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Energy & Infrastructure M&A 2024

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Germany: Law & Practice
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Chatham Partners

Germany: Trends & Developments
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GERMANY

Law and Practice

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Chatham Partners is a specialised and sector-focused boutique law firm located in Hamburg, Germany. Founded in 2016 by former lawyers and partners of Freshfields and Latham & Watkins, Chatham Partners now has a full-service offering for energy, infrastructure and real estate projects. Its special expertise ranges from land-grab and acquisition, through regulation, to the development of and investments in large-scale and complex energy assets. The team's thorough understanding of the entire life cycle of a project and focus on the development, realisation and operation of assets allows for a deeper understanding of the industry, its assets and challenges. This is paired with high-end corporate/M&A, tax and finance expertise, which enables the firm to provide advice on transactions that is second to none in terms of quality, efficiency and execution.

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1. Market Trends

1.1 Energy & Infrastructure M&A Market

The energy and infrastructure M&A market in Germany has experienced significant changes over the past year, influenced by economic pressures and geopolitical events. However, despite these challenges, the market overall has shown resilience and a continued commitment to sustainability.

Macro- and Microeconomic Pressures

Inflation has driven up costs for materials and labour, impacting project valuations. The European Central Bank's interest rate hikes have made borrowing more expensive, leading to a preference for equity financing over debt. Stricter lending criteria have also made securing loans more challenging.

Geopolitical Impacts

The conflict in Ukraine has disrupted supply chains and driven up energy prices, prompting increased investments in renewable energy and energy security. Providing stable energy supply, green energy projects are receiving increasing support from the general public.

Germany v Global Trends

Germany's M&A activity has been mixed compared to global trends. While deal volume has remained stable, the value of deals has fluctuated significantly. For instance, M&A deal values in Germany's energy sector dropped in Q1 2024 compared to the previous quarter. Despite this, Germany's focus on renewable energy aligns with the global trend towards sustainable investments.

Key Trends and Challenges

Speeding up energy turnaround

Investment in renewable energy has increased, driven by sustainability goals. The market has remained active despite a rise in corporate insolvencies, and the investor base has broadened as much as the amount and types of assets, which now increasingly include ancillary services like storage, demand-side management (eg, smart meters), charging infrastructure and H2 infrastructure.

Industry decarbonisation

Decarbonisation pressures are leading to evermore joint ventures and co-operations between energy producers and carbon-heavy industry as well as – depending on strategies – deeper vertical integration.

New market entrants

Besides industrial players, further new players are entering the energy M&A market for different reasons. The increasing need for capital keeps attracting different institutional investors (eg, leading to transactions of development projects and platforms). Digitalisation challenges and a slowing down of investor confidence in other types of start-ups are also leading to an increase in startup-transactions concerning energy business cases. A slowing-down of the real estate sector combined with synergies in investment processes, investor base and, at times, assets has also increasingly motivated core real estate investors to focus on renewable energy assets.

Financing challenges

Both renewable energy and infrastructure projects face financing challenges, with high initial costs, market risks and complex project structures contributing to difficulties in securing investment. Adding to this is the dependence of decarbonisation projects on subsidies and

similar state support, which has become more scarce following a ruling by the constitutional court limiting the government's flexibility to circumvent constitutionally anchored austerity.

Grid delays

Land and permits were previously the core challenges for any power project, but the overall transformation is increasingly overwhelming both Transmission System Operators (TSOs) and Distribution System Operators (DTOs).

2. Establishing a New Company

2.1 Establishing a New Company

Incorporating a start-up in Germany's energy and infrastructure sector is common, and founders usually prefer a German-based entity for the German market. Although European law leads to broad flexibility for market participation of other EU-incorporated entities, debt providers and local stakeholders favour entities that incorporate in the same jurisdiction as that in which the asset is located. Germany offers a structured and reliable process for company incorporation, ensuring transparency and legal compliance, making it an attractive location for start-ups. Entrepreneurs may be surprised, however, by German bureaucracy when setting up and by formalism when incorporating their first German entity.

The most popular legal forms include the limited liability company (*Gesellschaft mit beschränkter Haftung* – GmbH), the entrepreneur company (*Unternehmergesellschaft* – UG) and the limited partnership (*Kommanditgesellschaft* – GmbH & Co. KG).

