

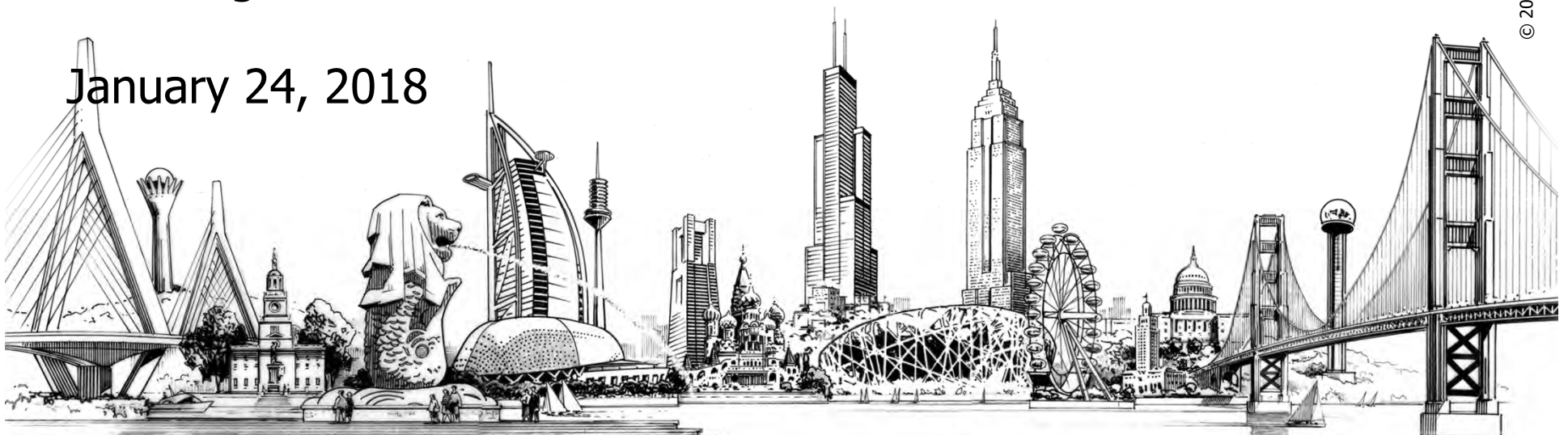
Morgan Lewis

GLOBAL PUBLIC COMPANY ACADEMY

Public Company M&A in the EU, UK, Germany and Russia

Ulrich Korth
Vasilisa Strizh
Iain Wright

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Agenda

- **Section 1: A Common Approach to Public M&A in the EU**
- **Section 2: The UK Takeover Code**
- **Section 3: Snapshot Germany**
- **Section 4: Russian Takeover Rules**

SECTION 1

A COMMON APPROACH TO PUBLIC M&A IN THE EU

EU Regulatory Framework

- **Takeover Directive** (Directive 2004/25/EC of 21 April 2004)
 - Basic principles for takeovers of public companies listed on an regulated market in a EU member state with a view to creating a level playing field.
- **Transparency Directive** (Directive 2004/109/EC of 15 December 2004 as amended by Directive 2013/50/EU of 22 October 2013)
 - General framework for the harmonisation of financial and other information disclosure obligations of public companies listed on a regulated market in an EU member state
- **Market Abuse Regulation** (Regulation No. 596/2014 of 16 April 2014)
 - Directly applicable in all EU member states
 - Rules on
 - Prohibition of insider trading and market manipulation
 - Mandatory disclosure of inside information by issuer
 - Rules on director dealings

EU Takeover Directive – Key Elements

- **General Principles**

- Equal treatment of holders of same class of securities
- Protection of minority shareholders in event of change of control
- Holders of securities of offeree company to have sufficient time and information to enable them to reach a properly informed decision
- Target board must act in the interests of company as a whole and must not deny holders of securities the opportunity to decide on the merits of an offer
- Offeror to have certain funds at time of announcement of takeover bid
- No false markets to be created
- Target must not be hindered in the conduct of its affairs for longer than is reasonable by a takeover bid
- Target board must give its views on the effects of the bid on employment

