Global Private M&A Guide - Limited External Content - Germany

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

This is the **Germany** section. Select a topic from the menu and explore the questions within.

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# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

Typical legal due diligence issues in Germany include commercial contracts (e.g., customer, supplier and distribution agreements), financing agreements (e.g., bank and shareholder loans, guarantees), real estate (owned and leased), employment and pension matters, IP, IT/software, data protection, regulatory/public law, environmental law and litigation. In a share deal (but typically not in an asset deal), corporate matters (e.g., title chain, corporate history and past re-organizations, articles, by-laws, shareholder agreements, resolutions of corporate bodies, profit and loss transfer agreements) are the main focus of the legal due diligence.

For quite some time, compliance issues, in particular relating to anti-bribery, corruption, money laundering, sanctions, export control and competition law, have also received increased attention in due diligence exercises. Compliance due diligence includes the analysis of past compliance violations and incidents, as well as the assessment of the adequacy and robustness of the target's compliance management system and internal compliance policies, procedures and responsibilities.

Legal due diligence is typically limited to a review of documents in a virtual data room, sometimes enhanced by expert interviews. For larger auction sales, it is common for a seller to provide a vendor due diligence report or a legal fact book as part of the information granted to bidders. Legal tech tools and artificial intelligence (AI) are increasingly being used to facilitate the due diligence and to create synergies between the due diligence work streams. This, for example, includes the use of cooperative due diligence platforms, AI-based software (e.g. for translations and document analysis) as well as automation tools for due diligence reports.

Issues identified in the due diligence are typically dealt with by: (i) having them rectified by the seller before signing/closing (e.g., obtaining waivers from third parties if change-of-control provisions have been identified in commercial contracts): (ii) specific indemnities regarding specific known risks identified in the course of the due diligence (e.g., environmental risks, ongoing/threatened litigation); or (iii) general representations and warranties (e.g., the existence and ownership of title to the shares that are being sold).

**Pricing and payment**

In a typical private M&A transaction (share deal or asset deal) where the purchase price is paid in cash (instead of shares), there is no statutory requirement to obtain an independent appraisal to support the valuation of the target. Nevertheless, the buyer's management will typically also conduct financial due diligence to determine the purchase price. In this context, it is common to involve third-party financial advisers to obtain a valuation of the target or a fairness opinion. For German buyers, this is mainly done to comply with management duties. The management of a German company has a general duty to make informed decisions and be able to justify its decision for an acquisition and the amount of the purchase price paid for the target.

Independent appraisals may be required where the purchase price is not paid in cash and in other types of corporate transactions, such as capital contributions in kind and/or reorganizations pursuant to the German Transformation Act.

There are generally no restrictions regarding the pricing or the payment of the purchase price from a legal perspective. Most commonly, the purchase price is paid in euros. However, a payment in other currencies or a consideration by way of shares is also possible. If the purchase price does not reflect the fair market value or if sellers receive varying purchase prices per share, this may have tax consequences.

**Signing/closing**

*Share sale*

The sale of shares in a German limited liability company (Gesellschaft mit beschränkter Haftung (GmbH)) is the most common acquisition structure in Germany. It requires the share purchase agreement (SPA), including all exhibits and annexes, to be notarized (i.e., notarially recorded) by a German notary. Notarization is formalistic and somewhat cumbersome since all parties have to be present at the notary appointment (either in person or by proxy based on a power of attorney), and the whole SPA has to be read aloud by the notary. The statutory notary fees triggered by the notarization depend on the value of the transaction and can be quite significant.

SPAs relating to shares in other types of companies (e.g., stock corporations or partnerships) generally do not require notarization and may be entered into by simply signing the SPA.

*Asset sale*

An asset sale does not typically require any notarization unless the sold assets include owned real estate, shares in a GmbH or the seller is selling all or almost all of its assets as a whole. An asset purchase agreement (APA) is typically more extensive and detailed, because it has to specify all individual assets, liabilities, contracts, employees, etc., that make up the sold business. Particularly with regard to tangible assets, German law requires an exact specification of the assets in the APA or in an exhibit. In an asset deal, the parties should allow sufficient time, and involve personnel with adequate knowledge of the target's business, for the preparation of the relevant asset lists.

Buyers that do not already have a German entity that can acquire the assets making up the sold business usually set up a special purpose vehicle to act as the buying entity and to conduct the German business operations going forward.