- A GmbH requires a minimum share capital of EUR25,000, with at least EUR12,500 deposited at incorporation. The process takes around two to three weeks and includes notarising the articles of association, opening a business bank account and registering with the local commercial register, trade office and tax authorities.
- a GmbH & Co. KG is a hybrid of a GmbH and a KG. The GmbH is required to hold EUR25,000 in capital, while the partnership as such has no minimum capital but commonly includes contributions from limited partners. The incorporation process takes three to four weeks, with additional steps like the conclusion of a partnership agreement (simple written form being sufficient) and registering both the GmbH and KG separately with the commercial register and tax authorities.
- a UG is a simplified version of a GmbH and can be started with as little as EUR1, although a higher initial capital is advisable. It follows a similar incorporation process as the GmbH, also taking two to three weeks but with less stringent capital requirements.

Since formalities and the required steps may take too long, it has become common to acquire shelf companies from professional providers. For a top up of 10–15%, founders will have their entity readily available in only a few days. Timewise, the KYC process when opening a bank account has proven to be quite lengthy in some circumstances and needs to be given early attention in order to avoid delays.

2.2 Type of Entity

The selection of the right legal entity is mainly influenced by tax considerations and distribution mechanisms.

- GmbHs and UGs are frequently selected for their adaptability and uncomplicated corporate governance. The GmbH is a taxable

entity, meaning that its profits are subject to corporate taxation. Distributions to shareholders, including dividends, incur withholding tax and may lead to dual taxation, first at the company level and then at the shareholder level.
- The GmbH & Co. KG is tax transparent, meaning that the partnership is not subject to (income) taxation at the entity level. Profits are directly distributed to the partners (both general and limited, depending on the agreed participations), who are thereafter taxed individually according to their separate profit shares. This tax transparency can offer specific tax benefits, potentially providing more advantageous tax treatment for specific investors, particularly in cross-border investment scenarios or when partners are governed by varying tax regimes.

2.3 Early-Stage Financing

Start-Up Financing

Generally, start-ups in Germany benefit from diverse funding sources and a structured, transparent documentation process.

Early-stage financing may be received from various sources, including local venture capital firms, business angels, family offices and constructions like the *High-Tech Gründerfonds* (HTGF), a public-private partnership between the government, Germany's federal investment bank KfW Bank and private institutions.

The financing process is documented through a term sheet, followed by an investment agreement, a shareholders' agreement and, in some cases, a convertible loan agreement. The company's articles of association are then updated to reflect the new shareholding structures.

Market-Specific Infrastructure Financing

For projects in the energy and infrastructure sector in particular, obtaining early-stage project financing can be challenging, especially if a developer wants to fund not only CAPEX but also DEVEX.

In these cases, project developers tend to team up with other partners (such as infrastructure funders or larger developers) and enter into joint venture or joint development agreements. While one of the partners may bring access to the project (eg, land use agreements, permits or licences), the other partner(s) may bring not only funds but also additional know-how to the partnership. Such a contractual arrangement is usually agreed upon in a joint venture (or joint development) agreement that stipulates when and how funds are provided, how final investment decisions are taken and how partners can exit the project.

2.4 Venture Capital

In Germany, venture capital predominantly originates from domestic venture capital firms that are actively investing in start-ups. International venture capital firms actively observe the German market and regularly offer financial opportunities. Moreover, infrastructure funds have progressively integrated venture capital investments into their strategies.

2.5 Venture Capital Documentation

Following the German corporate law's formalities, venture capital investments follow standard steps. Legal advisers and notaries usually work with certain standard documents. While templates (partly available to the public) are common, terms will be customised during negotiations.

Key documents include:

- a term sheet that outlines basic terms such as investment amount and equity stake;
- an investment agreement that finalises the terms;
- a shareholders' agreement that defines shareholder rights and exit strategies;
- a convertible loan agreement that allows loans to convert into equity later; and
- the articles of association, which are updated to reflect changes in the company's structure and, unlike the other documents, are publicly available in the commercial register.

2.6 Change of Corporate Form or Migration

In Germany, start-ups that have been incorporated as a UG first (owing to reduced capital prerequisites) usually change their corporate form. As businesses expand and get venture funding, they often transition to GmbHs to indicate maturity and stability – a process referred to as "growing up" to GmbH.

