

# CLIENT UPDATE

## IT IS “DURING” NOT “AFTER” – GERMAN SUPREME COURT TIGHTENS TAKEOVER SQUEEZE-OUT RULES

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The German Federal Supreme Court (*Bundesgerichtshof*) recently issued a ruling that effectively shortens the time frame in which strategic buyers, private equity funds, hedge funds and other bidders must reach the 95% ownership threshold required in a tender offer for a German target company before the bidder is allowed to “squeeze out” minority shareholders pursuant to the special rules for a takeover squeeze out (*übernahmerechtlicher Squeeze-out*).

Specifically, the Federal Supreme Court ruling clarified that a bidder must acquire at least 95% of the target’s share capital no later than by the end of the so-called “additional acceptance period.” This mandatory two-week period commences after the end of the initial offer period.

This ruling will limit the practical relevance of the takeover squeeze-out rules further. Such rules provide for certain advantages for the bidder over other squeeze-out options under German law, as discussed below. Yet, the 95% threshold is rarely reached in tender offers.

## INTRODUCTION

In a tender offer for a company listed on a regulated market in Germany, minority shareholders have the right to tender their shares, at the same terms and conditions as during the initial tender offer period, during a two-week period following the date on which the acceptance rate for the initial tender offer period is published. After the end of this additional acceptance period, the bidder has three months to apply with the Regional Court (*Landgericht*) Frankfurt am Main to order a takeover squeeze-out of the minority shareholders who have not tendered. Such a squeeze-out will not be approved by the court unless the bidder acquired at least 95% of the target's share capital within a specified time period.

However, that time period was not entirely clear under the rules. Some had believed that only shares acquired before the end of the additional acceptance period should count toward the required 95% threshold. Others believed that shares acquired during the three-month period following the end of the additional acceptance period should count towards the 95% threshold. The German Federal Supreme Court agreed with the first group. Its ruling clarifies that bidders must reach the 95% threshold by the end of the additional acceptance period. (BGH, II ZR 198/11)

## TAKEOVER SQUEEZE-OUT ADVANTAGES

The takeover squeeze-out rules provide two key advantages over the other squeeze-out procedures provided for by German law:

- The offer price is presumed to be fair compensation for remaining shareholders, provided that the bidder acquired at least 90% of the shares subject to the tender offer.
- A resolution of the shareholders' meeting is not required to effectuate the transfer of the shares from remaining shareholders that are being squeezed out. It is replaced by a court decision which alone effectuates the transfer of the shares to the bidder.

If the bidder does not reach the 95% threshold at the latest during the two-week additional acceptance period, German law provides for two alternative ways to squeeze out remaining shareholders:

## ALTERNATIVE SQUEEZE-OUT OPTIONS

### *Corporate Squeeze-Out*

A shareholder can achieve sole control of a target by means of a corporate squeeze-out (*gesellschaftsrechtlicher Squeeze-out*) against adequate cash compensation. In such case, it is sufficient if the shareholder acquires 95% of the share capital at any point in time. The corporate squeeze-out, however, requires a resolution of the shareholders' meeting to effectuate the transfer of the shares from the remaining shareholders. Minority shareholders can challenge this resolution in court alleging a violation of legal requirements and thereby delay the squeeze-out significantly. The adequateness of the compensation can also be reviewed, but only in a separate appraisal proceeding.

### *Merger Squeeze-Out*

The new rules for merger squeeze-out (*verschmelzungsrechtlicher Squeeze-out*) permit a shareholder to gain sole control of the target if it holds only 90% of the share capital. The transfer of the shares from the minority shareholders can only be made in connection with an upstream merger of the target into the main shareholder and against adequate cash compensation. This kind of squeeze-out also requires a resolution of the shareholders' meeting to effectuate the transfer of the shares from the remaining shareholders.

The lower threshold makes the merger squeeze-out attractive since the 95% threshold is rarely reached in tender offers. It requires, however, a carefully thought-through acquisition structure from the outset.

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Please do not hesitate to contact us with any questions.

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