

Questions and Answers
on the Current Economic Climate for Cross-Border M&A Transactions
in Germany

by
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I. Introduction

In May 2009, the British M&A magazine Corporate INTL asked selected international M&A experts about the current economic climate for cross-border M&A transactions.

Regarding Germany, Dr Maximilian Koch, corporate partner with Mütze Korsch Rechtsanwaltsgesellschaft (MKRG), was interviewed by Corporate INTL. Some questions and answers of this interview are set out below.

An excerpt of all interviews has been published in the June 2009 edition of Corporate INTL on p. 42 ff. ("Cross-Border Advisory Experts").

II. Questions and Answers

1. How would you describe the current climate for deal making in Germany?

Dr Maximilian Koch: We have experienced that - due to the worldwide economic crisis - the M&A market in Germany has changed and shifted its focus. Some months ago primary investments of financial as well as strategic investors were prevailing. Now we have a buyer rather than a seller market. Over the past months secondary transactions among financial investors as well as restructuring deals have gone ahead. Below the line the worldwide economic crisis has not had a negative impact on our law firm's turnover. For restructuring advice has ever been a main pillar of our legal practice.

2. To what extent has German deal flow been affected by the economic uncertainty?

Dr Maximilian Koch: Along with the worldwide economic crisis the economic uncertainty has increased immensely. Leveraged deals, which seemed to be smartly engineered some months ago, have turned into nightmares for the buyers. The takeover of Continental by Schaeffler and the takeover of Volkswagen by Porsche are only two prominent examples. In general, German companies face an economic environment characterised by great difficulty obtaining credits while even big players are crunching with broad repercussions. In particular the automotive industry and its subcontractors have been hit hard. For the M&A business in Germany this economic uncertainty has mainly the following consequences: Companies often put their M&A deals in the pipeline on ice or even call them off. On the other hand, the demand for high-end restructuring as well as divestiture advice is growing. Due to the growing globalisation and the international dimension of the crisis, in fact the number of cross-border restructuring cases has gone up as well. In Germany, we experience an increase in businesses for sale. However, there is often a lack of investors willing to

take the respective risks and having access to the financial means necessary to perform the transaction, although in particular strategic investors are facing attractive M&A and equity investment opportunities in Germany right now.

The other side of the crisis is that the demand of equity, mezzanine and debt investors for legal advice is growing. As a consequence of the impact the worldwide economic crisis has on German companies, the investments of the capital providers may be jeopardised. Right now our law firm is mandated in particular by many foreign investors who seek to protect their investments in public as well as private German companies by using their rights more effectively. Or these foreign investors need competent legal and economic advice in the restructuring process of the German company they are invested in to gain a better foothold and to optimise their negotiating position. MKRG can report many achievements in this respect as well. Our clients esteem and trust our law firm because of its independency and its unique blend of entrepreneurial knowledge, a lot of legal experience and complementary skills.

3. What is the present state of corporate financing in Germany? How difficult is it for companies to obtain financing at competitive terms and conditions?

Dr Maximilian Koch: In Germany, the small and medium-sized businesses generally attach great importance to maintaining their independency. Therefore, these enterprises primarily seek to finance their business internally via operative cash flows. Other important financing sources are supplier as well as customer credits. The worldwide economic crisis leads to a slump in turnover of many firms in Germany. Not only single firms are affected but entire industries. Hence, in many businesses the sources of financing as described above are dwindling. Leasing has become an important means of financing over the past years. And according to our experience the conditions for leasing have not tightened as much as the conditions for bank loans have. However, in many cases leasing as a means of financing is already optimised in use so that its additional financing potential is limited. Therefore, the supply of additional funds via external debt or equity financing becomes more and more important.

The difficulties for companies to obtain bank credits have increased immensely because of the worldwide economic crisis whose core is, as is known, first of all a financial crisis. Regarding new credit engagements in Germany, banks attach much more value to the solvency of their debtors than some months ago. This difficulty can only be partly overcome by public debt guarantees and credits arranged for in the German economic stimulus package II. And the public capital markets as an alternative to bank loans can only be accessed by big companies due to the high fixed expenses associated with this source of financing. But even if a big company issues corporate bonds, the interest is comparatively high.

As to project financing, the current situation is even worse. According to our experience it is quite difficult to obtain loans for projects at reasonable terms and conditions in Germany.

Although to date mezzanine capital and private equity play still a minor role in Germany, which is also confirmed by a new study the NRW.Bank has carried out for North Rhine-Westphalia, the importance of these alternative sources of financing should actually be increasing in Germany.