Start-ups generally operate within the German jurisdiction, capitalising on its strong legal and regulatory framework. As they expand, many are recommended to establish holding structures (or to be included in holding structures as subsidiaries) or to create subsidiaries to enhance tax and operational savings. Altering jurisdiction is uncommon, as corporations typically modify their corporate structure while remaining within Germany.

3. Initial Public Offering (IPO) as a Liquidity Event

3.1 IPO v Sale

IPO Market Developments

In Germany's energy and infrastructure sector, the choice between an IPO and a sale depends on factors like stock market conditions, growth stage, the company's size and potential market cap – and depends heavily on investor preferences. Many larger companies now use a dual-track process, preparing for both options to remain flexible, but this involves substantial resources.

The IPO market has seen volatility, although Germany remains a leader in IPO numbers. As a general rule, the choice of going public leads to a much higher level of transparency and a stricter corporate and regulatory framework for the company and potential transactions. This substantially binds management resources.

Sale as a Default for Project Developers

Whether a sale or an IPO is the right market approach is also a question of the strategy behind the liquidity event. A sale process will usually offer quicker liquidity and a more confidential transaction, especially if strategic buyers or private equity firms are interested.

In the energy and infrastructure sector, there is a substantial difference in the strategies of market players: while there are companies that work with a build-and-hold strategy (ie, aiming to develop assets and to operate them over a longer term), several developers would rather work with a develop-and-sell approach (ie, to generate revenue through project sales).

For companies pursuing a build-and-hold strategy and seeking to raise funds to expand and operate their assets long-term, an IPO might be an attractive approach. On the other hand, a sale generates immediate revenue for future projects and is the approach of choice for developers following a develop-and-sell strategy. Portfolio deals – where a large number of projects are sold – or the sale of greenfield projects are typi-

cally structured in straightforward sales (and not as IPOs).

Farm-Down as a Market-Specific Approach

The farm-down approach is a very specific yet popular transaction model in the energy and infrastructure sector, and is especially used by utilities. In this model, a project is developed through all stages. Upon commissioning, the developer divests a portion of its equity, usually keeping a portion of the equity and often continuing to run the operations and maintenance of the project. The utility usually buys and markets the generated electricity under a power purchase agreement (PPA).

This strategy offers a fair mix of risk reduction and consistent revenue, enabling developers to recycle capital into new projects while keeping a long-term stake in the asset and assisting in its operational success. For investors (in particular mere financial investors), this can be an attractive model since it offers access to assets without the requirement of specific industry experience.

3.2 Choice of Listing

Germany's emphasis on renewable energy and infrastructure has also made listing more attractive for companies in the sector. There are currently four listed energy companies. One of them is Encavis AG, which has recently been targeted by KKR.

In 2024, a German energy and infrastructure company deciding where to list would consider several options.

- A Frankfurt Stock Exchange listing offers local regulatory familiarity, access to German investors and support for renewable energy projects. It can also enhance the company's reputation within Europe.
- A foreign exchange like NYSE or NASDAQ provides larger capital pools, higher liquidity and global exposure, potentially leading to higher valuations, which offset the substantially higher transaction costs.
- A dual listing combines these benefits, maximising investor reach and liquidity.

With Germany leading in IPOs in 2024, the choice depends on the company's goals and market conditions, guided by financial advisers.

3.3 Impact of the Choice of Listing on Future M&A Transactions

Listing on a foreign exchange can complicate future sales, especially regarding minority squeeze-outs. Different countries have varying rules for this process. For example, Germany allows majority shareholders (90–95%) to buy out minority shareholders, but foreign exchanges like the NYSE may have stricter or different regulations. This can hinder full control post-acquisition and discourage potential buyers.

While foreign listings might offer increased capital and investor exposure, they introduce regulatory complexities that can affect future sales. Careful consideration and legal advice are crucial when navigating these challenges.

4. Sale as a Liquidity Event (Sale of a Privately Held Venture Capital-Financed Company)

4.1 Sale as a Liquidity Event (Sale of a Privately Held Venture Capital-Financed Company)

In Germany, the sale process of a privately held company can take different forms based on fac-

tors like the company's size, industry and stakeholder preferences. The following two approaches are common.

- Auction process – this is typically used when there is strong interest from multiple buyers. This can be the case in particular if a single type of assets (wind or solar farms, battery storages, etc) is sold. By creating competition among bidders, an auction can drive up the sale price. It is a more structured process, sometimes involving several rounds of bidding.
- Bilateral negotiation – this is more common when dealing with a strategic buyer and/or the formation of a joint venture. It is usually faster and more confidential than an auction, making it preferable when the seller wants to act in a more discreet way, if the transaction is complex or when market conditions do not support competitive bidding. Usually, bilateral negotiations are chosen if the price is only one of several factors in the choice of an investor.