*Closing*

In most cases, signing and closing do not occur simultaneously because of the required merger clearance, foreign investment approval and/or approval pursuant to the new EU Foreign Subsidies Regulation (see below). Therefore, a separate closing usually has to take place. At closing, the actual share transfer takes place and the purchase price is paid. Often, the SPA or the APA also provides for other closing conditions and closing actions.

## Approvals/registrations

**Foreign investment restrictions**

Germany has a mandatory and suspensory foreign investment screening procedure, which means that transactions that meet the relevant criteria need to be notified to the relevant authority and cleared before they can be completed.

The foreign investment review (FIR) regime is limited to certain sectors. For further information, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

Germany has a mandatory and suspensory merger control regime, which means that transactions that meet the relevant criteria need to be notified to the competition authority and cleared before they can be completed.

It is also necessary to consider EU merger control rules. Mergers involving companies active in several member states and reaching certain turnover thresholds are examined at European level by the European Commission. This allows companies trading in different EU member states to obtain clearance for their mergers in one go. For further information, see the more detailed section on "Antitrust/merger control".

**EU Foreign Subsidies Regulation**

As of 12 October 2023, the EU Foreign Subsidies Regulation (FSR) requires qualifying transactions, and bids in response to certain large public tenders in the EU, to be notified for upfront clearance by the European Commission where the companies involved have benefited from foreign financial contributions (a broad concept) that exceed certain (low) thresholds. Acquisitions of a target with annual revenues in the EU of at least EUR 500 million will trigger FSR deal notifications. Acquisitions of smaller targets will not, regardless of deal value. Outright mergers and large joint ventures will trigger a notification requirement if the EUR 500 million EU-wide revenue threshold is met by one of the merging parties or the joint venture.

**Other regulatory or government approvals**

Approval by the competent regulator may be required for acquisitions of companies that are subject to specific regulatory supervision, such as financial institutions, airports, telecom providers, etc.

## Employment

Share deal: In share sales, there is no change in the employer/employee relationship. Neither consent from employees nor notices to employees are required. However, an economic committee or, in the absence of such committee, the works council of the entity to be sold needs to be notified in advance of the contemplated sale. All rights, duties and liabilities owed by, or to, the employees of the entity to be sold continue to be owed by, or to, the entity. The buyer, therefore, inherits all those rights, duties and liabilities by virtue of being the new owner of the company to be sold.

Asset deal: In an asset sale that involves the transfer of a business (or part of a business) as a going concern, employees belonging to the business automatically transfer to the buyer by operation of law, and the parties to the transfer of business are not free to choose which employees will transfer with the business. Employees have a right to object to their transfer within one month from the time they are duly informed about the transfer. This information has to be provided in text format and is subject to strict requirements.

Terms and conditions of employment in principle have to remain unchanged after the transfer and the new employer by law has to recognize the employees' years of service. The buyer as the legal successor of the former employer becomes fully liable for all employment-related liabilities. Compensation for the automatic assumption of liabilities should be addressed in the transaction documents.

There is no general legal obligation to consult with works councils or the employees regarding the asset deal and the transfer of the employees. However, reorganizations and operational changes that need to be implemented in conjunction with the transaction (e.g., split of operations, carve-outs of employees, relocations) typically trigger consultation obligations. Consultations may take several months and, thus, may significantly affect the timing of the implementation of the respective reorganizations or operational changes. Terminations "due to a transfer of business" are prohibited by law. Terminations for other reasons (e.g., based on a separate restructuring decision) remain possible.

Pension schemes and the transfer of pension liabilities need to be considered carefully in the transaction context.

## Tax

**Asset deal**

The capital gains of a foreign corporate seller with a German permanent establishment are principally subject to corporate income tax (CIT) and solidarity surcharge (SolS) at a consolidated rate of 15.83% and trade tax (TT) at rates usually between 7% and 17%.

For a buyer, in an asset deal, the acquired tangible and intangible assets, including goodwill, attributable to a German permanent establishment are capitalized at acquisition costs on the basis of a purchase price allocation, often leading to a step-up of the tax basis and increased depreciation/amortization basis. Special tax valuations and accounting rules exist if liabilities are transferred to the buyer.

