



**IOSCO EMC Working Group 4 Seminar
Enforcement Aspects of Takeover Regulation**

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**Panel 1:
Differences in requirements to launch a bid**

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2. Disclosure Requirements in the offer document
3. Enforcement actions and civil law consequences
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1. Obligation to publish the decision to launch a bid – Introduction (1/2)

The German Takeover Act (WpÜG) distinguishes three different types of public offers for the acquisition of securities issued by a listed company:

1. Mandatory offer (sections 35-38 WpÜG)

The bidder has obtained control of a target company. Control is the holding or attribution of 30 % or more of the voting rights (section 29 (2) WpÜG).

2. Voluntary takeover offer (sections 29-34 WpÜG)

The bidder intends to acquire control of a target company by way of the takeover offer.

Note: If control is obtained through or in connection with a takeover offer, there is no subsequent obligation to launch a mandatory offer (section 35 (3) WpÜG).

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1. Obligation to publish the decision to launch a bid – Introduction (2/2)

3. Voluntary tender offer (sections 10-28 WpÜG)

The bidder intends to acquire securities of the target company without intending to obtain control of the target company (either because the offer is made for only up to 30 % of the voting rights and the bidder's shareholding of the target company after the voluntary tender offer remains below 30 % of the voting rights or the bidder already has a shareholding in the target company of more than 30 % of the voting rights and intends to increase his shareholding).

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1. Obligation to publish the decision to launch a bid – Decision vs. obligation

The procedure provided by WpÜG for launching an offer is triggered by the publication

- of the decision to make an offer (voluntary takeover offers and voluntary tender offers)
 - ➔ self-determined decision of the bidder
- or
- of the acquisition (or the attribution) of a controlling stake in the target company (mandatory offers)
 - ➔ legal obligation of the bidder

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1. Obligation to publish the decision to launch a bid – Requirements (1/2)


Internal

The bidder has “decided” (within the meaning of section 10 (1) WpÜG) to launch a bid if the relevant corporate bodies have concluded to pursue a transaction which has been formerly in a strategical design or planning stage. If a transaction will be pursued definitely and regardless of practical questions in detail and pending formal consent of some the corporate bodies the bidder has already “decided”.

Relevant are all corporate bodies whose consent is legally required to make a decision and form a will of a corporation. Irrelevant is the consent of all corporate bodies whose decision cannot change or avoid the will-formation of the corporation.

Generally, the consent of the shareholders´ meeting of the bidder (and e.g. the creation of new capital) is not a requirement for a decision (section 10 (3), sentence 2 WpÜG).

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1. Obligation to publish the decision to launch a bid – Requirements (2/2)

External

The bidder has not “decided” to launch a bid if the relevant corporate bodies’ general conclusion to pursue a transaction depends on an external event (e.g. the arrangement with major shareholders of the target company or changes to the law).

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2. Disclosure requirements in the offer document – Main issues (1/2)


In the offer document the bidder has to disclose certain information to the public. The main material issues are:

- Pre-offer acquisitions of shares in the target company by the bidder and persons acting in common (≠ acting in concert)
 - ➔ Acting in concert (section 30 (2) WpÜG) is relevant for a possible attribution of voting rights.
 - ➔ Acting in common (section 2 (5) WpÜG) extends the application of the price regime of the WpÜG any share acquisition by the person.

The number of shares acquired and every single purchase price has to be disclosed. The highest paid price is relevant for the minimum consideration.

- Existing shareholdings of the bidder and persons acting in common of the target company (incl attributed voting rights)


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2. Disclosure requirements in the offer document – Main issues (2/2)

- Necessary measures taken by the bidder to ensure the payment of the cash consideration
- Intentions of the bidder with respect to the target company (scope of business, assets, principal offices, employees etc.)
 - ➔ Only the intentions of the bidder at the time of BaFin’s approval of the offer document are relevant; future changes are possible and don’t have to be disclosed.
- Anticipated effects of the successful offer on the balance sheet (assets and liabilities), the profit and loss accounts or the earnings situation in general of the bidder
 - Exemption: There are lower requirements for private persons who are not obliged to prepare a balance sheet.

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2. Disclosure requirements in the offer document – Check the information (1/2)

The bidder is responsible and liable for the offer document. Generally, the information disclosed in the offer document is reviewed by BaFin only by completeness and plausibility.