4.2 Liquidity Event: Transaction Structure

In Germany, there is no consistent pattern in the sale of privately held energy and infrastructure enterprises with venture capital investors; it fluctuates according to the company's operations and the nature of the investors engaged.

A crucial consideration is the potential for replacing the management team and the associated risk of a brain drain to the company's future. Larger infrastructure funds rather opt to acquire the entire enterprise but generally incorporate management retention provisions to maintain stability. On the other hand, when new venture capital firms enter the already existing venture capital investors, they rather acquire a substantial equity stake without pursuing control, thereby permitting the original management and existing investors to retain their involvement.

The choice between divesting the entire firm or a controlling stake depends primarily on the prospects for sustained growth and the strategic objectives of the stakeholders.

4.3 Liquidity Event: Form of Consideration

In Germany's energy and infrastructure sector, the form of consideration in the transaction can vary, with several common approaches.

- Cash transactions are frequently used, particularly in larger deals, as they provide a clean exit and immediate liquidity, which are the aspects sellers often aim for. Documentation is straightforward and W&I insurance coverage is common and can be easily integrated.
- Stock-for-stock transactions are less common but can occur when a larger company aims to integrate the acquired business. They are attractive to sellers who see long-term potential in their sold business and in the purchaser's strategy.
- Combination of stock and cash – this hybrid model offers a balance of immediate liquidity and potential future gains. It is often offered to sellers by private equity investors.

The choice of structure typically depends on the strategic goals of both parties and the buyer's financial position. However, as a general observation, cash transactions make up the majority of sales in the energy and infrastructure sector.

4.4 Liquidity Event: Certain Transaction Terms

Founders and venture capital investors in Germany are typically expected to assume respon-

sibility for representations, warranties and certain liabilities after a transaction closes.

Key aspects include the following.

- Representations and warranties – in recent months, the German M&A market has started to shift from a seller-favourable climate, characterised by only limited warranties from sellers, to a more buyer-friendly landscape. Sellers must now give not just title and capacity warranties but also operational and business-related warranties.
- Liability is often limited to a fraction of the purchase price, in any case not exceeding 100% of the purchase price.
- Indemnifications are typically provided for risks detected during due diligence, particularly for historical tax liabilities. The liability for indemnifications is usually uncapped.
- Escrow/holdback – a portion of the purchase price can be held in escrow for a set period to cover potential claims related to breaches or liabilities. Escrows are advantageous for protecting warranty claims; nonetheless, in Germany, they are held and managed by notaries. Notarial fees will be charged based on the amounts held in escrow, and will lead to further substantial transaction expenses.
- W&I insurance is less common in Germany than in other regions, but its use is growing, offering coverage for breaches and reducing the need for large indemnification or escrow provisions. W&I insurance coverage is gaining popularity as an alternative that provides protection and mitigates transaction complexity.

5. Spin-Offs

5.1 Trends: Spin-Offs

Spin-offs (*Abspaltungen*) are a popular alternative to asset deals in Germany's energy and infrastructure sectors, especially when a company wants to sell part of its assets without transferring the full business. This approach is particularly beneficial in cases when obtaining agreement from all contractual parties for an asset transfer would be difficult or time-consuming. For example, when selling a portion of a wind farm portfolio, transferring individual agreements with suppliers, landowners and grid operators often requires clearance from each party, which may be a time-consuming and complex process.

A spin-off, on the other hand, provides for the formation of a new business to hold the relevant assets, eliminating the need to seek clearance before transferring each individual contract. The buyer can then take ownership of the new corporation, including its assets. This structure simplifies the process by eliminating the need to renegotiate many contracts, making it especially appealing in the energy sector, where assets are frequently subject to long-term contracts.

However, a spin-off presents certain complications:

- first, it might involve the buyer becoming liable for the remaining business prior to the spin-off date;
- second, certain formal requirements can make it cumbersome on the timeline of the deal; and
- finally, spin-off documentation must be notarised, which might result in higher transaction costs than uncomplicated asset transfers.

