Articles

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Recent Developments in Transatlantic M&A Practice

The M&A landscape in 2024 is shaped by the complex interplay of global economic trends, regulatory shifts, and evolving market dynamics on both sides of the Atlantic. Transaction terms in both private and public M&A in Germany and the United States are adapting in response to these changes. Historically, market standards between the two countries have differed significantly, but private M&A deal terms are gradually aligning, bridging many of the previous gaps. Public M&A terms, however, still reflect the contrasting legal frameworks of each country, often requiring additional care and creativity in cross-border transactions between Germany and the United States. This contribution explores the current state of both markets and highlights the latest developments in deal terms, including similarities and differences between the two markets.

I. General Market Developments

After a sluggish 2023, overall global M&A activity has rebounded modestly thus far in 2024. With the first nine months of the year complete, global M&A deal value is tracking approximately 16 % ahead of 2023.[1] During this period, deals involving a German target were up 57 % from the previous year's level in terms of deal value, while North American M&A advanced by around 19 % year over year.[2]

This rebound has been fueled primarily by double digit growth in strategic transactions, driven in large part by strong M&A activity in the energy, technology, healthcare and adjacent sectors. Indeed, these industries have seen a number of megadeals announced this year in the United States, including ConocoPhillips' $22 billion acquisition of Marathon Oil, Diamondback Energy's $26 billion merger with Endeavor Energy Resources, Hewlett Packard Enterprise's $14 billion acquisition of Juniper Networks, and OpenAI's $6.6 billion new equity fundraise at a $157 billion valuation. Transatlantic transactions in these sectors have included International Game Technology's $6.3 billion sale of its Gaming & Digital business to funds managed by Apollo Global Management and Novo Holdings' $16.5 billion acquisition of Catalent. In Germany, although mid-cap transactions have dominated these industries, strategic investors have made notable large-cap moves, with Abu Dhabi National Oil Company ("**Adnoc**") announcing a €14.7 billion takeover offer for Covestro and Novartis completing a €2.7 billion takeover of MorphoSys.

In contrast, global private equity ("**PE**")-related M&A deal flow has remained relatively muted due to a variety of macroeconomic factors, including higher interest rates, volatile share prices, and geopolitical conflicts. As the inflation and interest rate environment has shifted, however, green shoots have emerged, with the second quarter of 2024 witnessing a 41 % share of total M&A deal value for PE, up from less than 34 % in the first quarter, coinciding with the European Central Bank's loosening of its monetary policy in the second quarter of 2024 and expectations that the U. S. Federal Reserve would ultimately follow suit, as it did in September 2024.[3] While global PE activity slightly dipped in the third quarter compared to the second, global PE M&A volumes were still up 40 % year over year.[4] Reflecting this trend, the German market saw some notable PE transactions in 2024, including KPS Capital Partners' €3.5 billion acquisition of Innomotics from Siemens.

In both Germany and the United States this year, a noteworthy trend among sponsors has been the growing prevalence of delisting or take-private offers, as a significant amount of PE deal flow – roughly $76 billion, according to Bloomberg-compiled data – has come from buyout firms hunting in the public markets during 2024, especially for tech and tech-adjacent companies, such as with TowerBrook Capital Partners' $8.9 billion acquisition of R1 RCM Inc. with CD&R in the third quarter of 2024.[5] In contrast to 2023, when delisting offers accounted for just five out of 21 public offers in Germany, 14 out of the 23 offers published from January through October 2024 have aimed at delisting, including Telefónica's delisting offer for Telefónica Deutschland Holding, which valued the company at €7 billion, and Cinven's €2.4 billion delisting offer for Synlab, suggesting

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1 *LSEG Data & Analytics*, Global Mergers & Acquisitions Review First Nine Months 2024 (October 2024), p. 3.
2 *LSEG Data & Analytics*, Germany Investment Banking Review First Nine Months 2024 (October 2024), p. 4.
3 *PitchBook*, 2Q 2024 Global M&A Report (24 July 2024), p. 4.
4 *PitchBook*, 3Q 2024 Global PE First Look (2 October 2024); *LSEG Data & Analytics*, Global Mergers & Acquisitions Review First Nine Months 2024 (October 2024), p. 2.
5 For a delisting, German stock exchange law requires a bidder to launch a public acquisition offer for all outstanding shares not already held by a bidder; *see also*, *Ryan Gould*, Take-Privates Return to Boost Dealmaking in 2024, Bloomberg (21 May 2024), https://www.bloomberg.com/news/newsletters/2024-05-21/take-privates-return-to-boost-dealmaking-in-2024.

that companies are increasingly discouraged by public listings. Similarly, delisting offers are on track to outpace 2023 in the United States, with megadeals already surpassing the prior year. Through the second quarter of 2024 there have been 11 U. S. deals larger than $5 billion, as compared to five for the same period in 2023.[6]

Meanwhile, the number of initial public offerings ("**IPOs**") in both Germany and the United States has remained relatively low for more than two years. As a result, both markets have continued to witness a trend toward fewer companies listed on German and U. S. stock exchanges.[7] High reporting standards, subsequent listing obligations, stricter corporate governance rules, and increased market scrutiny, particularly the intense focus on earnings performance on a quarter-by-quarter basis, have made public listings less appealing, driving companies toward private ownership. These factors can particularly affect listed companies that have one or more large shareholders, leaving only a relatively small proportion of their shares in free float.

Another positive sign for PE-related deal flow has been that a longstanding trend – joint ventures involving PE investors – has persisted, which has allowed PE firms to invest in companies during crucial growth phases, providing strategic guidance and facilitating smoother IPOs or other exits when market conditions are favorable. In addition, PE-related distressed M&A activity is rising, driven in Germany by a nearly 30 % increase in corporate insolvencies this year due to factors like the expiration of pre-inflation financing lines, supply chain disruptions, shifts in consumer demand, and geopolitical uncertainties.[8] Asterion's €1.3 billion acquisition of German power company STEAG and Mallinckrodt plc's $925 million sale of its Therakos business to CVC Capital Partners highlight the growing appeal of distressed assets to opportunistic investors.