EU Takeover Directive – Key Elements

- **Mandatory takeover bid**

- Obligation triggered where a shareholder obtains control of listed company
- Control: specified percentage of voting rights as determined by the local law of the applicable member state (typically around 30%-33% of voting rights)
- Securities held by affiliates of shareholder or person acting in concert with shareholder are attributed to shareholder
- Where control has been acquired following a voluntary takeover bid, the obligation to submit a mandatory takeover bid does not apply

EU Takeover Directive – Key Elements

- **Minimum price rules**

- Consideration may consist of cash or (liquid) securities or a combination of both
- Highest price paid by offeror/concert party over a period of between 6 months and 12 months pre-offer (to be determined by relevant member state)
- If the offeror/concert party buys target securities during the offer period above the offer price, the offer price must be increased accordingly

- **Making of bid**

- Decision to make a bid to be made public without delay
- Minimum contents requirements for offer documents
- Offer period to be between 2 and 10 weeks
- Target board to issue a public document setting out its opinion of the bid and the reasons on which it is based

EU Takeover Directive – Key Elements

- **Squeeze-out and Sell-out**

- Offeror can squeeze out holders of the remaining securities for a fair price either:
 - Where offeror holds securities representing not less than 90% of the capital carrying voting rights and 90% of the voting rights in target (higher threshold, but not higher than 95%, permitted)
 - Where, following acceptance of the bid, offeror has acquired or has firmly contracted to acquire securities representing not less than 90% of the capital carrying voting rights and 90% of the voting rights in target
- Right of squeeze-out to be exercised within three months of the end of the acceptance period
- Right of holders of remaining securities to require offeror to buy their shares where the conditions for squeeze-out are fulfilled.

EU Takeover Directive – Optional Elements

- **Obligations of board of offeree company**

- Any action (other than seeking alternative bids) which may frustrate a bid requires prior authorisation of the target shareholders – restriction may start either from making of offer announcement or from first approach

- **Breakthrough rules**

- During the time allowed for acceptance of bid, transfer restrictions or voting right restrictions (including any multiple voting rights) shall not apply
- Breakthrough shall continue to apply where, following a bid, offeror holds 75% or more of voting rights

EU Transparency Directive – Voting Right Notification

- **Obligation to notify acquisition or disposal of major holdings**
 - Relevant thresholds: 5% of voting rights and subsequently 10%, 15%, 20%, 25%, 30%, 50%, 75%
 - Notification obligation not only is related to shares, but also covers financial instruments such as options and swaps (including cash settled swap structures)
 - Broad attribution rules apply
 - Group-wide attribution
 - Acting in concert
 - Notification made by shareholder to issuer; issuer then notifies market
 - Harsh consequences in case of non-compliance

Market Abuse Regulation and Takeovers

- **Perspective of bidder**

- Prohibition of insider trading (prior to announcement of decision to make a takeover offer)
- Off-market acquisition permissible if buyer and seller have same level of information
- Inside information obtained in the context of a due diligence to be disclosed in offer document
- Disclosure of bidder's intent to acquire control in target company on a confidential basis to potential sellers of target shares permissible (including "market soundings")

Market Abuse Regulation and Takeovers

- **Perspective of target company**

- Obligation to disclose inside information
 - Broad definition of inside information under MAR (negotiations with potential bidder 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)
- Disclosure of inside information to bidder in due diligence

SECTION 2

UK TAKEOVER REGIME

City Code on Takeovers and Mergers

- Governs the form, structure and timetable of takeovers
- Principles-based regime
 - General principles, supported by more detailed rules and notes
 - Obligation to comply with the spirit of the Code
- Takeover Panel
 - Representatives of financial institutions and professional bodies
 - Final arbiter as to when the Code applies, and what it means
 - Powers of enforcement and sanction

When Does the City Code Apply?