Despite these complications, the flexibility and lack of contractual permissions make spin-offs a viable tool to consider for energy corporations seeking to dispose of a portion of their portfolios while retaining continuity in their remaining activities.

5.2 Tax Consequences

Spin-offs can be structured as tax-free transactions at both the corporate and shareholder levels in Germany, provided certain conditions are met, as follows.

- Requirement of two separate business units – a tax-neutral spin-off requires the company to be reorganised to have two separate business units that are viable on their own – ie, after the spin-off, both companies (transferor and transferee) must have a business that is viable on a standalone basis.
- Allocation of assets – all assets that are essential for a business unit must be allocated to that unit; assets that are essential to both units constitute an impediment to a tax-neutral spin-off.
- No disguised disposal of business unit – the spin-off must not lead to an (indirect) disposal of a business unit to a third party, nor pave the way for such disposal.
- Formal application for rollover relief – the spin-off is tax neutral at the level of the company and the shareholder only if the company and the shareholder(s) file a formal application for rollover relief within the period defined by law.
- Forfeiture of tax losses and other tax attributes – generally, the spin-off leads to a partial or full forfeiture of tax losses and other tax attributes of the company. To a certain degree, tax attributes may be utilised for a (partial) set-up of the tax asset basis at the time of the spin-off.

By fulfilling these criteria, companies can achieve a tax-neutral spin-off, enabling them to restructure and focus on core business areas without incurring substantial tax liabilities.

5.3 Spin-Off Followed by a Business Combination

In Germany, it is allowed (and not unusual) to conduct a spin-off immediately followed by a corporate merger, sometimes known as a "spin-off and merger" or "spin-merger". Spin-mergers (both the spin-off and the subsequent merger) are governed by the Corporate Transformation Act (*Umwandlungsgesetz*), which mandates a variety of spin-off and merger agreements as well as shareholder resolutions and auditors' reports.

Spin-mergers are frequently used to improve balance sheets prior to a merger, such as spinning off pension provisions. However, they cannot perform wonders. A crucial aspect is that all parties involved, including the original and spun-off enterprises, are jointly accountable for any obligations or claims incurred prior to the spin-off. This liability passes to the merged entity, necessitating detailed cross-indemnifications to control risks and safeguard all parties involved.

5.4 Timing and Tax Authority Ruling

The timing for a spin-off in Germany varies based on transaction complexity, regulatory requirements and the specifics of the companies involved. Typically, the entire process can range from several months to over a year.

Key phases include the following.

- Planning and preparation – this initial phase involves strategic planning, due diligence and documentation preparation. Depending on

the business complexity and detail required, it can take several months.
- Regulatory approvals – securing necessary approvals, including from antitrust authorities, usually comprises not only the spin-off but also the subsequent transfer to the investor. This combined approach increases transaction certainty.
- Shareholder approval – if needed, obtaining shareholder approval adds extra time, as it involves preparing and distributing information, holding meetings and securing votes from shareholders.
- Execution and implementation – once approvals are obtained, the actual spin-off execution takes a few weeks to a few months, involving the transfer of assets, liabilities and operations to the new entity.
- Transfer of NewCo – the newly created entity (together with the spun-off business) is then transferred to the investor.

In addition, seeking an advance tax ruling from the competent tax office is advisable, although not mandatory. This ruling clarifies the tax implications and helps ensure tax neutrality, avoiding unexpected liabilities. The process for obtaining such a ruling can take several months, influenced by the transaction's complexity and the tax office's workload.

6. Acquisitions of Public (Exchange-Listed) Energy & Infrastructure Companies

6.1 Stakebuilding

Acquiring stocks in a public company before making a formal offer is possible in Germany but must be done in accordance with capital markets regulations. Insider dealing rules have to be followed, and acquirers are required to notify authorities once certain thresholds are reached. Compliance with the German Takeover Act (WpÜG) is also required.

6.2 Mandatory Offer

A mandatory offer might be required if an acquirer gains control over a public company.

6.3 Transaction Structures

In Germany, public company acquisitions can be structured in a variety of ways. The most common method is a share deal, in which the acquirer buys stock directly from other stockholders. Mergers are possible, but are less common due to their complexity and the degree of shareholder involvement.

6.4 Consideration: Minimum Price

When acquiring a public company in Germany, cash consideration is common. If the bidder aims to de-list the corporation or to gain control, they have to offer a minimum price.

