

Mergers & Acquisitions in Germany

Bearbeitet von
Dr. Joachim Rosengarten, Dr. Frank Burmeister, Dr. Martin Klein

2. Auflage 2016. Buch. XV, 174 S. Kartoniert
ISBN 978 3 406 68701 3
Format (B x L): 16,0 x 24,0 cm

[Recht > Handelsrecht, Wirtschaftsrecht > Unternehmensrecht > Unternehmenskauf,
Bewertung, M&A](#)

Zu [Leseprobe](#) und [Sachverzeichnis](#)

schnell und portofrei erhältlich bei

The logo for beck-shop.de features the text 'beck-shop.de' in a bold, red, sans-serif font. Above the 'i' in 'shop' are three red dots of increasing size. Below the main text, 'DIE FACHBUCHHANDLUNG' is written in a smaller, red, all-caps, sans-serif font.

beck-shop.de
DIE FACHBUCHHANDLUNG

Die Online-Fachbuchhandlung [beck-shop.de](#) ist spezialisiert auf Fachbücher, insbesondere Recht, Steuern und Wirtschaft. Im Sortiment finden Sie alle Medien (Bücher, Zeitschriften, CDs, eBooks, etc.) aller Verlage. Ergänzt wird das Programm durch Services wie Neuerscheinungsdienst oder Zusammenstellungen von Büchern zu Sonderpreisen. Der Shop führt mehr als 8 Millionen Produkte.

beck-shop.de
DIE FACHBUCHHANDLUNG

Rosengarten/Burmeister/Klein
Mergers and Acquisitions in Germany



beck-shop.de
DIE FACHBUCHHANDLUNG

Mergers and Acquisitions in Germany

An introduction to the legal framework for mergers and acquisitions in Germany, including corporate law, financing aspects, regulatory environment, competition law, taxation aspects as well as labour and corporate insolvency law

Joachim Rosengarten

Frank Burmeister

Martin Klein

Second revised edition
2016



Authors

Dr. Joachim Rosengarten, *Rechtsanwalt*, studied law at the Universities of Hamburg and Lausanne (Switzerland) as well as the University of California at Berkeley, Boalt Hall School of Law (LL.M.). He is a partner at the Frankfurt Office of HENGELER MUELLER and specialises in mergers and acquisitions and corporate law. He is admitted to the Frankfurt Bar.

Dr. Frank Burmeister, *Rechtsanwalt*, studied law at the University of Hamburg and spent a year in London working with a leading UK law firm. He is also a notary (*Notar*) and partner at the Frankfurt Office of HENGELER MUELLER and specialises in mergers and acquisitions and corporate law. He is admitted to the Frankfurt Bar.

Dr. Martin Klein, *Rechtsanwalt*, studied tax law at the Technical College of Economics, Nordkirchen (Diplom-Finanzwirt) and law at the University of Bochum. He spent a year in New York working with a leading US law firm. He is a licensed tax consultant (*Steuerberater*) and partner in the Frankfurt office of HENGELER MUELLER. His practice is focused on corporate reorganisations, tax-optimised structuring of mergers and acquisitions and international tax law. He is admitted to the Frankfurt bar.

HENGELER MUELLER is one of the leading corporate and commercial law firms in Germany. It provides comprehensive advice in a wide spectrum of business law. The firm's services have traditionally been centred on mergers and acquisitions, corporate law, private equity as well as banking, finance and capital markets, but HENGELER MUELLER has also strong practices in various specialised fields of law, notably restructuring, competition, TMT, tax, intellectual property, employment, and administrative law as well as litigation and arbitration. Hengeler Mueller has four offices in Germany: Berlin, Düsseldorf, Frankfurt and Munich. The firm's foreign offices are located in Brussels, London and Shanghai.

