss. 315b et seq., transposing the above-mentioned CSR-directive).

Large enterprises which are not organised in the form of a corporation, in particular commercial partnerships not qualifying for disclosure under the Commercial Code and sole proprietorships, are subject to the financial disclosure requirements under the Disclosure Act *(Publizitätsgesetz)*. In order to qualify under the Disclosure Act, at least two of the three following criteria must be exceeded (Disclosure Act, s. 1):
– € 65 million balance sheet total;
– € 130 million in sales; and
– an annual average of 5,000 employees.

Enterprises which qualify under the Disclosure Act have basically the same disclosure obligations as large corporations under the Commercial Code.

It should be added that, except with respect to larger companies, the German business community has so far been quite reluctant to comply with the financial disclosure

[28] An exemption applies, if the parent company and the subsidiaries, which would have to be included in the consolidated financial statements, do not exceed certain key figures relating to balance sheet total, sales and number of employees (Commercial Code, s. 293).

beck-shop.de
DIE FACHBUCHHANDLUNG

requirements. Upon intervention by the European Commission, stricter rules to enforce the disclosure obligations have been introduced and the operator of the electronic Federal Gazette is now obliged to verify whether the documents have been filed timely and completely. If not, it must notify such fact to the Federal Office of Justice *(Bundesamt für Justiz)* which may initiate a procedure to impose an administrative fine. If a listed corporation is involved, the fine on the corporation itself can be up to the higher amount of either € 10 million or 5 % of the company's total turnover. A fine can also be imposed on a member of the legal representative body of the corporation. Then it can be up to the higher amount of either € 2 million or twice the economic advantage derived from the omitted disclosure (Commercial Code, s. 335).

For the purpose of ensuring compliance with the statutory accounting requirements of companies whose securities are admitted for trading in the regulated market of a German stock exchange, a two-tiered enforcement procedure has been created in order to detect possible violations of accounting rules. On the first level, an independent institution organized under private law reviews the annual financial statements and management reports of the aforementioned companies for compliance with the statutory accounting provisions.[29] If the company does not cooperate or disputes or doubts arise in connection with the review by the independent institution, BaFin may carry out an additional review on a second level (Securities Trading Act, s. 108). A violation of the applicable accounting rules by the company must be published unless BaFin waives such requirement (Securities Trading Act, s. 109).

All financial reports of listed companies, except for the interim management statements, must contain a statement of the management board that the contained information is correct. A violation of this 'balance sheet oath' *(Bilanzeid)* for omitted or incorrect statements may lead to imprisonment of up to three years or a fine (Commercial Code, s. 331, no. 3a). In particular, the members of the management board must confirm in writing that the annual report reflects a true and fair view of the assets of the company and its financial situation and that the management report provides a realistic picture of its material opportunities and risks. The management board is liable to the company for incorrect statements in case of negligence. It is still being subject of debate whether the management is also liable vis-à-vis third parties.

beck-shop.de
DIE FACHBUCHHANDLUNG

9. Disclosure in Tender Offers

The Takeover Act provides for various disclosure obligations in the context of a tender offer. Details of the Takeover Act will be discussed in F.II.2., below.

10. Corporate Governance Disclosure

Listed stock corporations are required to declare annually their compliance with the recommendations included in the German Corporate Governance Code *(Deutscher Corporate Governance Kodex)*.[30] It presents regulations for the management and supervision of listed companies and contains internationally and nationally recognised standards for good and responsible governance. The aim of the German Corporate Governance Code is to make Germany's corporate governance rules transparent for both national and international investors. The Code summarises the most important statutory law and

[29] Currently, the work of the independent institution is carried out by the Financial Reporting Enforcement Panel *(Deutsche Prüfstelle für Rechnungslegung e. V. – DPR)*. However, it has been reported in the news that the German Government has terminated the contract with DPR as of the end of 2021.

[30] An English version of this code is available at www.dcgk.de/en/code.html.

contains recommendations and suggestions for supervisory and management boards on the disclosure of, *inter alia*, all material new facts made available to financial analysts and similar addressees, conflicts of interest, the self-evaluation of the supervisory board and the establishment and composition of committees. Although the Code has no force of law, each listed corporation is under a statutory obligation to issue a 'declaration of conformity' *(Entsprechenserklärung)* each year in which it discloses whether and to which extent it complies with the recommendations of the Code ('comply or explain' principle). It is not required to disclose deviations from the suggestions, though. The annual corporate governance declaration must be made permanently publicly available, *e.g.*, on the company's website (Stock Corporation Act, s. 161).

V. Insider Dealing Rules

The Market Abuse Regulation contains stringent rules on insider dealing (Market Abuse Regulation, art. 7 et seq. and 14). Compliance with these rules is monitored by BaFin. The Issuers' Guide published by BaFin provides for a non-authoritative interpretation of these rules and gives many illustrative examples (see C.IV.3., above).