Although it is difficult to predict the future for the M&A market, there are reasons to believe that global M&A activity, including transatlantic transactions, will accelerate during the remainder of 2024 and into next year as interest rates and inflation come down, fears of a global recession dissipate, and elections in the United States and other jurisdictions provide greater clarity regarding the regulatory scrutiny that transacting parties should expect to encounter.

II. Developments of Key Terms in Private M&A

In 2024, the German and United States private M&A markets have continued to experience a subtle shift from the more seller-friendly environment that characterized the M&A book in the immediate aftermath of the pandemic to a slightly more balanced, and occasionally – depending on the specific target or asset being sold – even buyer-friendly, market. In previous years, the market was distinctly favorable to sellers, driven by low interest rates, abundant liquidity, robust economic growth and vigorous competition for M&A targets.

However, this dynamic has evolved as macroeconomic conditions have changed. The rise in interest rates, tighter monetary policies, and heightened economic uncertainties have limited the availability of inexpensive capital, reduced the attractiveness of targets that cannot demonstrate clear paths to near-term profitability and limited capital redeployment while depressing exits from existing investments. These factors and others – including increased regulatory scrutiny and technological developments – have strengthened buyers' negotiating leverage in many transactions. This shift has played out in both Germany and the United States, although the German market continues to be perceived, in some respects, as more seller-friendly compared to the United States, with the specific terms and negotiating dynamic depending, first and foremost, on both sides of the Atlantic, on the specific context of each particular transaction.

1. Purchase Price and Valuation

As M&A activity picks up, a critical decision dealmakers must have on their radar is determining the appropriate purchase price mechanism for their transactions. The two most widely accepted purchase price mechanisms are "closing accounts" and "locked-box" methodologies, and the use of one over the other has implications for the ultimate purchase price for the transaction and the conduct of the target's business between signing and closing.

In the United States, the closing accounts structure, in which the economic interest in the target conveys from the seller to the buyer at closing and the performance of the target business during the pre-closing period is for seller's account, is the most common approach. In Germany, M&A transactions traditionally have been more likely to utilize the locked-box mechanism, in which the economic interest acquired by the buyer is determined based on a balance sheet as of a date prior to signing, with the buyer benefitting (or suffering) from upside (or downside) target performance prior to closing. However, one development in the German market is the growing preference for closing accounts over the traditionally dominant locked-box mechanisms.

This shift is largely driven by current market conditions. With volatility across various industries, a company's financial position can change significantly after the locked-box date, increasing the risk of overvaluation or undervaluation when applying the locked-box mechanism. Closing accounts, in this context, offer buyers a vital advantage by addressing the target's financial changes right up to the closing date. This ensures that the final purchase price more accurately reflects the target's financial position at closing. Additionally, an increasing prevalence of carve-out transactions in the German market has contributed to the rise of closing accounts. In carve-out transactions, locked-box mechanisms pose challenges, especially when the carve-out is not completed prior to the locked-box date. In such cases, particularly when relying on pro forma financial statements, locked-box mechanisms often fail to accurately capture the evolving financial state of the carved-out entity. The surge in distressed M&A activity has also bolstered the use of closing accounts, as these transactions often involve significant financial fluctuations, which can be accounted for through closing accounts. In addition, the growing presence of investors from the United States, where closing accounts have long been market standard, in the German M&A market has further accelerated this trend towards closing accounts.

6 *Karessa L. Cain/Mark F. Veblen/Victor Goldfeld/John R. Sobolewski*, Private Equity 2024, Chambers and Partners (12 September 2024), https://practiceguides.chambers.com/practice-guides/private-equity-2024/usa-new-york/trends-and-developments.

7 The number of publicly listed U. S. companies has halved since 1996, *see Mark J. Roe/Charles C. Y. Wang*, Public Companies Are Alive and Well, The Wall Street Journal (8 May 2024), https://www.wsj.com/articles/public-companies-are-alive-and-well-eb294667. Germany has experienced a similar trend over the past decade, *see Michael Denga*, Die e-Aktie, AG, Issue 5 (2024), 137; *see also Katja Langenbucher*, Rückgang börsennotierter Unternehmen: Gründe und rechtliche Gegenmaßnahmen, ZGR, Issue 2-3 (2024), 287.

8 *Creditreform*, Insolvenzen in Deutschland, 1. Halbjahr 2024, p. 1, https://www.creditreform.de/fileadmin/user_upload/central_files/News/News_Wirtschaftsforschung/2024/Insolvenzen_in_Deutschland/2024-06-24_AY_OE_analyse_UE-halbjahr-2024.pdf (last accessed: 4 November 2024).

Locked-box provisions, if used, are facing heightened scrutiny. Buyers have been negotiating stricter anti-leakage provisions to limit sellers' withdrawals between the locked-box date and closing, seeking to prevent any erosion of the value of the business during this period.

Alongside these changes, bridging value gaps has become a key topic. In both Germany and the United States, the use of earn-out provisions, which defer portions of the purchase price contingent on post-closing performance, has increased.[9] While earn-outs are typically linked to specific financial metrics at a certain point in time, many are also tied to different key performance indicators. In another development, the prevalence of continued post-closing participation by sellers, for example through minority equity rollovers or seller-provided financing, has increased. Moreover, anti-embarrassment clauses, which trigger additional payments when exit proceeds exceed a certain threshold, are becoming more common in Germany. These approaches help buyers mitigate the risk of overvaluation and financing uncertainties, particularly in sectors with uncertain growth or during challenging financing markets.

2. Closing Conditions

In the 2010s, material adverse change ("**MAC**") clauses within closing conditions became increasingly rare in the German market, largely due to the seller-friendly environment, and in stark contrast to the U. S. market, where such clauses have been essentially universal features of both private and public M&A for decades. However, MAC clauses are now being discussed more frequently in Germany as economic volatility – triggered by the pandemic, supply chain disruptions, and geopolitical instability – has highlighted the need for protection against unforeseen disruptions. This is particularly relevant in sectors more susceptible to volatility, such as energy, technology, and manufacturing, and represents another area where German and U. S. practices have converged.