www.beck.de

ISBN 978 3 406 68701 3

© 2016 Verlag C.H.Beck oHG
Wilhelmstraße 9, 80801 München
Druck: Beltz Bad Langensalza GmbH
Neustädter Straße 1–4, 99947 Bad Langensalza
Satz: Fotosatz Buck
Zweikirchener Str. 7, 84036 Kumhausen
Umschlaggestaltung: Bütefisch Marketing und Kommunikation,
Schlaitdorf

Gedruckt auf säurefreiem, alterungsbeständigem Papier
(hergestellt aus chlorfrei gebleichtem Zellstoff)



beck-shop.de

Preface

DIE FACHBUCHHANDLUNG

The purpose of this book is to give foreign investors and their advisors an overview of the legal framework for mergers and acquisitions in Germany. We describe the most important provisions to be taken into consideration by investors in the German market. To keep the book short and easily readable we sometimes use simplifications and generalisations.

You should be aware that the law is constantly changing and that this book reflects the law in force as of December 31, 2015. However, we have already taken into account the changes by the EU Market Abuse Regulation which will apply as of July 3, 2016.

We would like to thank our colleagues at HENGELER MUELLER for their assistance in connection with the preparation of this book. Their knowledge and experience is reflected in many sections. Special thanks go to Dr. Wolfgang Groß (capital markets law), Dr. Markus Röhrig (competition law), Dr. Martin Tasma (corporate insolvency law) and Vicky Treibmann (employment law). We are also very grateful to our research assistants Jan Häller and Arvid Morawe.

February 2016

The authors



beck-shop.de
DIE FACHBUCHHANDLUNG

beck-shop.de

Summary Table of Contents

DIE FACHBUCHHANDLUNG

Preface	V
Table of Contents	IX
Abbreviations	XV
A. Introduction	1
B. The Corporate Environment	2
I. Common Forms of Doing Business	2
II. Majority Rights and Minority Protection	17
III. Shareholder Liability and Piercing the Corporate Veil	20
IV. Sources of Information	23
C. The Regulatory Framework	26
I. General	26
II. Restrictions on Acquisitions	26
III. Securities Law	29
IV. Disclosure Obligations	32
V. Insider Trading Rules	42
D. Merger Control and Competition Law	44
I. German Merger Control	44
II. Other German Competition Law Aspects	47
III. EU Merger Control	48
E. Types of Transactions	52
I. General	52
II. Acquisition of Assets	52
III. Acquisition of Shares	58
IV. Asset Purchase Transactions compared with Share Purchase Transactions	62
V. Corporate Reorganisations	64
VI. Leveraged Buy-outs and Management Buy-outs	68
F. Listed Company Takeovers and Tender Offers	74
I. General	74
II. Public Tender Offers under the Takeover Act	75
III. Barriers to Takeovers	82
IV. Pre-bid Defensive Tactics	86
V. Post-bid Defensive Tactics	89
G. Financing Methods	94
I. Introduction	94
II. Equity	94
III. Senior Debt	96
IV. Mezzanine Debt	97

V. Capitalisation Rules	98
VI. Financial Assistance	99
VII. Availability of Local Financing	99
H. Taxation Aspects	101
I. Principles of the Tax System and Relevant Taxes	101
II. Acquisition Strategies	109
III. Germany as a Location for Holding Companies	116
I. Labour Law	118
I. Individual Labour Law	118
II. Collective Bargaining Agreements (<i>Tarifverträge</i>)	120
III. Co-determination (<i>Mitbestimmung</i>)	120
IV. Particular Aspects Relative to Acquisitions	124
J. Negotiating the Acquisition Contract	129
I. General Background	129
II. Due Diligence	130
III. Obligation to Negotiate in Good Faith	131
IV. Letter of Intent and Pre-contract	132
V. Important Elements of Contract	132
VI. Formal Requirements	137
K. Corporate Insolvency Law	141
I. Tests for Insolvency	141
II. Filing for Insolvency	142
III. The Insolvency Proceedings	143
IV. Creditors' Influence on the Insolvency Proceedings	145
V. Role of the Insolvency Administrator	146
VI. Restructuring of Unfavourable Contracts	146
VII. Avoidance Actions (Claw-back Rules)	147
VIII. Alternative Structures	148
IX. Duration of Insolvency Proceedings	150
Appendices	151
I. Glossary	151
II. Legal Forms of Business Organisations in Germany	157
III. German Merger Control Questionnaire	158
IV. Timeline for a Voluntary Takeover Bid	159
V. Legal Due Diligence Checklist	159
VI. Related Legal Literature (<i>in English</i>)	163
VII. Useful Weblinks	165
VIII. Useful Addresses	166
IX. English Translations of Selected German Statutes	167