Insider dealing arises where a person possesses 'inside information' and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. The use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information, shall also be considered to be insider dealing (Market Abuse Regulation, art. 8, para. 1)[31]. If the person concerned is a legal entity, this applies also to the natural persons who participate in the decision to carry out the acquisition, disposal, cancellation or amendment of an order for the account of the legal person concerned (Market Abuse Regulation, art. 8, para. 5). As already described in connection with the ad hoc disclosure requirements (see C.IV.3., above), 'inside information' is, *inter alia*, any information of a precise nature which has not been made public, relating to an issuer or to financial instruments, and which, if it were made public, would be likely to have significant effect on the prices of those financial instruments or on the price of related derivative financial instruments (Market Abuse Regulation, art. 7).

Art. 8 of the Market Abuse Regulation applies to gaining inside information as a result of (i) being a member of the administrative, management or supervisory bodies of the issuer, (ii) having a holding in the capital of the issuer, (iii) having access to the information through the exercise of an employment, profession or duties, (iv) being involved in criminal activities or (v) other circumstances where the person concerned knows or ought to know that it is inside information.

Any person is prohibited to (i) engage or attempt to engage in insider dealing, (ii) recommend that another person engage in insider dealing or induce another person to engage in insider dealing or (iii) unlawfully disclose inside information (Market Abuse Regulation, art. 14).

In this context, recommendation or inducement by a person possessing insider information must be aimed at encouraging another person to (i) acquire or dispose of financial instruments to which that information relates or (ii) cancel or amend an order concerning

[31] In relation to auctions of emission allowances or other auctioned products based thereon, the use of inside information also includes submitting, modifying or withdrawing a bid by a person for its own account or for the account of a third party.

beck-shop.de DIE FACHBUCHHANDLUNG

such instrument (Market Abuse Regulation, art. 8, para. 2 and para. 3). Additionally, it is required that the person using the recommendation or inducement knows or ought to know that it is based upon inside information.

Beyond, the Market Abuse Regulation excludes certain legitimate behaviour from the ambit of the prohibition of insider dealing in Art. 14. In particular, a person shall not be deemed to have engaged in insider dealing, where such person has obtained that inside information in the conduct of a public takeover or merger with a company and uses that inside information solely for the purpose of proceeding with that merger or public takeover, provided that at the point of approval of the merger or acceptance of the offer by the shareholders of that company, any inside information has been made public or has otherwise ceased to constitute inside information (Market Abuse Regulation, art. 9, para. 4). However, this does not apply to stake-building.

Besides possible claims for damages against insiders, the violation of the prohibition of insider dealing is subject to fines or to imprisonment of up to five years (Securities Trading Act, s. 119, para. 3). The attempt is also penalised.

In order to facilitate the monitoring of insider dealings, the issuers of listed shares and other financial instruments, as well as persons acting on their behalf or for their account, are required to draw up a register of those persons working for them under a contract of employment or otherwise perform tasks through which they have access to inside information (*e.g.*, advisers, accountants or credit rating agencies) ('insider list') (Market Abuse Regulation, art. 18). This register must be updated immediately and provided to BaFin upon request. Issuers are obliged to ensure that any person on the insider list acknowledges in writing the legal and regulatory duties entailed and is aware of the sanctions applicable to insider dealing.

beck-shop.de
DIE FACHBUCHHANDLUNG

This applies to issuers (i) whose financial instruments have been admitted to trading in an EEA member state (*e.g.*, Germany) on a regulated market, a multilateral trading facility (MTF) or an organised trading facility (OTF) or (ii) who have applied for admission in a EEA member state (*e.g.*, Germany) on a regulated market or an MTF. However, the obligation to draw up an insider list does not refer, under certain requirements, to issuers whose financial instruments are admitted to trading on a small and medium-sized enterprise (SME) growth market.

Moreover, market operators and investment firms that operate a trading venue shall establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing and market manipulation (Market Abuse Regulation, art. 16).

The prohibition of insider dealing is enforced by BaFin in cooperation with ESMA and foreign regulators on the international stage (Securities Trading Act, s. 6 in connection with Market Abuse Regulation, art. 22 et seq.). In this respect, BaFin has far-reaching investigative powers. In order to monitor the requirements and prohibitions under the Market Abuse Regulation, BaFin is authorised to demand information, the submission of documents or other data and the provision of copies from anyone, and to summon and question persons (Securities Trading Act, s. 6, para. 3). In addition, officials of BaFin may inspect business and residential premises (Market Abuse Regulation, art. 6, para. 12). In order to prevent further infringements of the prohibition of insider dealing, BaFin may, for a period of up to two years, require the cessation of the acts and conduct constituting the infringement (Securities Trading Act, s. 6, para. 6, sentence 1, no. 2). The authority may also impose a business prohibition on natural persons for a period of up to two years (Securities Trading Act, s. 6, para. 7).