6.5 Common Conditions for a Takeover Offer/Tender Offer

Takeover offers have to comply with the German Takeover Act (WpÜG), and the Federal Financial Supervisory Authority (BaFin) will review the offer conditions. These offers can include conditions, such as minimum acceptance thresholds and regulatory approvals.

6.6 Deal Documentation

In addition to the offer documentation, transaction agreements outlining further details of the deal are not uncommon. They aim in particular to protect the bidder and add transaction certainty.

6.7 Minimum Acceptance Conditions

Bidders tend to include minimum acceptance conditions in their offer to ensure sufficient control over the target company.

6.8 Squeeze-Out Mechanisms

In Germany, squeeze-outs of minority shareholders after a successful tender offer can be executed through several mechanisms, as follows.

- Takeover Act (WpÜG):
  - (a) the ownership threshold is 95% of the voting rights; and
  - (b) the remaining shareholders must sell their shares for cash if 90% of shares were tendered.
- Stock Corporation Act (AktG):
  - (a) the ownership threshold is 95% of the share capital; and
  - (b) the procedure involves a detailed report and court review of compensation, which can be contested by minority shareholders.
- Transformation Act (UmwG):
  - (a) the ownership threshold is 90% of the share capital; and
  - (b) the procedure is used during a statutory merger – the squeeze-out must be resolved within three months if the majority shareholder is a German stock corporation or similar entity.

6.9 Requirement to Have Certain Funds/Financing to Launch a Takeover Offer

Certain requirements under the German Takeover Act (WpÜG) aim to ensure that bidders have secured financing before making a takeover offer.

6.10 Types of Deal Protection Measures

In Germany, deal protection measures like break-up fees and matching rights can be used, but break-up fees are uncommon and are often considered ineffective. The target company's board must carefully consider these measures to avoid breaching their obligation to act in the best interest of the company.

6.11 Additional Governance Rights

A bidder can secure further significant rights in a listed company even without full ownership – eg, a substantial shareholding provides supervisory board representation.

6.12 Irrevocable Commitments

Bidders may try to obtain irrevocable commitments from major shareholders, especially institutional investors, to tender their stocks or support the transaction.

6.13 Securities Regulator's or Stock Exchange Process

Launching a takeover offer in Germany requires approval from the BaFin, which reviews the offer document for compliance with the German Takeover Act (WpÜG). If applicable, the BaFin will assess whether the offer price follows the minimum price rules.

6.14 Timing of the Takeover Offer

A takeover offer can be extended under certain conditions – eg, if regulatory or antitrust approvals are not obtained in time.

7. Overview of Regulatory Requirements

7.1 Regulations Applicable to Energy & Infrastructure Companies

While there are only few legal requirements that must be met to establish a new company, the operation and business of an energy or infrastructure company in Germany may be governed by several laws and may involve several regulatory bodies.

The German energy market, including the M&A market, is very much driven by the underlying regulation of the respective assets.

Renewable Energy Assets

With a phase-out of coal and nuclear power plants, the energy turnaround is well under way. The operation of assets in this market requires different rights and permits. While no independent power producer licence or similar general allowance is required to operate power assets, such projects typically require the following.

Construction and Operating Permit (COP)

This is needed for any types of physical asset granted under:

- the Federal Building Code (BauGB) – eg, for solar PV, transformer stations and (even large-scale) batteries;
- the Federal Imission Control Act (BImSchG) – eg, for onshore wind, most thermal and gas-based plants and infrastructure;
- the Energy Industry Act (EnWG) for power lines and pipelines;
- the Wind Energy on Seas Act (WindSeeG) for offshore wind energy infrastructure; and
- certain asset-specific laws – eg, under the Mining Act (BBergG) for below-ground parts of geothermal plants and offshore interconnector cables, or under the Sea Installations Act (SeeAnlG) for energy islands.

The stages and required steps, including zoning, hearings, etc, will depend on the type of permit that is required (eg, plan approval permit) and the specifics of the project. Amendment permits are common, while permits are mostly technology-specific. Most types of permits have a concentration effect – ie, all aspects of a project are concentrated in one permit decision and procedure, thus making any further permits to build and operate an asset obsolete (although, of course, exceptions apply).