The transfer of assets/liabilities by way of an asset deal involving the transfer of a business (or part of a business) as a going concern will typically not be subject to value-added tax (VAT). If no going concern business is transferred, the transfer of assets/liabilities within an asset deal is principally subject to VAT. If German property is transferred, real estate transfer tax (RETT) might apply.

Due to the "transparency" of German partnerships for income tax purposes, the acquisition of an interest in a partnership is treated similarly to an acquisition of the partnership's assets.

**Share deal**

The capital gains of a corporate seller in the case of a sale of shares in a corporate entity (share deal) are principally tax-exempt under German domestic law, but 5% of the capital gain is treated as a nondeductible business expense, leading to a consolidated tax burden equal to approximately -1.5% of the capital gain. In the case of a foreign corporate seller without a taxable presence in Germany, it can be argued on the basis of case law that the capital gain is entirely exempt from German taxation. Moreover, under applicable double tax treaties, Germany usually does not have a right to tax such capital gain realized by a foreign seller, if the seller does not have a permanent establishment in Germany. Special rules may apply for the sale of real estate rich companies.

Loss carryforwards and other tax attributes available at the level of the target company before the acquisition may no longer be usable after closing due to loss forfeiture regulations.

The sale and transfer of shares is generally not subject to VAT, unless the exemption is waived. If shares in a company holding German real estate are transferred, RETT might be triggered.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

The acquisition of a German company or business is typically structured as a purchase of shares or a purchase of assets. In addition, the German Transformation Act and general corporate law provide for alternative structuring possibilities for acquisitions (e.g., mergers) and in carve-out scenarios (e.g., demergers). The most common acquisition method in Germany is the purchase of shares. A purchase of assets is, in most cases, more complex and time-consuming and, therefore, less frequent. Another reason for sellers preferring a share deal is the fact that it is generally more tax-favorable for the seller.

Auction processes are very common in Germany. Such processes are typically administered by investment banks or other financial/M&A advisers that put together the teaser, information memorandum and virtual data room and organize procedural matters by way of process letters. In the course of the auction process, the bidders are initially requested to submit nonbinding indicative bid letters and, at a later stage, so-called binding bid letters and a markup of the seller's draft SPA. Although referred to as binding bids, from a German law perspective, such bids may still be nonbinding if the target is a GmbH. The obligation to purchase shares in a GmbH requires a notarial recording of the agreement. Since the bid letters typically are not notarially recorded, the obligation to purchase the shares at the offered price cannot be enforced. It is, therefore, common that final negotiations take place with more than one bidder after the bidders have submitted the final bids.

The German Transformation Act governs mergers and divisions of legal entities. A merger is the combination of at least two legal entities into one legal entity by way of transferring all assets and liabilities of the transferring (disappearing) entity, the transferor, to the receiving (surviving) company, the transferee. The act distinguishes between two basic types of merger: merger by acquisition and merger by the formation of a new company. In the first (more frequently seen) case, the transferee already exists, while in the second case (very rarely seen in practice), the transferee will be established by the merging transferors. The interest holders of each transferor receive shares or memberships in the transferee in return for shares or memberships in the transferor being dissolved by the merger. This is not always required; for example if the transferor is a 100% shareholder of the transferee.

A demerger is the split of a legal entity by transferring certain parts of its business (i.e., assets and liabilities, contracts, employees, etc.) to a receiving company. The act distinguishes between three basic types of demerger:

Split (Aufspaltung)

Spin-off (Abspaltung)

Hive-down (Ausgliederung)

Each of these types of division can be affected by acquisition or the formation of a new company and is a commonly used tool in carve-out transactions.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

The most popular forms of incorporated entities (Kapitalgesellschaften) are the GmbH and the stock corporation (Aktiengesellschaft (AG)). Both are legal entities that provide limited liability for their shareholders. In general, when conducting business through one of these two corporate bodies, only the company's (and not the shareholder’s) assets are accessible by the creditors of the company to satisfy their claims. In return, the establishment of both entities requires a certain minimum capitalization and the share capital is subject to certain capital maintenance restrictions.

The GmbH is the most common vehicle to conduct business, and it suits almost all kinds and sizes of operation. Its governing regime, the German Limited Liability Company Act (GmbHG), does provide the shareholders with broad possibilities regarding the arrangement of the entity's organization and corporate governance. Due to its flexibility, it is widely accepted among small and medium-sized corporations.

