

The background of the slide features a dynamic, abstract design. It consists of numerous thin, parallel lines that sweep across the frame from the bottom left towards the top right. These lines are primarily in shades of deep red and vibrant blue, creating a sense of motion and energy. The lines vary in opacity and thickness, with some appearing as sharp, bright streaks and others as softer, more blended washes of color. The overall effect is a modern, high-tech aesthetic that complements the professional nature of the presentation.

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# **TAKE PRIVATE TRANSACTIONS IN GERMANY AND FRANCE**

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## Introduction

- This presentation outlines the challenges for foreign corporates and private equity sponsors undertaking take private transactions in Germany and France.
- It's inspired by a series of recent high profile transactions in Germany which have illustrated some of the intricacies of German M&A rules and company law as they affect public company deals (Hellman & Friedman and Blackstone/Scout24; Kretinsky/Metro; and AMS/Bain and Advent/Osram).
- During the next hour we are going to focus on some of the key features of the public company takeover regime in Germany and offer a comparison with the equivalent rules in neighbouring France.

## A common core: The EU Takeover Directive (1)

- At the European level, the EU Takeover Directive (2004/25/EC), which came into effect in 2006, has established a framework setting out certain minimum standards for public company takeovers.
- The Takeover Directive required each EU Member State, including France and Germany, to create national legal frameworks, based on a series of over-arching principles:
  - equal treatment of the Offeree company's shareholders;
  - protection of minority shareholders (in particular where there is a controlling shareholder);
  - ensuring the Offeree company shareholders can take an informed decision on the merits of a takeover offer;
  - an obligation on the board of the Offeree company to act in the interests of the company;
  - the need to avoid false markets in the Offeree company's securities (or those of any other company concerned); (....)

## A common core: The EU Takeover Directive (2)

(.....)

- the Offeror must announce the offer only after ensuring that it can satisfy in full any cash consideration; and
- the Offeree must not be hindered in the conduct of its affairs for longer than is reasonable by an offer for its securities.
- To give effect to these principles, the Takeover Directive prescribes minimum standards in relation to certain matters.
- The Directive is complemented (and complicated) by the laws of individual EU Member States.

## Disclosure requirements under EU Transparency rules (1)

- Potential acquirers also need to comply with European disclosure regime to notify acquisition or disposal of major holdings:
  - German and French national law regimes implement the European Transparency Directive (Directive 2004/109/EC of 15 December 2004, as amended by Directive 2013/50/EU of 22 October 2013)
  - The Directive provides for an initial threshold of 5% (in Germany it is 3%) in relation to the acquisition or disposal of any voting interests (subsequent thresholds are 10, 15, 20, 25, 30, 50, 75%)
  - There is also a 5% threshold (and subsequent 10, 15, 20, 25, 30, 50 and 75% thresholds) for any holding of financial instruments or other instruments:
    - Including cash-settled swap structures
    - Which requires aggregation with voting interests under the (in Germany) 3% threshold
  - Broad attribution rules:
    - group-wide attribution
    - Acting in concert structures
  - Notification is made by the shareholder / holder of financial instrument to issuer; the issuer then notifies market

## Disclosure requirements under EU Transparency rules (2)

- There are potentially serious consequences in case of non-compliance:
  - suspension of voting rights;
  - substantial fines (of up to 10% of annual turnover)
  - “naming and shaming” by the market regulator
- There is an additional disclosure obligation once the threshold of 10% voting interests is reached:
  - disclosure in relation to objectives of investment (strategic or financial investment);
  - source of funding; and
  - capital market reaction

## Approach to the Offeree – Germany (1)

- Friendly takeover scenario
  - Approach of management board of target company by potential Offeror with a view to reach an agreement on business combination and the terms of the takeover offer
  - Management board and supervisory board obliged to issue a reasoned statement on the takeover offer
  - While a consent of management board is not required for the implementation of a takeover offer, hostile takeover offers (without support of management board of target company) are rather the exception in the German takeover market.
- Confidentiality agreement as a pre-condition
  - Background: obligation of listed company under MAR to disclose inside information concerning itself – negotiations with potential Offeror may qualify
  - Option to delay disclosure of inside information, if following requirements are met
    - There is legitimate interest (typically given in public M&A process)
    - Delay of disclosure is not likely to mislead the public
    - Confidentiality is ensured (obligation to immediately disclose insider information in case of leaks)