MAC clauses in Germany are mostly structured in line with U. S. market standards. In the United States, a MAC provision gives the buyer the right not to complete a transaction if the target experiences a "material adverse effect" (and may give the target an equivalent right in transactions involving equity consideration, where target shareholders will receive shares in the buyer). A U. S. MAC clause customarily includes numerous exceptions, however, that cannot constitute, or count toward, a MAC determination, including both general changes, like economic and market developments, changes in law and – particularly in more recent years – global pandemics, as well as transaction-specific effects, such as the impact of the announcement of the transaction on the target's relationships with its customers. MAC clauses generally also include an "exception to the exceptions" that allows certain of these effects – such as industry and economic effects – to be taken into account in determining the occurrence of a MAC to the extent the target is affected more than other industry participants. Although it is standard in the United States to include a MAC clause in a M&A agreement, the specific terms of the provision are often heavily negotiated. Despite this, a MAC remains a very high threshold that buyers seeking to walk away from transactions have cleared – or credibly threatened to clear – only in truly exceptional circumstances.[10]

While the prevalence of MAC clauses in Germany has increased, moving closer to U. S. practice, the contours of MAC clauses in Germany differ from those in the United States, often incorporating specific financial thresholds to clearly define when a MAC has occurred. These thresholds are typically linked to key financial metrics of the target company, such as a predefined percentage decrease in sales or EBITDA, or a specified euro amount. Alternatively, MAC clauses can incorporate temporal criteria, like the minimum duration of a supply chain interruption. This approach, which emphasizes specificity to minimize ambiguity, thereby ensuring both parties have a clear understanding of what constitutes a MAC event, differs from U. S. practice, where the less specific concept of "materiality" (which minimizes upfront negotiation, but inherently leads to greater uncertainty if the question of whether a MAC has occurred is later called) is widely accepted.

3. Representations and Warranties and W&I Insurance

a) Representations and Warranties

The German and U. S. M&A markets have experienced notable trends in representations and warranties that reflect the growing importance of topics such as environmental, social, and governance ("**ESG**") concerns, data security, artificial intelligence ("**AI**") and other compliance, and sanctions.

On both sides of the Atlantic, M&A agreements have seen additional emphasis on ESG and compliance topics in recent years, including renewed attention on traditional representations and warranties that cover environmental compliance, data protection, and compliance with laws. For example, it is not unusual for buyers to demand extensive representations regarding data security systems and incidents, particularly in transactions involving targets that have customer-facing businesses or otherwise handle sensitive personal data.

While sanctions warranties have been a long-standing feature in U. S. M&A transactions, in Germany, their relevance was typically limited to deals involving U. S. investors. Geopolitical developments, such as sanctions against Russia and the United States' exit from the Iran nuclear deal ("**JCPOA**"), have changed this dynamic, making sanctions compliance a central concern across the German M&A landscape. In transactions involving both U. S. and EU parties, the precise drafting of sanctions warranties is essential, as warranting compliance with U. S. sanctions may pose challenges for EU companies. U. S. sanctions often have an extraterritorial reach, meaning they can apply to non-U.S. companies and transactions outside U. S. borders, especially when U. S. dollars or U. S. persons are involved. To mitigate such extraterritorial effects, the EU has enacted "blocking statutes," which prohibit EU companies from complying with certain U. S. sanctions, particularly those related to Cuba and Iran, unless explicitly authorized by the European Commission. This means that a standard U. S. sanctions warranty could put an EU-based company in a position where it must comply with U. S. sanctions, risking non-compliance with EU law. Therefore, sanctions warranties in German M&A transactions must be carefully tailored to navigate the complexities of both U. S. and EU regulations, ensuring compliance without infringing EU laws.

9 Deal Point Data, LLC, www.dealpointdata.com, Earnout Data, grouped by Public or Private Target Type, for Announcement dates after 1 January 2018 (last accessed: 7 November 2024); *Werner Gleißner/Susann Ihlau/Kai Lucks/Reinhard Meckl*, Aktuelle Herausforderungen bei M&A, CF, Issue 1 (2023), 46 (52).

10 The first judicial finding of a MAC by courts in Delaware – the leading jurisdiction of incorporation for U. S. companies – occurred in 2018: in *Akorn, Inc. v. Fresenius Kabi AG et al.,* C. A. No. 2018-0300-JTL (Del. Ch. 2018), the Delaware court found that the target business had suffered a material adverse effect, such that the buyer was permitted to terminate the transaction.

In both the German and U.S. markets, AI-specific warranties have not yet become standard practice in M&A transactions. Most AI-related issues are still covered under general warranties for intellectual property, data protection, and compliance with laws. However, in transactions involving AI-focused companies, there is a growing trend towards more specific warranties, such as assurances regarding the training of AI models and the ethical use of AI systems. As the AI boom continues to reshape the business landscape, and regulators around the world race to respond, it is likely that transaction agreements will include additional representations and warranties regarding compliance and other AI-related matters.

b) W&I Insurance

In 2024, warranty and indemnity ("**W&I**") insurance (typically referred to as "representation and warranty insurance" in the U.S. market) has continued to cement its status as a market standard in private U.S. M&A transactions and larger German deals, maintaining its widespread use among financial investors while gaining increasing traction among strategic investors.[11] The factors that have contributed to the rise of W&I insurance include: transaction parties and their advisors have become more comfortable using W&I insurance to supplement or replace indemnification obligations in acquisition agreements as the market has matured; additional insurers have entered the space, with the number of carriers jumping from just six in 2014 to over 30 in 2023, leading to a more competitive underwriting environment; the process of obtaining a policy has become more streamlined, with the rise of dedicated and sophisticated brokers responsible for shepherding and coordinating insurers through the W&I process; insurance coverage has become increasingly available in larger transactions through large policies that involve multiple carriers; and insurers have been willing to proceed without the seller having any "skin in the game" in the form of indemnity obligations.