## What are the different types of limited liability companies?

The vast majority of German companies exist in the form of a GmbH. However, German law also offers a number of other legal forms, including AGs and partnerships (Personengesellschaften). A GmbH may be formed by one or more shareholders. The minimum share capital of a GmbH is EUR 25,000. Beyond the duty to pay in the share capital subscribed for, the shareholders are, in principle, neither liable for obligations of the GmbH nor required to pay in any additional share capital.

The corporate governance of the GmbH is structured as a two-tier system, consisting of one or more managing directors on the one hand and the shareholders' meeting on the other hand. Such a two-tier structure, however, is not mandatory. The articles of association may provide for the existence of a third tier, such as a supervisory board or an advisory board. Sometimes, the existence of a supervisory board is mandatory. Such mandatory supervisory boards have to have a ratio of employee representatives on the board.

The managing directors are responsible for the management of the GmbH and its representation vis-à-vis third parties. Their signatory power is unlimited vis-à-vis third parties and can only be restricted by granting a joint signature power to be exercised together with another managing director or a registered representative (Prokurist). In addition, it is possible to implement internal restrictions, such as approval requirements regarding certain transactions. However, such restrictions generally do not apply vis-à-vis third parties, who may rely on the managing director's unrestricted signatory power unless the third parties are aware of any internal restrictions.

In spite of the rather far-reaching powers of managing directors, the ultimate authority in a GmbH without a mandatory supervisory board remains with the shareholders, who are entitled not only to collectively decide on the appointment and removal of the managing directors but also to give the managing directors binding instructions on issues relating to the management of the company. Further, the shareholders' meeting has the competence to make decisions for the company with regard to certain fundamental issues provided for by law or the articles of association, such as the amendment of the articles of association, an increase or decrease of the registered share capital, the use of profits, liquidation or transformation of the company, etc. Nevertheless, the shareholders do not have authority to represent the GmbH vis-à-vis third parties.

## Is there a restriction on shareholder numbers?

Both a GmbH and an AG, can have one or several shareholders. With respect to partnerships, the number of partners needs to be at least two.

## What are the key features of a share sale and purchase?

By acquiring all of the shares or partnership interests in a legal entity, a buyer acquires all rights associated with the ownership of the shares or partnership interests. In particular, this includes the right to control the legal entity and to receive profits generated by it. At the same time, the buyer indirectly (as the new owner of the legal entity) acquires all liabilities and risks associated with the legal entity.

Since the change in ownership of the shares or partnership interests occurs only on the shareholder level, the legal entity and its business will not change as a result of the acquisition.

The sale of shares in a GmbH requires the SPA, including all exhibits and annexes, to be notarized by a German notary. SPAs relating to shares in other types of companies (e.g., stock corporations or partnerships) generally do not require notarization and may be entered into by simply signing the SPA.

## What are the key features of an asset sale and purchase?

German law does not provide for specific regulations regarding the sale and transfer of a business as a going concern. Instead, each asset must be sold and transferred individually. In particular, with respect to the transfer of ownership, it is important to observe the statutory requirements regarding the different types of assets that make up the business being sold.

An asset sale does not typically require any notarization unless the sold assets include owned real estate, shares in a GmbH or the seller is selling all or almost all of its assets as a whole. An APA is typically more extensive and detailed because it has to specify all individual assets, liabilities, contracts, employees, etc., that make up the sold business. This typically results in extensive exhibits to the APA. In particular, with regard to tangible assets, German law requires an exact specification of the assets in the APA, or an exhibit.

Although the liabilities and risks of an acquired business generally do not transfer to the buyer unless specifically provided for in the APA, there are circumstances under which a buyer may become liable for the obligations of the previous owner of the business. This will be the case, for example, where an acquired business is carried on under the previous company or trading name of the seller (Section 25, Handelsgesetzbuch  (HGB)). Such assumption of liabilities by operation of law can be avoided by an agreement between the seller and buyer, which becomes effective vis-à-vis third parties when published in the Federal Gazette and registered in the commercial register.