beck-shop.de

Table of Contents

DIE FACHBUCHHANDLUNG

Preface	V
Abbreviations	XVII
A. Introduction	1
B. The Corporate Environment	2
I. Common Forms of Doing Business	2
1. Overview	2
2. Sole Proprietorship (<i>Einzelkaufmännisches Unternehmen</i>)	3
3. Civil Law Partnership (<i>Gesellschaft bürgerlichen Rechts</i>)	3
4. General Partnership (<i>Offene Handelsgesellschaft</i>)	4
5. Limited Partnership (<i>Kommanditgesellschaft</i>)	5
6. Silent Partnership (<i>Stille Gesellschaft</i>)	6
7. Limited Liability Company (<i>Gesellschaft mit beschränkter Haftung</i>)	7
8. Stock Corporation (<i>Aktiengesellschaft</i>)	9
a) Establishment	9
b) Management Board	9
c) Supervisory Board	11
d) Shareholders' Meeting	12
e) Shares and Voting Rights	12
f) Squeeze-out of Minority Shareholders	14
g) REIT-AG	15
9. Partnership Limited by Shares (<i>Kommanditgesellschaft auf Aktien</i>)	15
10. European Company (<i>Europäische Gesellschaft or Societas Europaea</i>)	15
11. Foreign Companies in Germany	16
II. Majority Rights and Minority Protection	17
1. Majority Rights	17
2. Minority Protection	18
III. Shareholder Liability and Piercing the Corporate Veil	20
1. Pre-incorporation Liability	20
2. Capital Contributions and Repayment of Capital	21
3. Contractual, Pre-contractual and Tort Liability	21
4. Breach of a Fiduciary Duty	21
5. Commingling of Assets	22
6. Exercise of Controlling Influence	22
a) Control Agreements	22
b) Factual Control Situations	22
c) Rights of Creditors	23
IV. Sources of Information	23
1. Commercial Register	23

2. Company Register	24
3. Further Sources	24
C. The Regulatory Framework	26
I. General	26
II. Restrictions on Acquisitions	26
1. Restrictions on Acquisitions by Non-residents	26
a) Control of Foreign Investments	27
b) Exchange Control	28
c) Reporting Requirements	28
2. Licensing Requirements	28
3. Restrictions under Company Law	29
4. Restrictions under the Takeover Act	29
5. Merger Control	29
III. Securities Law	29
1. Requirement for Securities Prospectus	29
2. Stock Exchanges	31
a) Listing	31
b) Delisting	31
IV. Disclosure Obligations	32
1. Disclosure Relating to Marketing of Securities or Other Participations	32
2. Periodic Disclosure Relating to Listed Securities	32
3. Ad Hoc Disclosure	33
4. Disclosure relating to Directors' Dealings	35
5. Disclosure Relating to Major Holdings of Shares	36
a) Non-listed Corporations	36
b) Listed Corporations	36
6. Notification of Share Transfers; Registration	38
7. Disclosure to Commercial Register	39
8. Financial Disclosure	39
9. Disclosure in Tender Offers	41
10. Corporate Governance Disclosure	41
V. Insider Trading Rules	42
D. Merger Control and Competition Law	44
I. German Merger Control	44
1. General	44
2. Definition of Mergers	44
3. Notification	45
4. Prohibition of Mergers	46
5. Appeals; Private Suits	47
6. Dissolution	47
II. Other German Competition Law Aspects	47
III. EU Merger Control	48
1. General	48
2. Definition of Concentration	49
3. Definition of Union Dimension	49
4. Notification and Review Procedure	50
5. Standard of Review	50
6. EFTA Merger Control	51