4. The German parliament adopted the Foreign Trade Act in early 2009. How has this legislation affected cross-border transactions in Germany?

Dr Maximilian Koch: The thirteenth Act amending the German Foreign Trade and Payments Act as well as the Foreign Trade and Payments Regulation of 18th April 2009 entered into force only recently, i. e. on 24th April 2009. Hence, there is no experience with the new law, yet. On the other hand, we think that normal foreign investors need not fear the new rules.

The amendment to the Trade and Payments Act enables the German Federal Ministry of Economics and Technology to examine the acquisition of a stake in a German company through non-EU or non-EFTA purchasers leading to a voting power of at least 25 % and, only if necessary, to prohibit such acquisition in order to safeguard the public order and security of the Federal Republic of Germany; this requires a genuine and sufficiently serious threat, affecting one of the fundamental interests of society.

The Federal Ministry of Economics and Technology may examine the investment ex officio within three months after conclusion of the contract or after publication of the decision to make a public tender offer or with the publication of having obtained the control over the company. After receiving the complete documentation, the Federal Ministry of Economics and Technology has two months time to issue orders or to prohibit the acquisition provided that (i) such measures are necessary to safeguard the public policy or public security of the Federal Republic of Germany and provided that (ii) the prior consent from the Federal Government to such measures has been obtained.

Therefore, the hurdles for the Federal Ministry of Economics and Technology to issue orders or even to prohibit a transaction are high. Furthermore, there is no requirement for foreign investors to inform the Federal Ministry of Economics and Technology proactively about such transactions. Hence, it should be expected that the danger of deal obstruction remains a mere theoretical possibility in most cases.

And if complete transaction safety is needed in the individual case, the purchaser can apply for a certificate of non-objection to the acquisition if the purchase raises no concerns regarding the public policy or public security of the Federal Republic of Germany. The certificate of non-objection shall be deemed to have been issued if the Federal Ministry of Economics and Technology does not open a formal examination procedure within one month after receipt of the application. The time issue should not be overestimated. In most cases of major transactions a merger control clearance has to be obtained before the merger may be consummated. However, the merger control clearing takes its time as well.

5. Please characterise MKRG's cross-border M&A expertise and the ways in which you distinguish yourself from competitors.

Dr Maximilian Koch: MKRG was established in 2004. Due to the Sabanes-Oxley regulations, PricewaterhouseCoopers (PwC) separated from its former law firm of which the Dusseldorf and Cologne offices finally became MKRG. Since then MKRG has successfully expanded its partnership internally as well as via lateral hirings. MKRG is now a completely independent full-service law firm, but still able to work inter alia on a best-friends basis with PwC regarding industrial auditing, tax law and business management issues. And although the brand MKRG is quite young, the partners are very experienced and have been used to working in international teams on big and complex projects for many years.

MKRG has 27 lawyers of whom 15 are partners. The main areas of MKRG's legal practice are Corporate Law, M&A including Financial and Capital Markets Law as well as Insolvency Advice and Restructuring, Labor Law (individual as well as collective) including Immigration Law, Real Estate including Construction Law, Public Private Partnerships, Public Procurement Law and Public Law, in particular Hospital Law, as well as IP / IT, Commercial and Competition Law. MKRG renders legal and economic advice not only to domestic but in particular also to international clients and attends to mandates throughout the Federal Republic of Germany.

MKRG's aim is to find the best legal as well as commercial solution for its clients to meet the clients' needs at best. The recognition of MKRG outside Germany is constantly growing. Only recently the head of our Construction / Real Estate practice group has been elected as being a leading expert in Construction by the US publication Best Lawyers International 2009 (Germany edition). And the Corporate law / M&A practice group has just won MKRG the ACQ Global Award 2009 in the category "Small Law Firm of the Year – Western Europe".

MKRG's three corporate partners, who are also managing directors of MKRG, are very experienced cross-border M&A lawyers, too. This is documented by a number of headline deals. All of MKRG's lawyers are business fluently not only in their mother tongue German but also in English; and all corporate lawyers are adept at drafting legal documents in English according to international standards.