Buyers without a German entity that can acquire the assets making up the sold business, usually set up a special purpose vehicle that acts as a buyer and conducts the German business operations going forward.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

In bilateral transactions (as opposed to auctions with several bidders), it is customary to prepare a letter of intent or term sheet setting out the main parameters of the transaction. Such preliminary documents are typically only binding to a limited extent (e.g., confidentiality, exclusivity, choice of law and jurisdiction). The negotiations and any preliminary documents entered into trigger pre-contractual obligations of the parties. Pre-contractual obligations may, in particular, become relevant in the case of breaches of exclusivity or the abandonment of negotiations. A seller that pretends to have an interest in selling to a buyer or breaches its exclusivity undertaking may become liable for that buyer's expenses incurred up until that point (due diligence, etc.) if the sale to the buyer ultimately does not take place. This may apply even if the parties have signed a nonbinding letter of intent, term sheet, memorandum of understanding or similar pre-agreement. However, it is usually difficult for a buyer to prove that the seller breached its pre-contractual obligations to negotiate in good faith. Therefore, buyers have an interest in requesting a breakup fee or liquidated damages in the letter of intent, in particular if the letter of intent provides for exclusivity.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity:** Exclusivity of negotiations is one of the provisions typically covered in term sheets and letters of intent.

**Break fee:** Breakup fees are not very common, but they are sometimes agreed upon, particularly in the event that a party will need to incur significant costs to progress negotiations up to the point of entering into a transaction.

**Confidentiality:** Confidentiality is one of the provisions typically covered in term sheets and letters of intent unless confidentiality has already been agreed in a separate confidentiality agreement (NDA).

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Separate confidentiality agreements or nondisclosure agreements are very common. Typically, a confidentiality agreement is entered into at the outset and then, at a later stage, the term sheet or letter of intent makes reference to the initial confidentiality agreement already in place.

## Is there a duty or obligation to negotiate in good faith?

Under German law, there is a general pre-contractual duty to negotiate in good faith. Accordingly, each party may become liable vis-à-vis the other party for damages caused by a breach of their pre-contractual duties.

Such pre-contractual duties include quite far-reaching information and disclosure duties on the part of the seller. In an M&A transaction, sellers are generally obliged to inform buyers of all material issues and circumstances that they are aware of, if such issues and circumstances can generally, and from an objective perspective, be regarded as relevant to a buyer's purchase decision. An even more far-reaching disclosure duty applies if a buyer asks the seller specific questions (e.g., in the due diligence process). If a seller's disclosure duty is breached intentionally during the negotiations, the buyer may be entitled to claim damages from the seller over and above any damages or limitations of liability provided for in the purchase agreement. This is because it is generally not possible to limit or cap a party's liability for intentional behavior. Further, if the nondisclosure constitutes fraud on the part of the seller, the buyer may be entitled to rescind the purchase agreement.

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Common; however, sellers often try to push for a locked-box structure with no post-closing adjustment. In particular, in auctions sellers are frequently successful in getting bidders to accept a locked-box structure.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Most common adjustments are cash-free debt-free adjustments combined with a working capital adjustment.

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Rarely; however, collars are sometimes provided for.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: More often, the buyer prepares the closing balance sheet. At the outset of the SPA negotiations, the seller often tries to secure the right to prepare the closing balance sheet, but frequently is willing to give this up in the negotiations.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Rarely; closing balance sheets are usually not audited; this depends on the circumstances. Typically, the parties agree on avoiding the additional cost of having the balance sheet audited and rely on the dispute mechanism provided for in the purchase agreement.

## Is an earn-out common?

Frequency/market practice: Rarely; it is uncommon for larger deals, but sometimes seen in small and mid-cap deals (e.g., startups, venture capital or other growth companies) with private individuals as sellers.

## Is a deposit common?

Frequency/market practice: Rarely; not at all.

## Is an escrow common?

Frequency/market practice: Fairly common; whether an escrow is requested by a buyer depends on the seller. Where large corporations act as the seller, an escrow is typically not requested. Escrow arrangements are typically rather complicated (due to German anti-money-laundering requirements) and expensive, especially if a notary acts as escrow agent (which is most often the case).

## Is a break fee common?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Less common; it is typically difficult for buyers to negotiate an MAE closing condition.

## Is the MAE general or specific?

Frequency/market practice: Both are seen.

## Is the MAE quantified?

Frequency/market practice: Fairly common; sometimes seen as a reference to the financial impact and/or sales or earnings before interest, taxes, depreciation and amortization (EBITDA) effect.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Very common; typically the seller agrees to enter into a two or three year noncompete undertaking. There are, however, legal limitations to noncompete obligations regarding sellers that hold only a minority share in the target.