This growing trend has significantly streamlined negotiations, primarily through the adoption of the "zero liability" concept for sellers. Under this concept, sellers can limit their liability to a minimal amount, thereby reducing their post-transaction risk exposure and, in turn, making sellers more willing to accommodate the representations and warranties requested by buyers while minimizing the significance of heavily negotiated indemnification provisions. However, fundamental warranties – such as those related to title, authority, capacity, and solvency – are often contractually exempt from this "zero liability" standard, thereby imposing full liability on the seller, particularly in the German market. Additionally, German law prohibits excluding liability for fraud and willful misconduct and Delaware case law in the United States does not permit parties to eliminate liability for intentional fraud, resulting in some residual liability for the seller.[12]

Despite the maturity of the W&I market, challenges persist in securing W&I insurance for complex carve-out transactions and deals in uncertain jurisdictions. Insurers are especially cautious when carve-outs are not completed at the time of signing, as the lack of independent financial statements, unclear asset allocation, and the need for transitional services make risk assessment more difficult. This often necessitates policy *addenda* and further reviews once the carve-out steps are finalized. While thorough due diligence is crucial for securing W&I insurance coverage in general, it becomes even more vital in these situations, as the scope of coverage – and specific or categorical exclusions – heavily depends on whether insurers are comfortable that they, and the buyer they are insuring, have a clear understanding of the target's financial and operational landscape, helping them gauge the true extent of risks.

In deals backed by W&I insurance, sellers often set strict material adverse effect thresholds in warranties or apply knowledge qualifiers, knowing that buyers can typically secure materiality and knowledge scrapes from the insurer to address coverage gaps. This approach balances a seller's desire to limit liability and disclosure requirements with a buyer's need for broader insurance coverage, ultimately streamlining negotiations.

4. Regulatory

Regulators in Germany, the United States and other jurisdictions have ushered in a new, more aggressive and less predictable era of deal enforcement. Because of this and other factors, deals are taking longer to close, and although terminated transactions remain exceptional rather than commonplace, more deals are not getting done. In the decade that ended in 2022, increased review and scrutiny by regulators extended the time needed to advance from announcement to approval by 35 % for the 100 largest global deals done each year.[13] Based on these recent trends, regulatory scrutiny continues to play a defining role in shaping the M&A landscape in 2024, necessitating an evolution in deal terms to address increasingly stringent requirements for regulatory filings, timelines for regulatory reviews and regulatory challenges to transactions.

a) Regulatory Filing Requirements and Closing Conditions

The German foreign direct investment ("**FDI**") regime has undergone significant tightening by far-reaching reforms over the last several years,[14] introducing extensive mandatory notification and approval requirements with strict gun-jumping prohibitions in various sectors. As a consequence, the Federal Ministry for Economic Affairs and Climate Action ("**BMWK**") has substantively broadened its review pro-

11 Studies have shown that from 2022 to early 2023, approximately 55 % of private transactions in North America involved W&I insurance, up from approximately 29 % in 2016 to 2017. *See Am. Bar Ass'n*, Private Target Mergers & Acquisitions Deal Points Study 121 (18 December 2023); *see also SRS Acquiom*, 2023 M&A Deal Terms Study (2023). For details on the rise of W&I insurance in Europe, *see HWF*, Market Claims Study 2016-2023 (October 2023).

12 *See Abry Partners V, L.P.* v. *F&W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006) (holding that, as a matter of public policy, a contract party cannot limit its liability for intentional fraud, but contractual liability limitations attributable to lesser states of mind, such as recklessness or gross negligence, are permissible).

13 *Jake Henry/Mieke Van Oostende*, Top M&A Trends in 2024, McKinsey & Company (20 February 2024), https://www.mckinsey.com/capabilities/m-and-a/our-insights/top-m-and-a-trends-in-2024-blueprint-for-success-in-the-next-wave-of-deals.

14 First Act on the Amendment of the Foreign Trade and Payments Act (*Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes*), Federal Law Gazette I 2020, p. 1637; Act on the Amendment of the Foreign Trade and Payments and the War Weapons Control Act (*Gesetz zur Änderung des Außenwirtschaftsgesetzes und des Gesetzes über die Kontrolle von Kriegswaffen*), Federal Law Gazette I 2021, p. 1275; 12th Amendment to the Foreign Trade and Payments Ordinance (*Zwölfte Verordnung zur Änderung der Außenwirtschaftsverordnung*), Federal Gazette, Official Part (28 December 2018), V1; 15th Amendment to the Foreign Trade and Payments Ordinance (*Fünfzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung*, Federal Gazette, Official Part (2 June 2020), V1; 16th Amendment to the Foreign Trade and Payments Ordinance (*Sechzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung*), Federal Gazette, Official Part (28 October 2020), V1; 17th Amendment to the Foreign Trade and Payments Ordinance (*Siebzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung*), Federal Gazette, Official Part (30 April 2021), V1.

cesses,[15] focusing particularly on transactions in sectors critical to national security, such as advanced technology, defense, and critical infrastructure. Moreover, investments originating from non-EU countries, especially those involving state-owned enterprises from China and Russia, are subject to heightened scrutiny. Similar developments can be observed across nearly all EU Member States. The tightening of regulatory oversight has led to a notable rise in required FDI filings in M&A transactions, prompting a corresponding increase in closing conditions related to regulatory approvals in the German market.

Although the broader EU merger control landscape has not seen substantial shifts in recent years, a key development is the increased scrutiny of "killer acquisitions" – takeovers of innovative start-ups or emerging companies to eliminate future competition that fall below traditional merger control revenue thresholds – by merger control authorities. While the European Commission lacks the authority to review subthreshold transactions, and a landmark European Court of Justice ruling on 3 September 2024 confirmed that such review would exceed the Commission's powers,[16] several EU Member States have enacted laws allowing their competition authorities to request filings for M&A deals that fall below the standard filing thresholds.[17] The increased risk of subthreshold reviews in these types of transactions, potentially even post-closing, has led parties to include specific closing conditions in purchase agreements, such as a requirement for a soft comfort letter from the relevant authority.