- Information necessary to determine the consideration is most relevant: Pre-offer acquisitions of shares of the target company have to be verified by the bidder by filing the relevant documents (e.g. share purchase agreement).
- Sometimes BaFin has reason to examine the information concerning persons acting in common (because of market information, press articles etc.).
 - ➔ Request for information (section 40 WpÜG, formal administrative investigation procedure)

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2. Disclosure requirements in the offer document – Check the information (2/2)

- The information on necessary measures to fulfill the payment of the cash consideration have to be plausible and the amount has to be sufficient to cover the expected costs.
The measures are not verified by BaFin in detail, because an investment services enterprise (e.g. banks, securities firms from the European Economic Area) has to confirm in a written statement that the bidder has taken all necessary measures to ensure full financing of the offer.
This written confirmation is an essential part of the offer document! If it is not included, the offer will be prohibited.

(P) In BaFin´s praxis, only once in six years the consideration was not paid in time; in this particular case, the written confirmation had been issued by a small foreign investment services enterprise.

- The source of funds is not relevant for takeover supervision.


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Excursus: National strategic interests

- National strategic interests are not relevant aspects of BaFin´s takeover supervision.
- Legislative procedure to extend the scope of national strategic interests on the way. No definite decision yet.
- Main (planned) changes:
 - Law is applicable to all industries (formerly: only arms industry and companies producing crypto-systems).
 - Acquisition can be prohibited if the public order of security of Germany is endangered (formerly: essential security interests of Germany have to be ensured).
 - Competence: Federal cabinet (formerly: Ministry of Economics)
- Even if these changes will be adopted, the national strategic interests are not relevant for BaFin´s takeover supervision.

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3. Enforcement actions and civil law consequences (1/2)

If the bidder fails to meet the disclosure requirements, he has to face certain administrative and civil law consequences:

Civil law consequences (for mandatory offers only)

- Suspension of rights out of the shares (section 59 WpÜG)
 - ➔ Most relevant, because shareholders may challenge AGM decisions in which the votes of the bidder in the target company are included ("action to set aside", sections 241-249 German Stock Corporation Act).
- Obligation to pay interest on the consideration (section 38 WpÜG)
 - (P) There has to be an offer first! The interest obligation depends on the consideration (prevailing legal opinion).

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3. Enforcement actions and civil law consequences (2/2)

Administrative consequences (for all offers)

- Prohibition of the offer (section 15 WpÜG)
- Administrative fee for the prohibition (section 47 WpÜG), up to € 100.000
- Administrative fines (section 60 WpÜG), up to € 1.000.000

Administrative consequences (for takeover and tender offers)

- One year waiting period for a new offer (section 26 WpÜG)

Administrative consequences (for mandatory offers only)

- Order to file an offer document in compliance to the law. The order is enforced with a penalty payment of up to € 500.000. Generally, the order can be repeated endlessly.

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Excursus: Enforcement against defence tactics (1/2)

- Art. 9, 11 Directive 2004/25/EC (EC Takeover Directive):
 - Germany opted out.
 - Companies can opt in (no such case recorded yet).
- Former rule of prohibition of defence actions remained unchanged (Section 33 (1) WpÜG):

Generally actions taken by the target that may frustrate the success of a bid are prohibited. There are three exemptions:

- Actions that a prudent and diligent manager of a company that is not affected by a takeover would have taken similarly.
- Search for a competing bid ("white knight defence").
- Actions to which the supervisory board of the target company has consented (two-tier board structure).

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Excursus: Enforcement against defence tactics (2/2)

- "White knight defence" is allowed and most relevant (e.g. Bayer AG's takeover of Schering AG).
- Up to now no prohibited actions were detected, no enforcement action by BaFin yet.

Main reason:

"Legalisation" of the action by the consent of the supervisory board.

Most relevant is the increase of the share capital by issuing new shares out of the existing authorised capital pursuant to a decision of an AGM.

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Excursus: Evidence on acting in concert

If BaFin has reason to investigate a transaction, evidence can be gathered by requests for information (section 40 WpÜG).

The competence to request information includes the right to access (domestic) office rooms and have a look there, but it is not allowed to search the rooms. No confiscatory power!

Main problems are:

- BaFin relies on the information the requested persons (want to) give. No real possibility to verify the information, especially in case of foreign persons.
- According to the Oberlandesgericht Frankfurt am Main (Higher Regional Court of Appeal) BaFin has a high burden of proof, because any acting in concert can result in the acquisition of control and any defaulted mandatory offer can be fined (similarity to criminal prosecution).

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Thank you very much for your attention.

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