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Very common; purchase agreements always provide for general severance clauses, which in some cases are enhanced by specific clauses relating to noncompete covenants.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Fairly common; typically in conjunction with a noncompete.

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Rarely used in national transactions because competition law is very restrictive in this regard.

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Very common; competition law restrictions regarding so-called gun-jumping need to be observed when drafting these restrictions. The buyer's control and influence on the target prior to merger clearance must be limited, in particular the buyer may not interfere with the target’s ordinary course of business.

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Fairly common; generally yes in private transactions, but subject to competition law restrictions.

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Fairly common; materiality qualifiers are commonly seen but are often not quantified (other than specific warranties, e.g., contract value).

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: The seller’s knowledge is often limited to the actual knowledge of the seller and/or the actual knowledge or due enquiry of a specified list of senior management/deal team.

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Rarely; sellers typically reject such warranties with an argument that under German law sellers are already subject to broad disclosure duties.

## Is disclosure of the data room common?

Frequency/market practice: Very common; typically, the data room is saved on data carriers (e.g., USB stick), which are kept at the acting notary and/or the parties. Typically, parties agree on a fair disclosure concept.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Fairly common; however, this is not a formal repetition, but instead a buyer will typically request that the representations and warranties be given as of signing and closing; it is standard for this to apply to fundamental warranties (e.g., title, capacity). With regard to operational warranties, it is more difficult to get a seller to also give the representations and warranties as of closing, in particular regarding representations and warranties that are outside the seller's control (e.g., no litigation, product liability cases, etc.). In cases of representations and warranties being insured by W&I insurance, it is, for the purposes of the W&I insurance, common to provide for a formal process regarding the bring-down of representations and warranties as of closing.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: As stated above, the representations and warranties are typically given as of signing and — at least partially — as of closing. Insofar, there is a formal repetition.

## Is a bring-down certificate at closing common?

Frequency/market practice: Rarely; Bring-down certificates are typically required in case of a W&I insurance, if and to the extent representations and warranties are given as of the closing date.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: Fairly common; true and accurate in all material respects is common but often carve-out for fundamental representations, which must be absolutely true.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: The common cap amount is typically between 10% and 25%. Title to shares is often capped at the amount of the purchase price.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: The lower (operational) cap generally applies to operational warranties and damage claims. However, the higher (overall) cap and other limitations typically apply to all claims under the agreement with certain exceptions, such as tax and/or leakage (in the case of locked-box) indemnity claims.

## What are the common exceptions to the cap?

Frequency/market practice: Key warranties (e.g., title), typically, covenants between signing and closing, tax and environmental indemnities and other specific indemnities are excluded from the lower cap but are often subject to a higher overall cap.

## Is a deductible or basket common?

Frequency/market practice: Both are common.

## Is a de minimis common?

Frequency/market practice: Very common.

## How long does seller liability survive?

Frequency/market practice: A general survival of one full accounting cycle after completion, typically 18 months, is common. There are typically longer periods of three to seven years for fundamental warranties.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: Fraud and liability for intentional behavior is carved out and subject to statutory time limitation. Tax is typically subject to a three to six-month limitation period after relevant tax assessments have become final and binding, in some cases combined with a maximum period between five and 10 years. In addition, environmental indemnities and other specific indemnities are typically subject to separate time limitations.

## Is warranty insurance common?

Frequency/market practice: Warranty insurance is common, particularly when private equity is selling.

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Fairly common.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: Fairly common; common for actually received.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: Fairly common; common for actually received.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: Very common; this is required by law.

## Is there an exclusion of consequential damages?

Frequency/market practice: Fairly common; indirect and consequential damages and lost profits are frequently limited to objectively foreseeable damages or are fully excluded.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: Very common. Buyer’s knowledge is commonly limited to certain information, e.g. information disclosed in the SPA and its exhibits and in documents in the data room.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes.

## What is the common governing law?

Frequency/market practice: German law.

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Arbitration is more common with German arbitration rules (DIS) being applicable, the place of arbitration is typically Germany.

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: No stamp duty is payable in Germany. The buyer typically pays the notarization fees for the mandatorily required notarization of the sale and/or the transfer of shares in a limited liability company.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: Very common.

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