The EU Foreign Subsidies Regulation ("**FSR**"), which came into force last year, has introduced new filing obligations, resulting in the inclusion of corresponding closing conditions in purchase agreements. Transactions meeting certain thresholds concerning non-EU subsidies must be notified to the European Commission and cannot proceed without its approval. Deals involving significant subsidies, particularly from countries like China, are subject to increased scrutiny.[18] In the German M&A landscape, the FSR's impact has already been noticeable. By September 2024, 89 M&A deals had been formally notified to the European Commission, surpassing initial expectations, with 76 cases cleared by then. Despite this surge in notifications, the market impact has been moderate, as the European Commission has yet to block any transactions under the FSR.[19]

The scope and impact of regulatory scrutiny of foreign investments has also expanded significantly over the last decade in the United States, particularly following passage of the Foreign Investment Risk Review Modernization Act ("**FIRRMA**") in 2018, and a series of implementing rules adopted by the U.S. Department of Treasury. As FIRRMA has been implemented, the role of the Committee on Foreign Investment in the United States ("**CFIUS**") and the need to factor the risks and timing of the CFIUS review process into deal analysis and planning have been further heightened. Although notification of most transactions remains voluntary, FIRRMA introduced mandatory notification requirements for certain transactions, including investments in U.S. businesses associated with critical technologies, critical infrastructure, or sensitive personal data of U.S. citizens where a foreign government has a "*substantial interest*" (*e.g.*, 49 % or more) in the acquiror. Critical technology and critical infrastructure are broad and flexible concepts, and FIRRMA includes in that rubric "*emerging and foundational technologies*" used in computer storage, semiconductors and telecommunications equipment sectors, and critical infrastructure in a variety of sectors. Supply chain vulnerabilities during the pandemic also increased the likelihood that investments in U.S. healthcare, pharma and biotech companies will be closely reviewed by CFIUS. As a result, evaluating, and negotiating for the allocation of, foreign investment risks has become increasingly important in inbound U.S. M&A.

b) Commitments and Reverse Break Fees

While the German market remains relatively seller-friendly regarding regulatory deal terms, and sellers still aim to impose "hell or high water" standards where possible, there is a growing trend toward more nuanced risk-sharing provisions in purchase agreements, particularly in deals involving PE investors. These provisions may include specific commitments from the buyer to take targeted actions to secure approval. In the context of FDI, this may involve restrictions on certain business activities, limitations on shareholder influence or corporate body composition, ring-fencing sensitive information and technology, or maintaining certain operations within Germany. For merger control, this often encompasses obligations to dispose of assets, properties, or businesses of the buyer or its affiliates. The increasing inclusion of "reverse break fees" has become another notable feature of purchase agreements, stipulating a fee payable by the buyer to the seller if the transaction fails to close due to the inability to secure regulatory clearances.

Likewise, in the United States, regulatory risk sharing is often one of the most heavily negotiated aspects of M&A transactions. Regulatory provisions are negotiated against the backdrop of the particular industry – with certain industries, such as technology and healthcare, facing added scrutiny in recent years – and the positions of the two companies in that industry, and also reflect the relative leverage of the parties to the transaction. Regulatory risk may be allocated through efforts standards, divestiture commitments, "reverse break fees," obligations to litigate with the government if it seeks to block a transaction, restrictions on other transactions, and other features, and may be tailored, even within the same agreement, for different types of regulatory risks. For example, in the United States, an increasing number of cross-border transactions in recent years have sought to mitigate non-consummation risk related to foreign investment review that

15 Since 2019, the number of FDI cases screened by the BMWK almost tripled, *see BMWK*, Investment Screening in Germany: Facts & Figures, BMWK (30 January 2024), https://www.bmwk.de/Redaktion/EN/Publikationen/Aussenwirtschaft/investment-screening-in-germany-facts-figures.pdf?blob=publicationFile&v=2.

16 The European Commission recently tried to expand its jurisdiction under Article 22 of the EU Merger Regulation by encouraging referrals from Member States even in cases in which the national filing thresholds were not met (Illumina/Grail), *cf. European Commission*, Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases 2021/C 113/01, C/2021/1959, OJ C 113 (31 March 2021), p. 1. While the EU General Court had validated that practice in July 2022 (CJEU, Judgment of 13 July 2022, *Illumina*, T-227/21, EU:T:2022:447), the Court of Justice decided upon appeal in its landmark judgment dated 3 September 2024 (ECJ, Judgment of 3 September 2024, *Illumina*, C-611/22 P / C-625/22 P, EU:C:2024:677) that the Commission overstepped its powers.

17 For example, such rules now exist in Denmark, Ireland, Italy, Sweden, Slovenia, Lithuania, Latvia and Hungary. Germany and Austria have already introduced transaction value thresholds in 2017 in order to be able to capture "killer acquisitions," even if traditional turnover thresholds are not met.

18 *See Christian v. Köckritz/Harald Weiss/Kristina Winkelmann*, The EU Foreign Subsidies Regulation: What Antitrust Lawyers Should Know About the New Instrument, American Bar Association (ABA), Antitrust Magazine Online (June 2023), https://www.americanbar.org/groups/antitrust_law/resources/source/2023-june/.

19 If the parties determine that FSR filing obligations are not applicable, purchase agreements increasingly incorporate specific representations and warranties attesting to the absence of foreign subsidies that might otherwise necessitate an FSR review.

is undertaken by CFIUS by including reverse break fees specifically tied to the CFIUS review process.

c) Long Stop Dates

Heightened regulatory scrutiny has prompted significant changes to long stop date provisions. If merger control or FSR proceedings advance to phase II in the EU, or a "second request" in the United States, or if in-depth FDI or CFIUS proceedings are initiated, the review process can take several months, and potentially well over a year, often with unpredictable timelines due to the possibility of extensions and "stop-the-clock" mechanisms.[20] For this reason, long stop date provisions within purchase agreements have become an increasing area of focus. While such provisions originally mostly only included a specific date, purchase agreements may now incorporate extension clauses, allowing the long stop date to be extended automatically or by one or both parties under specific circumstances, such as ongoing regulatory reviews. This flexibility is crucial to prevent deal collapse due to protracted regulatory proceedings. These clauses require meticulous drafting to outline the conditions under which an extension is allowed and can also have knock-on effects, such as making it more difficult or expensive for the buyer to obtain committed financing to provide certainty of funds at closing where the lenders are subject to market risks during a period that may be measured in years.

d) Revised U. S. Competition Guidelines

U. S. antitrust agencies have embarked on a wide-ranging effort to slow down M&A activity through the adoption of new merger guidelines and informal and formal rulemakings. In December 2023, the agencies jointly issued new merger guidelines that underscore the current administration's commitment to aggressive enforcement of the antitrust laws. The guidelines significantly lower existing market concentration thresholds at which the agencies will presume a transaction violates the antitrust laws and introduce new share-based thresholds, including for transactions resulting in a combined share of greater than 30 % where one party had a share of 10 % or more.