## Approach to the Offeree – Germany (2)

- Business combination agreement (BCA)
  - Negotiation of terms of business combination agreement
  - Typical elements include
    - Economic terms of takeover offer
    - Support of takeover offer by management board
    - Common business objectives
    - Capital funding
    - Integration of business post settlement of takeover offer
    - Corporate governance
- Limited due diligence
  - In context of the potential takeover of a German listed company, management board of target typically only allows for a limited due diligence as most relevant information concerning the listed company ought to be disclosed in ongoing capital market reporting
  - Inside information obtained in the context of a due diligence to be disclosed in offer document



## Regulation of the approach to the Offeree – France (1)

Confidentiality and announcements:

- The Offeror is not required to disclose an approach and neither party is required to disclose the existence of discussions between them, provided that (i) they are able to preserve confidentiality and (2) confidentiality is temporarily necessary for the completion of the negotiations.
- If confidentiality can no longer be ensured (notably in the case of a leak), an immediate public announcement must be made by the Offeree and the Offeror.
- There is a “Put up or shut up rule”. This is an obligation for the potential Offeror, if required by the French market authority (the AMF), to announce its intentions within a time frame set by the regulator. (Note: There is no equivalent rule in Germany).

## Regulation of the approach to the Offeree – France (2)

- If the AMF requires a PUSU announcement, the potential Offeror can either :
  - announce that it intends to make an offer, in which case the AMF will set the date on which the Offeror must issue a public announcement, setting out the characteristics of the offer or the date on which it must file its offer; or
  - announce that it does not intend to make an offer (or remain silent as to its intentions), in which case it will be precluded from doing so during the six months following the announcement, unless significant changes occur in the market environment or in the situation or share ownership of the parties concerned.
- Making a public announcement prior to filing the offer with the AMF does not constitute an offer, but it opens a pre-offer period during which certain restrictions apply.
- These rules on confidentiality and announcements underpin the overarching requirements of the EU Market Abuse Regulation (MAR)

## Regulation of the approach to the Offeree - France (3)

Due diligence (where Offeree board is co-operative):

- There are AMF guidelines relating to data room access. (Note: there are no specific rules or regulatory policy statements in Germany).
- Data room access is required to be limited to potential Offerors showing a “serious interest”, in particular as regards their ability to finance the transaction, as set out in a letter of intent and who have previously entered into a confidentiality agreement. The offeror may be given access to non-public information.
- The Offeree may decline to disclose commercially sensitive information or may require that its disclosure be limited to an Offeror “clean team,” in order to comply with antitrust laws.
- There is also a requirement for equal treatment of competing Offerors.
- There is an Offeree obligation of subsequent market disclosure of price sensitive information which has been disclosed to a potential Offeror.

## Rules regarding the offer price on a voluntary offer - Germany

- In the case of takeover offer, the consideration must be in the form of a cash payment in euro or liquid shares admitted to trading on an organized market in the EU.
- In the case of takeover offer the offeror is generally free to determine the amount of the consideration, provided that the higher of the following minimum amounts is reached (statutory minimum price):
  - the volume-weighted average stock exchange price (“VWAP”) of the target company during the three months period prior to the publication of the intention to launch a takeover offer or the publication concerning the acquisition of control of the target company; or
  - the highest price paid or agreed by the offeror, a person acting jointly with the offeror or any of their subsidiaries for the acquisition of shares in the target company during the six months period prior to the publication of the offer document.
- Premiums over the VWAP offered by offerors in connection with takeover offers vary to a large extent, as well as the number of offers varies from year to year.

## Rules regarding the offer price on a voluntary offer - France

- The general principle is that the offer price is freely determined by the Offeror, provided that it respects the general principles of public takeovers, including the equal treatment of the Offeree's shareholders.
- An independent expert's fairness opinion on the offer price is required:
  - if the offer is likely to cause conflicts of interest within the Offeree board; or
  - if the terms or circumstances of the offer "jeopardize the fair treatment of holders of securities issued by the Offeree".
- A fairness opinion is often needed on a take private transaction by a financial sponsor, where Board members or management (the founder and/or CEO etc.) may be participating in the buyout. The independent expert is appointed by the Offeree Board on a proposal of an ad hoc committee of the Board comprising at least three members and including a majority of independent directors.
- The independent expert is required to be appointed by the Offeree Board at the latest 15 business days before its report is expected to be issued. The Offeree Board is required to publish a reasoned opinion on the offer, on the basis of the independent expert's opinion.