E. Types of Transactions	52
I. General	52
II. Acquisition of Assets	52
1. General	52
2. Specification of Assets and Liabilities	52
3. Transfer of Assets and Liabilities	53
4. Statutory Assumption of Liabilities	55
5. <i>Bona Fide</i> Acquisition	56
6. Acquisition of an Insolvent Business	56
7. Tax Aspects	58
III. Acquisition of Shares	58
1. General	58
2. Scope of Transfer	58
3. Transfer of Shares in Different Types of Company	59
a) Partnership	59
b) GmbH	60
c) Stock Corporation	60
4. Statutory Assumption of Liabilities	61
5. <i>Bona Fide</i> Acquisition	61
6. Tax Aspects	61
IV. Asset Purchase Transactions compared with Share Purchase Transactions	62
V. Corporate Reorganisations	64
1. General	64
2. Types of Reorganisation	64
a) Merger or Consolidation (<i>Verschmelzung</i>)	64
b) Splitting (<i>Spaltung</i>)	65
c) Transfer of Assets (<i>Vermögensübertragung</i>)	65
d) Change of Legal Form (<i>Formwechsel</i>)	66
3. Reorganisation Procedure	66
4. Tax Aspects	66
5. Cross-border Mergers	67
VI. Leveraged Buy-outs and Management Buy-outs	68
1. Introduction	68
2. Financing Structure	68
a) Equity	69
b) Senior Debt	69
c) Mezzanine Debt	69
d) Shareholder Loans	70
3. Structure of Transaction	70
a) Acquisition Vehicle	70
b) Asset or Share Transaction?	70
c) Capital Maintenance Rules	71
4. Management Duties in MBOs	72
F. Listed Company Takeovers and Tender Offers	74
I. General	74
II. Public Tender Offers under the Takeover Act	75
1. Scope	75
2. Basic Principles	75
3. Rules and Regulations Applying to all Types of Public Bids ...	76

4. Offer Conditions	78
5. Special Rules and Regulations Applying to Takeover Bids	78
6. Mandatory Offer	79
7. Takeover Squeeze-out and Sell-out	81
8. Supervision and Sanctions	81
III. Barriers to Takeovers	82
1. Identification of Shareholders	82
2. Management Control	83
3. Protection of Corporation	84
4. Protection of Minority Shareholders	85
IV. Pre-bid Defensive Tactics	86
1. Restricted Registered Shares (<i>Vinkulierte Namensaktien</i>)	86
2. Change of Majority Requirements	87
3. Appointment Rights and Staggered Supervisory Board	88
4. Cross-shareholdings (<i>Überkreuzverflechtungen</i>)	89
V. Post-bid Defensive Tactics	89
1. Use of Authorised Capital (<i>Genehmigtes Kapital</i>)	90
2. Special Dividend	92
3. Acquisition and Disposal of Own Shares	92
4. Disposal of Assets ('Crown Jewels')	93
5. Search for a Competing Bidder ('White Knight')	93
G. Financing Methods	94
I. Introduction	94
II. Equity	94
1. GmbH	94
2. Stock Corporation	95
3. Commercial Partnership	96
III. Senior Debt	96
1. Loans	96
2. Straight Bonds	97
IV. Mezzanine Debt	97
V. Capitalisation Rules	98
1. Undercapitalisation	98
2. Debt-Equity Ratio	99
VI. Financial Assistance	99
VII. Availability of Local Financing	99
H. Taxation Aspects	101
I. Principles of the Tax System and Relevant Taxes	101
1. Individual Income Tax (<i>Einkommensteuer</i>)	101
2. Corporate Income Tax (<i>Körperschaftsteuer</i>)	101
3. Income Taxation of Partnerships	102
4. Solidarity Surcharge (<i>Solidaritätszuschlag</i>)	102
5. Trade Tax (<i>Gewerbesteuer</i>)	102
6. Taxation of Dividends	103
a) Withholding Tax on Dividends	103
b) Taxation at the Level of the Shareholder	104
7. Net Assets Tax (<i>Vermögensteuer</i>)	105
8. Value Added Tax (<i>Umsatzsteuer</i>)	105
9. Real Estate Transfer Tax (<i>Grunderwerbsteuer</i>)	105