The new guidelines also memorialize more expansive theories of harm and introduce new theories, including one based on "*serial acquisitions*" that targets PE roll-up strategies and makes clear that the competitive effects of such roll-ups cannot escape scrutiny even if no single transaction, on its own, is anticompetitive.[21] In September 2023, the U. S. Federal Trade Commission (the "**FTC**"), one of the two primary U. S. antitrust enforcement agencies, filed its first lawsuit based on a "serial acquiror" theory against PE investor Welsh, Carson, Anderson & Stowe, alleging that, beginning in 2012, Welsh Carson directed a "roll-up scheme" to monopolize and reduce competition for anesthesia services in certain markets through the acquisition of over a dozen anesthesia practices. The complaint seeks unspecified structural relief that could include unwinding prior consummated deals, which mostly were small enough not to require filings under the U. S. Hart-Scott-Rodino Act.

III. Development of Key Terms in Public M&A

Public M&A transactions in Germany are subject to stringent statutory requirements, primarily outlined in the Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*) and the Offer Ordinance. These frameworks impose comprehensive regulations on key deal terms,[22] particularly in public offers, governing aspects such as minimum price requirements, acceptance periods, and permissible offer conditions. Despite the influence of PE investors, particularly from the United States, who have introduced certain changes to the German market, the terms of public M&A deals therefore remain closely regulated.

In the United States, in contrast, deal terms generally reflect market practice, with certain constraints imposed by a web of common or statutory law of the jurisdictions of organization of the transaction participants and the U. S. Securities and Exchange Commission, rather than comprehensive regulatory requirements. As a result, while certain transaction terms may be subject to legal limitations – such as the size of a fiduciary break fee payable by a Delaware incorporated target to accept a topping bid, or the duration for which a tender offer must be made available to a target's shareholders – U. S. M&A deal terms are driven first and foremost by market practice and, in the case of federal law, a focus on public disclosure to enable informed shareholder voting rather than specifically prescribed or proscribed transaction provisions.

1. Offer Price and Premiums

In Germany, offer prices in public M&A transactions are subject to stringent regulations, resulting in limited flexibility for innovative pricing structures and making cash the predominant form of consideration in public offers. In particular, statutory requirements strictly enforce a minimum offer price to protect shareholders' interests. For public takeover offers, the price must be at least equal to the highest price paid or agreed upon by the bidder for the target's shares within the six months prior to the offer announcement. Additionally, the offer price must not fall below the volume-weighted average stock market price of the target's shares over the three months preceding the offer (or six months in the case of delisting offers). These regulations ensure fair treatment for shareholders but inherently restrict the bidder's flexibility in structuring the offer price. Only in the case of simple offers, *i. e.*, public offers that neither aim at the acquisition of control nor at the delisting of a target, is a bidder not subject to mandatory minimum price requirements.

In terms of premium trends, recent years have seen a clear divergence between delisting offers and other public offers. The consideration in delisting offers typically equals the statutory minimum offer price or, at most, includes single-digit premiums, since these offers are centered on providing an exit rather than a strategic acquisition and are often structured to follow takeover offers in quick succession. This

20 In FDI proceedings, for example, the BMWK may initiate an in-depth review within two months of becoming aware of a transaction. While this in-depth review is generally subject to a statutory four-month period, there are several mechanisms to "stop the clock," and even a unilateral power of the BMWK to extend the review in complex cases. As a result, in practice, these cases may take nine to twelve months or even longer.

21 On 23 May 2024, the FTC and Department of Justice, Antitrust Division ("**DOJ**") launched a public inquiry to "*identify serial acquisitions and roll-up strategies throughout the economy that have led to consolidation that has harmed competition.*" In their Request for Information, the FTC and DOJ define "*serial acquisitions*" as "*corporate consolidation strategies that occur when a company becomes larger — and potentially dominant — by buying several smaller firms in the same or related business sectors or industries.*" *FTC/DOJ*, FTC and DOJ Seek Info on Serial Acquisitions, Roll-Up Strategies Across U. S. Economy, Federal Trade Commission (23 May 2024), https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-doj-seek-info-serial-acquisitions-roll-strategies-across-us-economy.

22 The key deal terms in public M&A transactions in Germany are outlined in the offer document which the bidder submits to the Federal Financial Supervisory Authority ("**BaFin**"). Deal terms may also be contained in an investment agreement or business combination agreement entered into between the bidder and the target in connection with a public offer.

delisting trend has significantly contributed to the overall decline in premium payments. This has been particularly evident in the past two years, where only about half of public M&A transactions included a premium. For public takeover offers not aimed at delisting, premiums had traditionally ranged between 20 % and 30 % over the volume-weighted average stock price in the three months preceding the offer. However, market uncertainties and more conservative bidding strategies led to a decline, with the average premium for these transactions falling to 18.2 % in 2023.[23] In 2024, while the general trend toward lower premiums has so far persisted (largely due to the high number of delisting offers), certain transactions have defied this pattern. Notably, the €3.1 billion KKR-led acquisition of ENCAVIS included a 33 % premium, while Novartis' takeover of MorphoSys featured an exceptionally high premium of 142 %, which appears to be an outlier rather than indicative of broader market behavior, likely driven by a desire to acquire control in sectors with significant growth potential or innovative technologies.