## **A French take private case study: Silver Lake Partners/Cegid (2016/2017) (1)**

- Silver Lake and its minority partner AltaOne Capital made an off-market purchase of 37.6% of the share capital of Cegid, a French software and cloud management service provider listed on Euronext Paris, from three shareholders, including the holding company of the founder and CEO.
- The founder agreed to reinvest part of the proceeds of the sale of his holding company's Cegid shares in the buyout.
- The off-market purchase triggered an obligation to make a mandatory public offer for all the remaining shares and other securities of Cegid. This was because it involved the acquisition of more than 30% of the share capital or voting rights of the Offeree. A mandatory public offer is required to be (1) unconditional and (2) at a price not less than the highest price paid by the Offeror over the last twelve months preceding the threshold crossing.
- The mandatory offer was made at a price of EUR 61 per share, ex a EUR 1.25 per share dividend. This was the same as the price paid on the initial block purchase.

## A French take private case study: Silver Lake Partners/Cegid (2016/2017) (2)

- In its offer document the Offeror declared that if, following closing of the offer the remaining minority shareholders represented no more than five per cent of the share capital or voting rights, it would (a) undertake the squeeze out (ie compulsory purchase) procedure with respect to the remaining shares and (b) pay an additional EUR 1.25 per share to the sellers of the 37.6 per cent block.
- On closing of the mandatory offer, the Offeror and persons acting in concert with it owned just over 90 per cent of the share capital and voting rights of Cegid.
- 12 months later, in 2017, having acquired on market a small number of shares in the interim, the Offeror made a further voluntary offer to the remaining minority shareholders at EUR 86.25 per share, again declaring that it would operate the squeeze out procedure if, following closing of the offer, the remaining minority shareholders represented no more than five per cent of the share capital or voting rights.

## Conditions of takeover offer Germany (1)

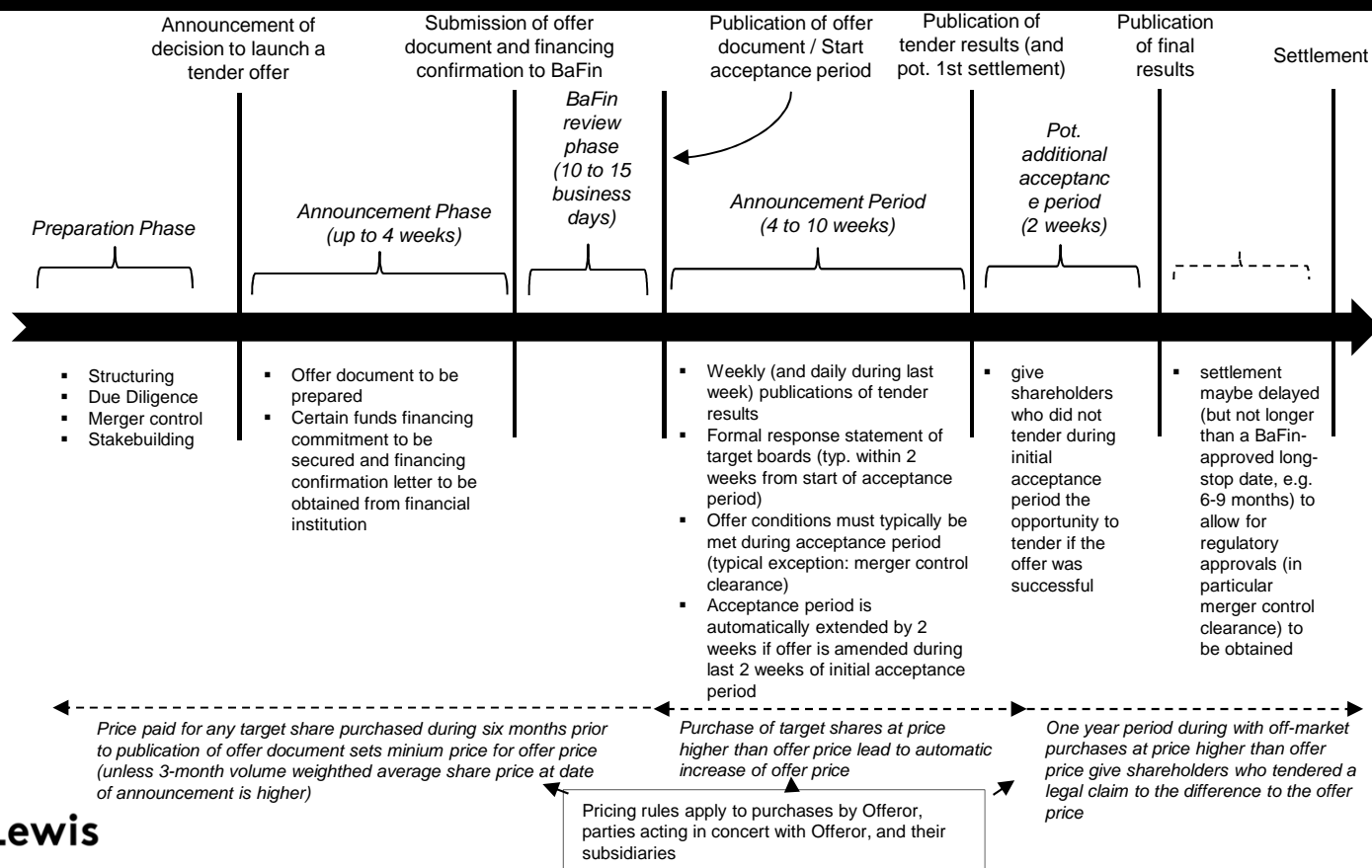
- General principles
  - Once the Offeror announced its intention to submit a takeover offer, the Offeror is bound to do so
  - Announcement of a decision to submit a takeover offer is not revocable
  - Only the takeover offer itself can be made subject to certain conditions
  - Once Offeror announced its intention to submit a takeover offer, Offeror has 4 weeks to prepare an offer document
- Consequences
  - Due diligence process before disclosure of intention to submit a takeover offer
  - Financing typically to be secured before the disclosure of the intention to submit a takeover offer
  - BCAs typically concluded before announcement of intention to submit a takeover offer



