

Morgan Lewis

GLOBAL PUBLIC COMPANY ACADEMY

PUBLIC COMPANY M&A IN THE EU, UK, AND BEYOND

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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

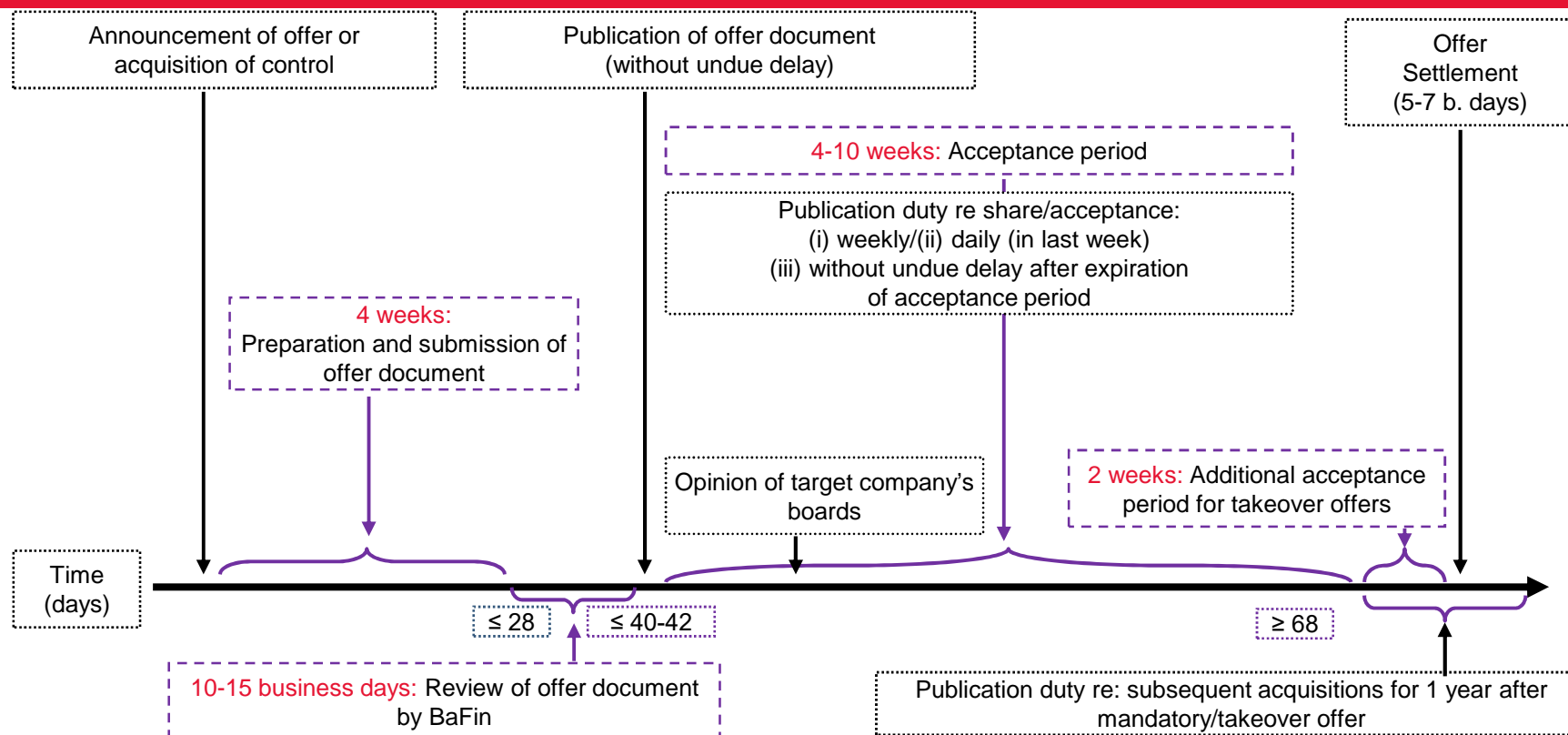
- **Acting in concert**
 - Requirements
 - Coordination of exercise of voting rights
 - Cooperation with a view to change the entrepreneurial focus of the company
 - Relevance
 - Price rules
 - Attribution of voting rights
 - Mandatory bid obligation

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, Russia's 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 (Russia's Central Bank) 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 an affiliate 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, voting rights of the offeror and its affiliates 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

Q&A

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With a focus on mergers and acquisitions (M&A), and capital markets, Iain Wright counsels clients on a range of corporate finance issues. He handles public and private M&A transactions in both the United Kingdom and internationally, and advises clients on initial public offerings (IPOs) and secondary fundraising. Iain also provides clients with regular guidance on securities law and governance issues, with an emphasis on the London Stock Exchange's AIM market for growth companies.

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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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