However, what makes MKRG's Corporate / M&A practice group unique is that every partner has at least one additional and unique expertise which enables each of us not only to be an integrating team player but also a leading strategic legal advisor. Hans Stefan Korsch is not only business fluently in English and German, but also in French and Italian. Aside from being a corporate lawyer he is also a specialist lawyer in labor law and very experienced in negotiating social compensation plans in restructuring cases. Burkhard Niesert, being a former judge, is also a renowned expert in insolvency advice. He had been a managing director of the Indo-German Chamber of Industry and Commerce in India for two years before he worked as a business lawyer and insolvency administrator in Germany. As for me, I had studied business administration and economics and had been employed as a manager of a plastics-

processing company that produced parts for the international TV set industry before I turned to business law. Prior to joining MKRG in 2005, I had been working with the international law firm Shearman & Sterling as a scientific associate mainly for their leading M&A rainmaker Georg F Thoma, thereafter as an assistant lecturer with the father of German corporate governance Prof Dr Dr hc Theodor Baums and then as a corporate lawyer with Freshfields Bruckhaus Deringer in the small team of Dr Ralph Wollburg, one of Germany's most respected leading corporate and M&A lawyers. Over the past years I advised inter alia many private as well as public headline M&A deals and numerous corporate, commercial, capital markets and finance law cases.

The fact that MKRG's associates and partners form a small but select, highly qualified and very experienced team enables MKRG to work extremely efficiently and flexibly on complex international projects such as cross-border M&A transactions. If required, MKRG can access its various domestic or international cooperation-partners any time. But, being an independent law firm, MKRG is also able to work with personal ease as an integral part of an international project team established by the client. Due to its autonomy and the high quality of its work MKRG is, last but not least, a valued partner of international law firms not possessing a German office.

6. What are the key legal difficulties associated with cross-border M&A in Germany?

Dr Maximilian Koch: The legal problems of cross-border M&A issues are quite complex. The change of control does not only trigger merger control questions. It often affects various other legal positions negatively (contractual, finance, tax etc.). These issues have to be dealt with. If the target company has foreign subsidiaries, the legal problems associated with a change of control can be even more complex. Therefore, sound structuring and preparation of the deal as well as in most cases a thorough Due Diligence exercise are inevitable. MKRG is adept at working in international teams. I structured and led not only many M&A deals but also many international legal Due Diligences in the past years and therefore know that a thorough preparation at the very beginning as well as a good management of the Due Diligence exercise is necessary for an efficient process that leads to a DD report which is of use for the client as well as for the entire M&A process later on.

A takeover of a publicly listed company in Germany is of course associated with a lot of additional legal difficulties. The requirements of the German Acquisition and Takeover Act have to be complied with. At the same time the rules on insider trading have to be adhered to. Associated with these capital markets law requirements is the tricky hands-on task to harmonise the confidentiality needs of the target company and the transaction with the information requirements of the takeover process and the information policy of the target company. In my M&A projects regarding public German companies these issues were often very intricate. According to my experience a thoroughly planned and structured process as well as a good coordination and communication with the target company are of vital importance for the success of the transaction.

The IBA Takeover Guides give a good overview of the regulatory framework for takeovers in many countries of the world. The IBA Takeover Guides can be downloaded on the homepage of the International Bar Association at www.ibanet.org. I wrote the German guide together with my partner Hans Stefan Korsch.

7. How can your firm assist in overcoming such challenges?

Dr Maximilian Koch: As already mentioned, MKRG's corporate partners are also very experienced M&A lawyers working at the highest legal quality standards and each having additional complementary skills. This gives MKRG a unique competitive edge. As a fully independent German full-service law firm with 27 lawyers, MKRG is able - if required in cooperation with its network partners - to handle small as well as big cross-border M&A cases while not being forced to over-staff its M&A project teams. Hence, MKRG's team structure and size will be in any M&A case very efficient.

8. In which notable cross-border deals has MKRG been involved?

Dr Maximilian Koch: MKRG has been involved in many notable cross-border deals. Only a few of them shall be outlined here in order not to go beyond the scope of this interview.

- MKRG is the representative of the mezzanine capital consortium, of which the British ICG Capital is the pool leader, in the committee of creditors of the insolvent Edscha group;
- MKRG advises GHE, Italy, an automotive supplier, in the corporate structuring of its group of companies,
- MKRG advises the restructuring of the Pelikan group, of which the parent company is listed on the Malaysian stock exchange.

Furthermore, MKRG advised the following closed cross-border M&A headline deals:

- MKRG advised the top managers on their first MBO of Maredo (steak house chain) out of the British Whitbread group in 2005 as well as on their secondary MBO in 2008. The latter won MKRG the ACQ global award 2009 in the category "Small Law Firm of the Year – Western Europe";
- MKRG advised the main shareholders of Onvista AG, a German online financial service provider listed on the Frankfurt stock exchange, on the sale of their Onvista shares to the French Boursorama group in 2007;

- MKRG advised the Indian Cranes Software International Ltd., a company listed on the stock exchange in Mumbai, on the acquisition of Cubeware GmbH, a German software company, in 2008

In addition, MKRG has successfully advised numerous other cross-border projects and mandates.

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