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M&A Transactions in Germany

Germany is one of the world's major economies. As a result, many foreign enterprises consider acquisitions of companies in Germany to get (better) access to the German market.

There are two major types of mergers and acquisitions (M&A) transactions in Germany: the acquisition of shares of the target company (Share Deal) and the acquisition of the assets of the target company or of specific business segments of the target company (Asset Deal). When the buyer is supposed to acquire only individual, but not all business segments from the seller, or when the buyer does not want to assume all liabilities or liability risks, an Asset Deal is often the better choice.



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Typical Targets: GmbH and GmbH & Co. KG

A GmbH (*Gesellschaft mit beschränkter Haftung*) is the most common form of corporation in Germany and is a limited liability company. It does not have any share certificates. The shares are transferred by way of an agreement, which needs to be notarized.

A GmbH has a management board consisting of at least one managing director (*Geschäftsführer*). It can have a separate supervisory board (*Aufsichtsrat*), but usually does not have one unless it is required by law for purposes of co-determination of employees.

It is registered with the local commercial register. Lawyers and other registered users can get the key information, such as names of the managing directors and their power of representation, as well as copies of the Articles of Association, the list of shareholders and the annual financial statements, on the Internet from the commercial register.

A GmbH & Co. KG is a limited partnership with at least one limited partner and a GmbH as general partner. The GmbH & Co. KG is managed by the general partner GmbH, which in turn is managed by its managing directors. Usually, the limited partners are also shareholders of the general partner GmbH. The individual liability is limited to the respective limited partner's capital contribution.

The GmbH & Co. KG is registered with the commercial register where its key information is available. However, the partnership agreement is not filed with the commercial register and therefore not publicly available. The partnership's interests are transferred by way of an

agreement, which needs to be notarized if they are transferred together with the shares of the general partner GmbH.

Notarization of Agreements

Any agreement on the sale or transfer of shares in a GmbH needs to be notarized at a German notary public. This is often a cumbersome procedure, since the entire agreement, including all exhibits, needs to be read aloud to the representatives of the parties by the notary public. However, German M&A lawyers are experienced in this area and can ensure a smooth notarization procedure. The notary's fees can be material, depending on the value of the notarized transactions. To give an example: In the case of a purchase price of about EUR 10 Mio. for GmbH shares, the cost of notarization of the share purchase and transfer agreement can be about EUR 35,000 plus VAT.

Involvement of Employee Representatives

Works Councils

A company may have one or more works councils (*Betriebsrat*) consisting of employees. It can be established by the employees of each establishment with five or more employees. The works council needs to be involved in particular cases, such as the dismissal of employees. It needs to be informed beforehand. Otherwise, the dismissal may be void.

In companies with more than 20 employees, the employer must inform the works council in advance about any planned alterations of an establishment, which may cause substantial disadvantages to a substantial part of the staff. The employer must try to reach an agreement with the works



council on reconciliation of interests (*Interessenausgleich*) and a social plan (*Sozialplan*) before starting the alteration. A social plan provides for a compensation of the disadvantages suffered by the employees. If both parties cannot agree on the reconciliation of interests or the social plan, either party can submit the matter to a Conciliation Board (*Einigungsstelle*), which shall attempt to reconcile the parties and is authorized to draw up the social plan.

The works council cannot prevent the alteration and cannot force the employer to agree to a specific reconciliation of interests or a specific social plan, but it can delay the process. Not every M&A transaction requires the mentioned procedure. However, if there are major restructurings of the business in connection with an M&A transaction, this could be the case.

Economic Committee

If a company has more than 100 employees and a works council, it is obliged to have an economic committee (*Wirtschaftsausschuss*), which consists of employees as well. The employer needs to inform the economic committee about various economic matters in advance, e.g., in case of the purchase of a majority interest by a buyer.

Co-determined Supervisory Board

A GmbH, as well as a GmbH & Co. KG, can be required to establish a so-called

co-determined Supervisory Board if the company has more than 500 employees. Thus, the company needs to have a Supervisory Board where one-third (in companies with more than 500 to 2,000 employees) or half (in companies with more than 2,000 employees) of the members are employee representatives. The Supervisory Board supervises the company's management board.

Depending on the circumstances of an M&A transaction, an approval by a (possibly co-determined) Supervisory Board could be required on the seller's/ buyer's side or in the target company.

Transfer of Employees by Operation of Law

In case of the acquisition and transfer of an undertaking or parts of it by way of an Asset Deal, employees belonging to the concerned undertaking or parts of it are transferred to the buyer by operation of law. The concerned employees have to be informed prior to the transfer and have a right to object to the transfer of their employment relationship within one month of receipt of a due notification. If an employee objects, he or she remains an employee of the seller.

Prohibition of Acquisitions in Case of a Foreign Buyer

In case of acquisitions by a foreign buyer from outside the European Union (EU) and the European Free Trade Association

(EFTA; i.e., Iceland, Liechtenstein, Norway and Switzerland), the German Ministry of Economic Affairs may prohibit the acquisition if the investment endangers public policy or the security of the Federal Republic of Germany. The government recently implemented an obligation to notify the ministry in case of acquisitions concerning critical infrastructure. In other cases, it is possible to proactively file an application to the ministry in order to get a confirmation that the acquisition does not endanger the public policy or the security of Germany.

In case of acquisitions by any foreign buyer regarding companies which are operating in particularly security sensitive areas (manufacturers and developers of military weapons and certain components for tanks, as well as producers of certain products with IT security functions), the German Ministry of Economic Affairs must be notified in advance. The ministry can prohibit the acquisition if material security interests of Germany are endangered.

In both cases, the criteria of an acquisition is fulfilled if the buyer acquires directly or indirectly more than 25 percent of the voting rights. Thus, even the acquisition of a foreign company with a German subsidiary can be subject to the aforementioned examination procedures and a prohibition by German authorities. Recently, the German Ministry of Economic Affairs has reviewed some potential acquisitions of German companies by Chinese investors, for example.

Significant Advantage with the Early Involvement of a Local Counsel

German law provides a legal framework with complex issues in connection with investments in Germany that might appear as problems from a foreign perspective. However, if experienced German M&A lawyers are involved at an early stage, they can plan your transaction in a secure way and will, in most cases, be able to avoid damaging impacts. **P**