- **Nature of target**

- UK companies with shares traded on a UK exchange
- Any UK public (and some private) companies with central management and control in the UK
- Split jurisdiction where either:
 - UK company listed on EEA regulated market (but not UK)
 - EEA company listed on UK regulated market (but not home)

- **Type of transaction**

- Takeovers and mergers, “however effected”
- Other transactions with objective or potential effect of obtaining or consolidating control
 - “Control” means 30% of voting rights
 - Consolidating control – increasing voting rights between 30% and 50%
- Partial offers and tender offers

Principal Methods of Implementing Takeover in UK

- **Takeover offer**
 - Contractual offer to target shareholders (by offer document)
 - Voluntary offers (recommended and hostile) and mandatory offers
- **Scheme of arrangement:** statutory process controlled by target
 - Implemented by scheme document
 - Requires approval of court and shareholders
 - Guarantees acquisition of 100% of target shares if approved

Mandatory Offer – Rule 9

- Triggered on acquisition or consolidation of control
- Must make mandatory offer for all equity share capital of target
 - Only permitted condition: 50+% ownership
 - Offer must be in cash/cash alternative
 - Minimum price: highest price paid in previous 12 months (or during offer period)
 - Dispensations and whitewash procedure

Minimum Price – Rules 6 and 11

- Rule 6: Acquisitions within three months of an offer period or during offer period
 - sets floor price for offer
- Rule 11:
 - Acquisition of interest in shares carrying 10% or more of the voting rights of that class during offer period or
 - prior 12 months (if acquired for cash)
 - prior three months (if securities exchange)
 - Offer consideration must be cash (if acquisitions were in cash) or securities (if acquisitions were for securities)
 - Highest price paid sets floor price for any subsequent offer

Public Disclosure of Holdings and Dealings

- Rule 8: holdings/dealings in “relevant securities”:
 - opening position held by offeror and offeree (plus concert parties) and holders of 1% interests
 - dealing during offer period by bidder or target (or concert parties) or third party who has/which results in interest in 1% or more of relevant securities
- DTR 5: any change in voting interest through 3% threshold or any whole % point above 3%
- DTR 3: any dealing by a PDMR or connected person in voting share
- EU Short Selling Regulation: net short position of 0.5%
- S.793 CA 2006: UK plc has power to demand from any person detailed information about interest in its shares – information available to public

Secrecy and Announcements

- Obligations on all parties to keep talks secret (MAR and City Code)
 - Implications for due diligence, bid financing, approaching target shareholders, etc.
- If talks leak or there is a spike in the target share price, obligation to make an announcement
 - Announcement must name all potential offerors
 - Triggers start of offer period
 - Triggers 28-day PUSU period

Key Documents

- Firm intention announcement
 - Effectively commits offeror to make offer
 - Detailed rules on contents as well as terms and conditions
 - Offeror must have certain funds before released
- Offer document
 - Detailed rules on contents as well as terms and conditions
 - Offeror board must take responsibility for contents
 - Revisions/extensions by supplementary documents or announcements
- Target board circular
 - Opinion on offer (NB if offer recommended then joint offeror/target document)
 - Responsibility statement from target board
 - Detailed contents requirements prescribed by Code

Offer Timetable

- Formal offer must be made within 28 days of firm intention announcement (offer document or scheme document)
- If offer is contested, target has 14 days to publish defence document
- Minimum offer period of 21 days; may be extended
- Offeror may revise bid up to day 46
- Acceptance condition must be satisfied by day 60
- Other conditions must be satisfied within 21 days of acceptance condition being satisfied (or first closing date)

Other Points to Note

- Concert parties
 - Persons co-operating to obtain or consolidate control
 - Certain categories of persons deemed to be acting in concert, e.g. companies with subsidiaries and associates (>20% ownership), companies with advisers
 - Offeror and concert parties effectively treated as single entity for purposes of many Code rules
- Break fees and other constraints on target board are prohibited
- Frustrating action by target is prohibited without approval of target shareholders
- Squeeze-out and sell-out level is 90%
- 75% shareholding usually required to delist target
- Restrictions on follow-up action after “failed” bid

SECTION 3

SNAPSHOT GERMANY

Key Topics

- **Role of regulator BaFin**

- Review and admission of offer document
- Protection of public interest
- Active regulator – practice of BaFin strong influence on takeover practice

- **Voluntary takeover offers vs. mandatory takeover offer**

- Most takeover offers in Germany are voluntary takeovers
 - Influence of price rules
 - Private stake acquisitions/irrevocables in combination with takeover offer
- Consequences of non-fulfilment of mandatory bid obligation
 - Suspension of dividend and voting rights and fines
 - No right of shareholders to demand fulfilment of mandatory bid obligation