In contrast to the German market, acquirors of U. S. companies are not subject to minimum offer price obligations, and transaction prices and premiums are therefore determined by the negotiations between the parties against a backdrop of market practice and industry trends. In the United States, unaffected acquisition premiums, on average, have been on a slight downward trajectory recently (48.4 % in 2022 versus 47.7 % in 2023 and 37.7 % year-to-date in 2024). Notably, in the past five years, the healthcare and business services sectors have seen the highest premiums on average, at 66 % and 63.2 %, respectively, whereas, the energy and financial services sectors have yielded the lowest premiums on average, at 13.4 % and 29.7 %, respectively, with the technology sector falling in between, at 35.8 %.[24]

2. Offer Conditions

Public takeover offers in Germany typically involve a very limited set of conditions, largely due to the stringent legal framework. In the case of mandatory offers, conditions beyond regulatory approvals are not permitted, while delisting offers allow no conditions. With the rise in delisting offers in recent years, there has been a noticeable scarcity of varied offer conditions. Even in public offers not targeting a delisting, including conditions within the bidder's control is prohibited. Consequently, such offers have historically been confined primarily to regulatory conditions and, occasionally, minimum acceptance thresholds. As with private M&A transactions, regulatory offer conditions have become increasingly vital in public offers, particularly due to the enforcement of stricter FDI regimes and the introduction of the FSR.

Public company transactions in the United States also typically include only a limited set of conditions, although this is a product not of a particular legal framework, but rather market practice. In U. S. public M&A transactions, closing conditions generally are limited to the receipt of required regulatory and shareholder approvals, the absence of a MAC, and the accuracy of representations and warranties and compliance with covenants, subject to materiality qualifications.

Although MAC clauses traditionally have been less common in German public takeover offers, in recent years, likely influenced by the increasing presence of U. S. investors in the German market, and due to a growing need for flexibility in public M&A transactions amidst volatile market conditions, MAC clauses in public M&A are being discussed more frequently.

In the United States, MAC clauses in public deals generally track the provisions included in private M&A, as described above, subject to negotiation between the parties. In Germany, in contrast, broad MAC clauses without narrowly defined and specific triggers remain scarce in public M&A transactions, as they are mostly prohibited under German law. Notably, tying conditions directly to the target's share price is generally not permissible under German law, as the share price may easily be influenced by the bidder. Instead, offer documents in Germany occasionally include specific market MAC clauses, where the offer is contingent on a specific stock index (such as the DAX, MDAX, or SDAX) maintaining a minimum value on the last or penultimate day of the acceptance period.[25] There are also market MAC clauses that require the index not to fall below a certain threshold for several consecutive days during the acceptance period. Another variation of market MAC clauses requires that trading on the relevant stock exchange not be suspended for more than a few consecutive days. These features would not be found in U. S. M&A agreements.

Business MAC clauses, though rare, have appeared in some public M&A transactions in Germany. These clauses stipulate that the target company has not released, nor was obligated to release, any new information under Article 17 Market Abuse Regulation ("**MAR**") that could cause a specific financial measure like group EBITDA to decrease beyond a certain threshold.[26]

Similarly, compliance conditions – often referred to as compliance MAC clauses – are increasingly used as offer conditions in Germany, requiring that no material compliance breaches occur between the publication of the offer document and the expiration of the acceptance period.[27] These conditions typically mandate that neither the target nor its governing bodies, officers, employees, or agents have engaged in or are suspected of criminal or administrative offenses, including bribery, corruption, antitrust violations, money laundering, or sanctions. This increased attention to compliance is driven by enhanced regulatory scrutiny and recent geopolitical factors, notably Russia-related sanctions.

23 For details on premiums in public offers in Germany, *see* published offer documents pursuant to Section 14 of the Securities Acquisition and Takeover Act, https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Liste/WPUeG/li_angebotsunterlagen_wpueg_14.html (last accessed: 7 November 2024).

24 The unaffected premium percentages cited indicates the difference between the price per share offered as consideration in the transaction and the "unaffected price," reflected as a percentage. The "unaffected price" is the target's closing stock price on the date that is one calendar day prior to the first public disclosure regarding a potential deal involving the target and on which the target's stock price was unaffected by the news of the deal; Deal Point Data, LLC, www.dealpointdata.com, Premiums Data, grouped by Target Industry Sector, for Announcement dates after 5 October 2019 (last accessed: 4 October 2024).

25 *E.g.*, offer document re. public acquisition offer of Schaeffler AG re. all shares in Vitesco Technologies Group Aktiengesellschaft dated 15 November 2023, section 11.1.3; offer document re. delisting acquisition offer of Telefónica Local Services GmbH re. all shares in Telefónica Deutschland Holding AG dated 5 December 2023, section 13.1.

26 *E.g.*, offer document re. public acquisition offer of Schaeffler AG re. all shares in Vitesco Technologies Group Aktiengesellschaft dated 15 November 2023, section 11.1.4.

27 *E. g.*, offer document re. public takeover offer of Elbe BidCo AG re. all shares in ENCAVIS AG dated 24 April 2024, section 12.1.9; public takeover offer of Novartis BidCo AG regarding all shares in MorphoSys AG dated 11 April 2024, section 12.1.4; offer document re. public acquisition offer of Schaeffler AG regarding all shares in Vitesco Technologies Group Aktiengesellschaft dated 15 November 2023, section 11.1.6.

In U.S. transactions, compliance risks traditionally have been, and continue to be, addressed in closing conditions, but in a different manner – typically, the buyer is protected through a condition that requires that the target's representations and warranties (which customarily address compliance matters) are accurate at closing. This closing condition, however, is usually subject to a MAC or materiality qualification, consistent with the general view in U.S. transactions that the buyer generally should not be permitted to walk away from a transaction, except in truly extraordinary circumstances.

In Germany, minimum acceptance thresholds, typically between 50 % plus one share and 75 % of the target shares,[28] still remain common, but they have become less prominent in recent years.[29] The declining use of this condition stems from the challenge of accurately predicting shareholder behavior, as institutional investors often tender their shares only towards the end of the acceptance period. Consequently, bidders often lack the time to respond and waive the minimum acceptance threshold if it is not met. In the United States, required shareholder tender or approval levels are determined by reference to the law of the jurisdiction of organization of the target company and any specific requirements included in the target's organizational documents, with a requirement that the transaction must be approved, or obtain tenders of, a majority of the outstanding shares being the most common threshold.[30]

3. Financing Provisions

In practice, many public offers in Germany and in the United States are at least partially financed through debt, so M&A agreements often require the target to provide reasonable cooperation and assistance in arranging the bidder's debt financing.[31] This may include attending meetings with rating agencies and potential lenders, aiding with due diligence, and providing access to financial information and key records. However, these provisions must be carefully considered in both Germany and the United States. In Germany, it is crucial to avoid conflicts with the German Stock Corporation Act (*Aktiengesetz*), which prohibits stock corporations from providing financial assistance for acquiring its own shares. Once the offer is published, financing covenants become less significant, as the bidder must have already secured the necessary funds upon the offer's publication. In the United States, it is critical for target companies to agree only to cooperation obligations with which they are certain they can comply, as failure to do so could result in a breach of a covenant that, if material and uncured, may allow the acquiror to terminate the transaction.