## Conditions of takeover offer – Germany (2)

- Regulatory approval conditions
  - Merger Clearance
  - CFIUS, Foreign Investment Law Approvals
  - Regulatory approval conditions typically only fulfilled after end of acceptance period. Settlement may thus be delayed, but not longer than BaFin approved long-stop date, e.g. 6 to 9 months, to allow for regulatory approvals to be obtained
- Typical non-regulatory conditions
  - Minimum acceptance threshold (90%/75%/50% plus 1)
  - No capital measures or changes to articles of association
  - No material adverse change (objective standard to be confirmed by auditor)
  - Non-regulatory conditions to be satisfied/met by end of acceptance period
- Waiver of conditions only permissible before end of acceptance period if relevant condition can still be fulfilled - according to BaFin practice, no waiver of condition possible, if condition can no longer be achieved.

# Indicative timetable – Germany



## Conditions and irrevocability of a voluntary offer – France (1)

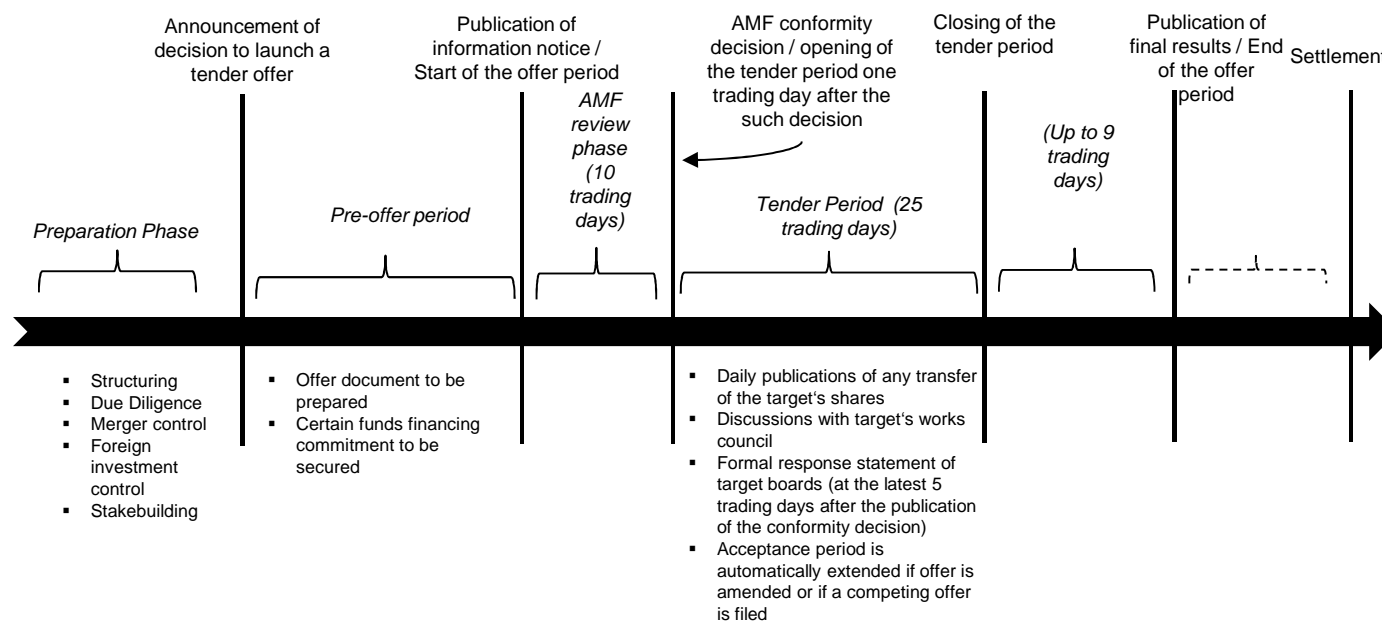
Between announcement and filing the offer with the AMF:

- The offer may be subject to “pre-conditions”.
- The offer period will not commence until such pre-conditions are satisfied.
- Pre-conditions could relate for example to:
  - financing; or
  - other regulatory approvals, such as foreign investment regime approval

## Conditions and irrevocability of a voluntary offer – France (2)

- As from filing with the AMF the offer is **irrevocable**, with limited exceptions, including in particular:
  - the acceptance condition;
  - competing offers; certain antitrust approvals;
  - certain Offeror corporate authorisations (eg in relation to an associated equity financing).
- The offer cannot be conditional on securing debt financing.
- The Offeror's financial advisor, which is required to be an investment services firm authorized in France, is required to guarantee to the AMF and Offeree shareholders "the substance of the offer and the irrevocable character of the commitments made by the Offeror pursuant to the Offer".

# Indicative timeline – France



## Corporate governance and effective control – Germany (1)

- Following the settlement of the takeover offer, the offeror will have an interest in integrating the target company into the offeror's Group. In the context of private equity, the sponsor has an interest in gaining access to the cash flow of the company.
- Such group integration will typically require a co-called domination and profit loss agreement (75% majority required), or a squeeze-out (90% or 95% majority required, depending on the type of squeeze-out procedure).
- The domination and profit loss transfer agreement allows the acquiring company (i) to give instructions to the management board of target company and (ii) get access to the cash-flows of target company which may have a high relevance for the financing of the transaction
- Outside shareholders will have certain rights to safeguard their interests and will under any of these integration measures receive a certain compensation which will be subject to auditor and/or court review.

## Corporate Governance and effective control – Germany (2)

- In the absence of a domination agreement, management board of target company is solely responsible of the day-to-day management. The management board is legally independent and not subject to any instructions of the acquiring company. Acquirer has no direct access to cash-flow of target company as management board is legally required to protect the capital of the company.
- Acquirer has some form of de-facto control over target company as it may appoint the (majority of the) members of the supervisory board. The supervisory board has the sole competence to appoint and revoke members of the management board.
- Acquirer may subsequently also launch a delisting offer to take the acquired company private. A delisting offer basically follow the same rules as a mandatory takeover offer and puts pressure of outside shareholders to tender their shares as the share liquidity is substantially limited if the target company shares are no longer traded on a stock exchange.

## Corporate governance and effective control – France (1)

- Majority requirements for the adoption of shareholder resolutions:
  - The majority required for resolutions proposed at ordinary general shareholders meetings is a simple majority of votes cast by shareholders present or represented.
  - Ordinary general meetings are competent to take any decision other than those reserved for extraordinary general meetings.
  - The majority required for resolutions proposed at extraordinary general shareholders meetings is a two thirds majority of votes cast by shareholders present or represented.
- Extraordinary general shareholder meetings have exclusive authority to approve amendments to the company's bylaws. This includes resolutions to:
  - increase, amortise or reduce the share capital;
  - approve mergers, de-mergers and spin-offs; or
  - wind up the company.
- Some comments on a French specificity: the double voting rights regime.



## Corporate governance and effective control – France (2)

- Directors are appointed and removed by the ordinary shareholders' meeting, by a simple majority.
- Two tier board structures :
  - Supervisory board: Members are appointed and removed by the ordinary shareholders' meeting. The supervisory board controls the activity of the management board and appoints and removes its members. Discussions in relation to an offer are conducted with the supervisory board.
  - Management board: Determines the company's strategy and ensures its implementation, in accordance with the company's corporate interest, taking into consideration the social and environmental impact of its business.
- Employee representation: Depending on the number of employees the company has, employee representatives are allowed to attend meetings of the board of directors or supervisory board and the appointment of directors or supervisory board members representing the employees may be required.