Key Topics

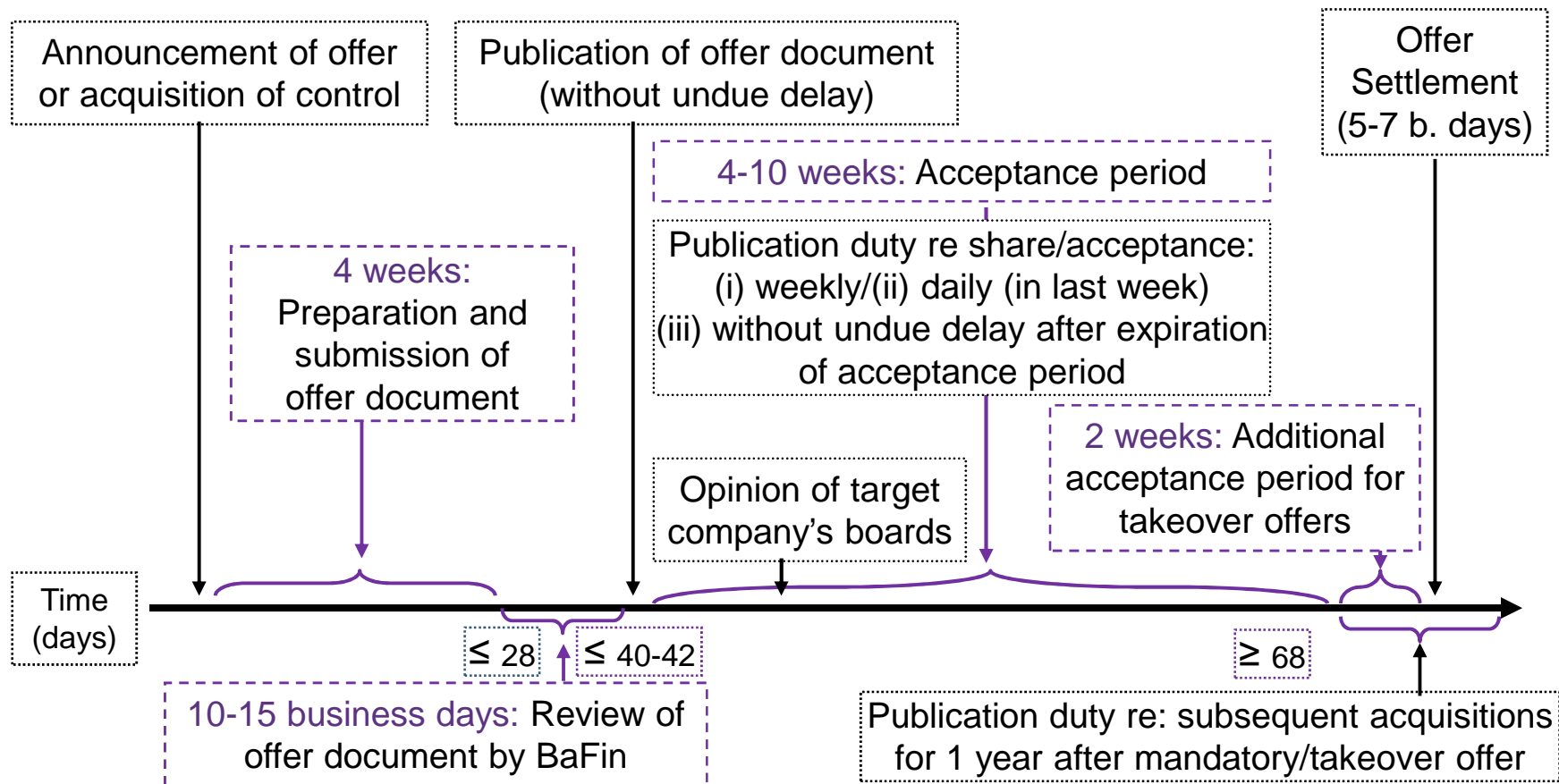
- **Acting in concert**
 - Requirements
 - Coordination of exercise of voting rights
 - Cooperation with a view to change the entrepreneurial focus of the company
 - Relevance
 - Price rules
 - Attribution of voting rights
 - Mandatory bid obligation