D.
MERGER CONTROL AND COMPETITION LAW

I. German Merger Control

1. General

Merger control by the Federal Cartel Office *(Bundeskartellamt)* pursuant to the Act Against Restraints of Competition has a major impact on most acquisitions. Mergers, as defined in the statute, must in general be notified to the Federal Cartel Office in Bonn.

All mergers which have an appreciable effect on the domestic market are subject to merger control regardless of whether domestic or foreign undertakings are involved. This is even true for mergers between foreign undertakings transacted abroad.

2. Definition of Mergers

The Act Against Restraints of Competition contains complex rules defining the transactions which are considered 'mergers' *(Zusammenschlüsse)*. Transactions not captured by those rules are not subject to merger control and, therefore, may neither be investigated nor prohibited by the Federal Cartel Office. The following transactions constitute mergers within the meaning of the Act (Act Against Restraints of Competition, s. 37, para. 1):

– the *acquisition of* the *assets* of another undertaking, in whole or in substantial part;
– the *acquisition of* direct or indirect *control* by one or several undertakings over one or more other undertakings or portions thereof (created by rights, agreements or by any other means which confer the possibility of exercising decisive influence on an undertaking, in particular by ownership rights or usage rights with regard to all or a portion of the assets of the undertaking, or by rights or agreements which confer decisive influence on the composition, the deliberations or the decisions of the bodies of the undertaking);
– the *acquisition of shares or interests* in another undertaking (be it by the transfer of existing shares/interests or by subscription for shares/interests in connection with the formation of a new undertaking, or in connection with an increase in capital of an existing undertaking), if such shares or interests alone or together with other shares or interests already held by the acquirer equal or exceed (i) 25 % or (ii) 50 % of the capital or voting rights of the other undertaking; and
– any other affiliation between undertakings by which one or more undertakings may directly or indirectly exercise a significant competitive influence over another undertaking.

There are a number of supplementary rules which are intended to expand the applicability of the merger control provisions. The following may be of particular importance in the context of an acquisition:

– The creation of a joint venture company *(Gemeinschaftsunternehmen)* does not merely constitute a vertical merger between each joint venturer and the joint venture company. With respect to the markets in which the joint venture company is or will be

beck-shop.de
DIE FACHBUCHHANDLUNG

active, it is also deemed to constitute a horizontal merger between the joint venturers themselves (Act Against Restraints of Competition, s. 37, para. 1, No. 3, sentence 3). A joint venture company has been defined to mean any undertaking in which two or more undertakings each hold interests of at least 25 % of the capital or voting rights thereof. In addition to the merger control rules, the creation of a joint venture company is subject to the general rules of competition law, in particular to the prohibition on horizontal restraints of competition.

3. Notification

A planned merger must be notified to and in principle cleared by the Federal Cartel Office before its completion (mandatory pre-merger notification) if, during the last preceding fiscal year,

– all undertakings participating in the merger had combined aggregate worldwide sales in excess of € 500 million; and
– at least one of the undertakings participating in the merger had sales in excess of € 25 million in Germany; and
– at least one other undertaking participating in the merger had sales in excess of € 5 million[32] in Germany (Act Against Restraints of Competition, s. 35, para. 1).

A planned merger must also be notified if, during the last preceding fiscal year,

– all undertakings participating in the merger had combined aggregate worldwide sales in excess of € 500 million; and
– at least one of the undertakings participating in the merger had sales in excess of € 25 million in Germany; and
– the sales of none of the undertakings participating in the merger exceeded € 5 million in Germany; and
– the consideration for the transaction (i. e., all payments or other assets the seller receives from the purchaser for the transaction, including debt assumed by the purchaser) exceeds € 400 million; and
– the undertaking to be acquired is significantly active in Germany (Act Against Restraints of Competition, s. 35, para. 1a).

In addition, mainly for statistical purposes every such merger must be notified without undue delay *after* its implementation (Act Against Restraints of Competition, s. 39, para. 6).[33]

The sales of an undertaking are computed on a world-wide basis and include the sales of subsidiaries and affiliates. In case of an acquisition of shares, interests or assets, the seller is not generally considered a participating undertaking, so that its sales are not consolidated for these purposes (unless the seller retains control or a shareholding of 25 % or more), whereas the sales of the target company or the target business, as the case may be, are consolidated.

Certain mergers are not subject to merger control and, hence, no merger notification is required, even if the aforementioned sales thresholds are met. The exemption applies if the acquired undertaking is not controlled by another undertaking and had world-wide

[32] On January 24, 2020, the German Federal Ministry for Economic Affairs and Energy presented a draft bill for the 10th Amendment to the Act Against Restraints of Competition which includes the increase of the turnover threshold to € 10 million.

[33] Under the 10th Amendment to the Act Against Restraints of Competition such notification requirement will be deleted.

beck-shop.de
DIE FACHBUCHHANDLUNG