10. Stamp Duties and Notarial Fees	106
11. Group Taxation (<i>Organschaft</i>)	107
12. Loss Carry-forward (<i>Verlustvortrag</i>) and Loss Carry-back (<i>Verlustrücktrag</i>)	107
13. Use and Transfer of Loss Carry-forwards	108
14. Deductibility of Interest	108
II. Acquisition Strategies	109
1. General	109
2. Share Purchase Transaction	110
a) Seller's Position	110
b) Purchaser's Position	112
3. Asset Purchase Transaction	113
a) Seller's Position	114
b) Purchaser's Position	114
4. Conflict of Interest between Seller and Purchaser	115
III. Germany as a Location for Holding Companies	116
I. Labour Law	118
I. Individual Labour Law	118
II. Collective Bargaining Agreements (<i>Tarifverträge</i>)	120
III. Co-determination (<i>Mitbestimmung</i>)	120
1. Shop-Floor Level Co-determination (<i>Betriebliche Mitbestimmung</i>)	121
2. Board Level Co-determination (<i>Unternehmerische Mitbestimmung</i>)	122
IV. Particular Aspects Relative to Acquisitions	124
1. Share Transaction	124
2. Asset Transaction	125
a) Transfer of Employment Contracts	125
b) Co-determination	127
J. Negotiating the Acquisition Contract	129
I. General Background	129
II. Due Diligence	130
III. Obligation to Negotiate in Good Faith	131
IV. Letter of Intent and Pre-contract	132
V. Important Elements of Contract	132
1. Parties	132
2. Subject Matter	133
3. Signing and Closing	133
4. Purchase Price	134
5. Representations and Warranties	135
6. Legal Remedies; Insurance	135
7. Statute of Limitations	136
8. Non-Compete Clause	136
9. Participation in Legal Proceedings, Tax Audits and Merger Control Proceedings	136
10. Arbitration or Venue	137
11. Taxes and Costs	137
12. Governing Law	137

VI. Formal Requirements	137
1. Form of Contract, Notarisation	137
a) General	137
b) Notarisation Abroad	138
2. Consents and Approvals	139
3. Registration	140
K. Corporate Insolvency Law	141
I. Tests for Insolvency	141
1. Illiquidity	141
2. Imminent Illiquidity	141
3. Over-Indebtedness	141
II. Filing for Insolvency	142
III. The Insolvency Proceedings	143
1. Preliminary Insolvency Proceedings	143
2. Main Insolvency Proceedings	143
3. Rank of Creditors	144
IV. Creditors' Influence on the Insolvency Proceedings	145
1. Creditors' Assembly	145
2. Creditors' Committee	145
V. Role of the Insolvency Administrator	146
VI. Restructuring of Unfavourable Contracts	146
VII. Avoidance Actions (Claw-back Rules)	147
VIII. Alternative Structures	148
1. Insolvency Plan Proceedings (<i>Insolvenzplanverfahren</i>)	148
2. Self-Administration (<i>Eigenverwaltung</i>)	149
3. Protective Shield Proceedings (<i>Schutzschirmverfahren</i>)	149
IX. Duration of Insolvency Proceedings	150
Appendices	151
I. Glossary	151
II. Legal Forms of Business Organisations in Germany	157
III. German Merger Control Questionnaire	158
IV. Timeline for a Voluntary Takeover Bid	160
V. Legal Due Diligence Checklist	161
VI. Related Legal Literature (<i>in English</i>)	165
VII. Useful Weblinks	167
VIII. Useful Addresses	169
IX. English Translations of Selected German Statutes	170
Index	171