Key Topics

- **Conditions**

- Regulatory approval conditions
 - Merger Clearance
 - CFIUS, Foreign Investment Law Approvals
- Typical non-regulatory conditions
 - Minimum acceptance threshold (90%/75%/50% plus 1)
 - No capital measures
 - No material adverse change (objective standard to be confirmed by auditor)
- Non-regulatory conditions to be satisfied by end of acceptance period (waiver of non-satisfied conditions not permissible according to BaFin practice)

Takeover Process Germany



SECTION 4

RUSSIAN TAKEOVER RULES

Russian Takeover Rules at a Glance

- **Key rules**
 - Chapter XI¹ of the Stock Companies Law
 - Regulations of the securities market regulator (currently, the Central Bank)
- **Apply to any Russian stock company if it has in its name**
 - The word “Public”
 - In some cases, the word “Open”
- **Triggered by acquisitions of**
 - Ordinary shares and voting preferred shares
- **Apply to direct acquisitions only**
 - Indirect acquisitions (e.g. acquiring holders of shares) are not affected (still)
 - UNLESS the acquiror or any of its affiliates also acquired at least one share directly

Tender Offers – Triggers

- **Voluntary tender offer (VTO)**
 - Intention to acquire 30+%
 - Shares owned by affiliates of the acquiror are attributed to the acquiror
- **Mandatory tender offer (MTO)**
 - Acquisition of 30+%, 50+% or 75+%
 - Shares owned by affiliates of the acquiror are attributed to the acquiror
 - Limited exemptions (transfers between affiliates; exercise of pre-emption rights; contribution of shares to the share capital of strategic companies approved by the President; acquisition via VTO compliant with MTO rules and other)
- **Competing tender offer**
 - No specific trigger: can be made by any person during VTO or MTO

MTO – Process

- **Offer to all holders of**
 - Ordinary shares and voting preferred shares
 - Securities convertible into voting shares
- **Strict rules on timing**
 - Must be made within 35 days after the acquisition of 30+%, 50+% or 75+%
 - Offer period: not less than 70 but not more than 80 days
 - Payment period: within 17 days after the last day of the offer period
- **Approvals, etc.**
 - Target board to issue a public recommendation on the offer price, effects on the market value of shares post-acquisition, and the acquiror's plans concerning The target and its employees
 - The Russian securities regulator (Bank of Russia) to review
 - IMPORTANT: other regulatory non-MTO-specific approvals might be needed

MTO – Purchase Price and Bank Guarantee

- **Minimum price rules - not less than**
 - Average share price determined per results of on-exchange trading during six months before MTO, OR
 - Market value determined by independent appraiser (for shares not traded on stock exchange or traded for less than six months); AND
 - The highest price paid by the offeror or its affiliates during six months before MTO
- **Consideration – the acquiror may offer**
 - Cash
 - Cash or (liquid) securities, at seller's choice
- **Must be backed up by an irrevocable bank guarantee**
 - Issued by a Russian bank or a non-Russian bank but with Russian agent
 - Surviving, in general, the whole payment period plus at least six months
 - Covering, in general, 100% of purchase price for all securities subject to the offer

MTO – Restrictions

- **Voting by the offeror**

- Until MTO is served shareholder's and its affiliates' voting rights are limited to 30%, 50% or 75%

- **Transacting with target securities**

- The offeror's transactions with offerees outside MTO are prohibited

- **Decisionmaking by the target**

- During MTO and 20 days after, only the general shareholders' meeting can approve
 - Issuing new shares and securities convertible into shares
 - Disposing of assets of the book value above 10% of the book value of all of target's assets
 - Entering into related-party transactions
 - Share buybacks
 - Increasing remuneration of directors and officers
 - Amending employment termination clauses in contracts of directors and officers

Buy-Outs and Squeeze-Outs

- **Apply after VTO or MTO**
 - If the shareholder resulted in 95+%
 - Shares owned by affiliates of the shareholder are attributed to the shareholder
- **Buy-out**
 - The shareholder must make a buy-out offer (if failed it is deemed to have it made)
 - Within 35 days
 - Holders can sell the securities within six months
- **Squeeze-out**
 - The shareholder can squeeze out all other shareholders
 - Within six months after the offer period
 - BUT only if it bought at least 10% of shares via VTO or MTO
- **Minimum purchase price**
 - Same principles as in MTO
 - In any event not less than the price in VTO or MTO

Questions?