# Squeeze-out procedures in France and Germany

## France:

- Within three months following the closing of a takeover offer as a result of which the Offeror and persons acting in concert with it own more than 90% of the Offeree's shares and voting rights, the Offeror may compulsorily acquire the remaining securities, provided that:
  - concurrently with the filing of the offer, the Offeror declared that it reserved the right to apply the squeeze out procedure; and
  - the price is at least equal to the price payable under the terms of the offer.

## Germany:

- 90% threshold for takeover squeeze-out
- Additional squeeze out options under general corporate law (which require 90% or 95% threshold)

## Biographies



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Uli Korth focuses his practice on both private equity and private and public mergers and acquisitions (M&A) transactions, bringing years of experience representing global financial investors and corporate clients in complex pan-European and cross-border transactions.

In particular, Uli has advised major multinational corporations in public and private mergers and acquisition transactions throughout Germany and mainland Europe.

Uli advises private equity firms and other global financial investors throughout the whole life cycle of their investments, from buy-side leveraged buy-outs, team-up, and co-investment structures, along to the portfolio phase including management incentives, add-on acquisitions, and refinancing transactions and then in the exit phase, including private and public sell-side disposals and close-out of management participation structures

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Stephen Walters counsels clients on public and private mergers and acquisitions, joint ventures, private equity and other equity financing transactions, corporate governance, and general corporate advisory matters. Stephen also handles financial services matters for a number of financial institution clients. He has experience of advising clients in a range of sectors including energy, technology, life sciences and financial services.

Dual qualified in England and France, he advises clients on transactions in the UK and France and has also advised on transactions in the United States and a number of emerging markets

Corporate clients he has advised on M&A transactions include: BlackBerry; CRH plc; Chevron Corporation; Lazard; LyondellBasell Industries; BrightSphere Investment Management plc; Royal DSM NV; Smiths Group plc; SoLocal SA and Telefónica SA

Private Equity clients he has advised on M&A transactions include: 4D Global Energy Advisors; Freeman Spogli; Lime Rock Partners and SK Capital Partners

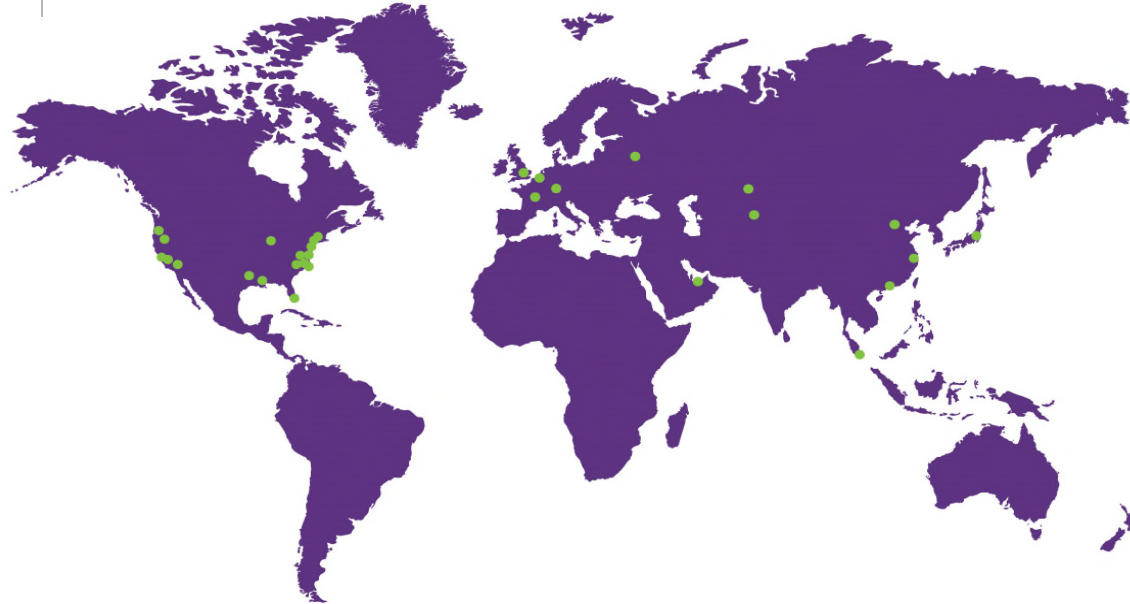
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