4. Litigation Trends

In the United States, public company M&A transactions routinely generate litigation, often alleging disclosure violations and/or violations by boards of directors of their fiduciary duties. In the vast majority of deals, this litigation is a mere nuisance and is resolved through dismissals or small settlements. In certain instances, however, litigation can give rise to significant judgments and noteworthy legal developments. Indeed, there have been a number of noteworthy cases in 2024, including the Delaware Court of Chancery's decisions in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.* and *Sjunde AP-fonden v. Activision Blizzard*. Both cases called into question longstanding M&A market practices, and contributed to the swift enactment of amendments to the Delaware corporate law to mitigate the effects of the rulings.

In *Moelis*, the plaintiffs challenged certain contractual rights granted to the founder of Moelis & Company in a stockholders agreement prior to the company's initial public offering. The plaintiffs maintained that the various consent rights granted in the stockholders agreement restricted the board of directors from managing the business and affairs of the company in the manner dictated by Delaware law. While the Court acknowledged that it is common market practice to include many of these provisions in a stockholders agreement, the Court ultimately ruled in favor of the plaintiffs and held that the consent rights were invalid.[32] This surprising decision resulted in changes to Delaware corporate law that expressly authorize a corporation to enter into agreements that grant stockholders the type of consent rights at issue.

Similarly, in *Activision*, the Court of Chancery held that common practices the board of Activision Blizzard, Inc. followed in approving its October 2023 merger with Microsoft Corporation may not have complied with technical requirements under Delaware corporate law relating to mergers, and therefore the merger may have been invalid. Notwithstanding customary U.S. practice in which a merger transaction is approved by the target's board of directors on the basis of the material terms of the transaction but prior to the finalization of the merger agreement, which often occurs during overnight hours prior to an early morning announcement, the Court found that the approval was inadequate because the form of the merger agreement presented to the board did not include all required terms. In response, Delaware adopted amendments to its corporate law providing, among other things, that any document that requires board approval may be approved by the board in "substantially" final form.

Unlike the United States, court proceedings in public M&A transactions in Germany are relatively rare. However, two recent decisions by the German Federal Court of Justice – on the takeover of Postbank by Deutsche Bank and the takeover of STADA by Nidda Healthcare – attracted attention for their impact on German takeover practices, particularly concerning minimum price requirements. In the *Postbank* case,[33] the court ruled that the mere existence of interest protection clauses (*Interessenschutzklauseln*) in share purchase agreements could be seen as a pre-acquisition (*Vorerwerb*), thereby influencing the statutory minimum offer price in a subsequent takeover offer, even if the actual share transfer was to occur much later. This decision highlights the importance of avoiding provisions in share purchase agreements entered into in connection with a public offer that might affect voting rights. In the *STADA* case,[34] the German Federal Court of Justice built on the principles of the *Celesio* case[35] and found

28 A 75 % majority of the votes cast at the general meeting in Germany is required to implement a domination and profit and loss transfer agreement, a means to grant the bidder substantial control over the target.

29 *E.g.*, offer document re. public takeover offer of Elbe BidCo AG re. all shares in ENCAVIS AG dated 24 April 2024, section 12.1.5; offer document re. public takeover offer of Novartis BidCo AG re. all shares in MorphoSys AG dated 11 April 2024, section 12.1.1.

30 Although the requirement to obtain complete ownership of the target may vary depending on the law of its jurisdiction of organization and its organizational documents, it often is possible to obtain full ownership with the approval or tender of a majority of the target's outstanding shares.

31 *E.g.*, offer document re. public takeover of Mosel BidCo SE re. all shares in Software AG dated 17 May 2023, section 8.2.3.

32 *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, No. 2023-0309-JTL (Del. Ch. 2024).

33 Bundesgerichtshof (*BGH*) [Federal Court of Justice] Judgement 13 December 2022 – II ZR 9/21, NZG 2023, 1318 (Ger.).

34 Bundesgerichtshof (*BGH*) [Federal Court of Justice] Judgement 23 May 2023 – II ZR 219/21, NJW 2023, 2573 (Ger.).

35 Bundesgerichtshof (*BGH*) [Federal Court of Justice] Judgement 7 November 2017 – II ZR 37/16, NJW-RR 2018, 99 (Ger.).

that if a bidder agrees to a higher price than the takeover bid for a subsequent domination and profit and loss transfer agreement ("**DPLTA**") in a separate agreement with a shareholder to secure the option to demand such shareholder's vote in favor of the DPLTA in the target's general meeting, that higher price must be paid to all shareholders that accepted the takeover offer as the minimum price. This ruling prevents bidders from securing support for structural changes through separate agreements with shareholders that result in a higher price.

IV. Conclusion

Despite the regional differences and legal complexities that have historically set German and U. S. M&A practices apart, there is a noticeable shift toward greater alignment, especially in private M&A. Germany's traditionally seller-friendly market is gradually moving toward a more balanced – and at times, even buyer-friendly – market. In public M&A, the differences are more pronounced, but common trends, such as the growing prevalence of delisting or take-private offers and increasing regulatory scrutiny, are influencing both markets in similar ways. Looking ahead, both the German and U. S. M&A markets are positioned for potential growth despite the challenges posed by geopolitical uncertainties, regulatory hurdles, and financing constraints. In both markets, participants will need to remain agile, carefully navigating evolving trends and requirements relating to deal terms to successfully adapt to the changing M&A landscape.[36] ■

36 With thanks to Dr. Christian Cascante, Dr. Markus Martin, Aylin Hoffs, and Dr. Harald Weiß, all from Gleiss Lutz, for the discourse on public M&A, FDI, and merger control and FSR, respectively.