Iain Wright

London

T +44.20.3201.5630

E iain.wright@morganlewis.com



Ulrich Korth

Frankfurt

T +49.69.714.00.741

E ulrich.korth@morganlewis.com



Vasilisa Strizh

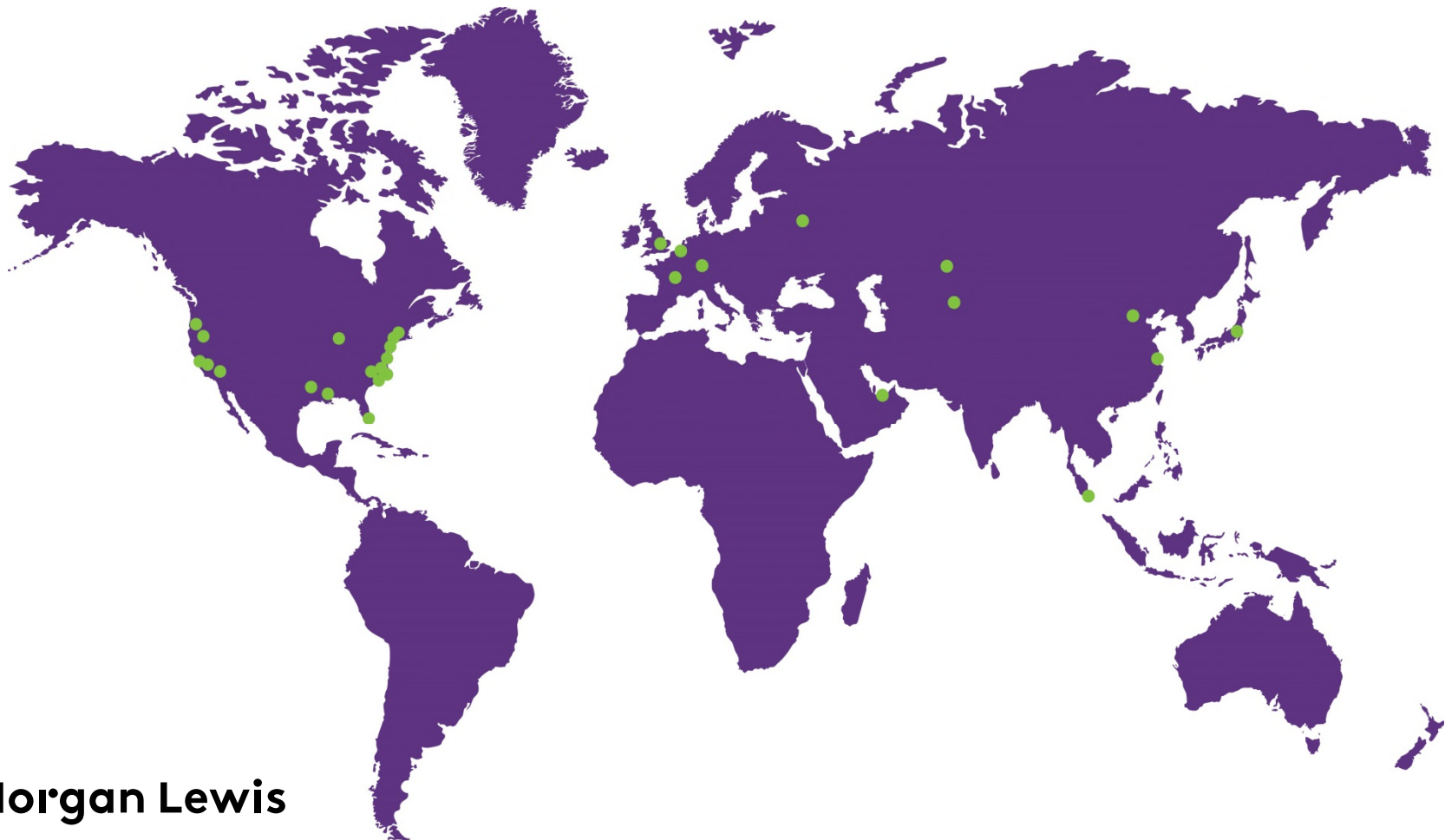
Moscow

T +7.495.212.2540

E vasilisa.strizh@morganlewis.com

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