Tender awards

Tenders are awarded for the following, for example:

- a floor price (*anzulegender Wert*) under the Renewable Energies Act (EEG);
- the right to permit and grid-connect an offshore wind farm under the WindSeeG;
- short-term offtake under the "usage instead of curtailment" statutes under the EnWG;
- the sale or purchase of H2 derivatives under the H2 Global Programme;
- different types of system services provided to a grid operator;
- (in the future likely) under the proposed capacity mechanism for (H2-ready) gas power plants; or
- (envisaged but delayed) subsidies to build the first offshore to H2 project in the German Exclusive Economic Zone (EEZ) under the WindSeeG.

Mind the milestones: German tender awards regularly come with (to different degrees, but often surprisingly fierce) milestones linked to penalties and loss of awards, which often play a significant role in a transaction context.

It is now common practice to conclude PPAs exceeding the floor price obtained in an EEg, tender (if applicable). In this scenario, the EEg, award serves mostly to ensure a floor price, which of course has a positive impact on project financing. This practice is common and possible, even with regard to parts of an asset's production only, if the respective volumes are signed into and out of the EEg, regime in sufficient time (more than four weeks ahead).

Title to grid

This is governed under the EEG, EnWG and WindSeeG, depending on the type of asset and the rights concerned, and is typically granted in a rather formal procedure governed by each grid operator and not necessarily in line with the underlying statutes. As grid capacity is increasingly scarce, provisions in transactions increasingly consider the relevance of the grid entitlement and the value increase once it is obtained.

Valuations of companies often depend on the development status of their respective projects and pipelines, as well as their regulatory classification (whether and at what level a project has received an award in a tender under the EEg, or is purely market-based, etc). Therefore, it is common to conclude forward deals on development projects (or pipelines) with agreed milestone/earn-out payments upon reaching development-related milestones (zoning decision, grid reservation, etc). In such transactions, it is essential to have a full grasp of the meaning and consequences of each of these steps, as milestone payments allocated too early or late can disrupt a project's development and lead to discrepancies between valuations and purchase price payments.

Electricity Trading at the Power Exchange

Increasingly, business models require participation in the public electricity market – eg, to offer certain delivery profiles to industry assets or to offer full (ie, uninterrupted) supply to end consumers. PPAs that are not simply structured along an asset's availability ("pay-as-produced") typically require the sourcing of additional power elsewhere, which is easiest on the public markets.

To become a European Energy Exchange (EEX) participant, various admission requirements must be met, as regulated in Sections 14 et seq of the EEX Exchange Rules and Regulations and in Section 19 (4) of the BörsG. The following must be observed throughout/re-confirmed following certain transactions:

- recognition as a trading participant by the European Commodity Clearing AG (ECC);
- proof of the personal reliability and professional suitability of the person(s) authorised to manage the company;
- proof of liable equity capital of at least EUR50,000; and
- technical connection to the trading system(s).

Grid Operators

Grid operators are governed under the Energy Industry Act, which entails unbundling provisions driven by EU law. These unbundling provisions restrict control across various sectors of the value chain, if grid assets are involved.

The Federal Network Agency (BNetzA) oversees compliance with unbundling restrictions. Unbundling was implemented to ensure competition and guarantee the openness of grids and networks by excluding any conflict of interest within grid and network operators. Unbundling requires vertically integrated utilities to be separated, and is built on three primary pillars:

- ownership unbundling, which mandates ownership over grid and network operators to be completely separate from generation and supply companies;
- legal unbundling, which ensures that grid and network operators are organised as single entities; and
- functional unbundling, which mandates that the operation of grids and networks is organised independently from the operation of generators and suppliers.

These unbundling provisions can therefore (and increasingly) require deeper analysis in the context of a transaction, especially as asset definitions become more fluid. As assets increasingly offer ancillary grid services and generally serve more than one purpose, it becomes more difficult to uphold a clear sectoral division of the market.

Grid operation requires special licences under the EnWG. Grid fees and returns on investment based on a so-called regulated asset base (RAB) are determined in five-year cycles (in future, cycles will probably be three years). They offer a fixed equity return on an assumed equity share and gearing of the overall asset base.

To buy into this fixed return/low-risk investment profile, so-called Mini-TSOs have been established for some assets (eg, offshore converter platforms). This can open the business for more diversified investors (ie, those that also operate power production assets), so could formally breach unbundling provisions. Mini-TSOs are single-asset TSOs in which the investor holds a largely silent participation. Each such vehicle requires careful co-ordination and a regulatory decision by the BNetzA, which also requires revision and possibly confirmation in each case of a transaction.

7.2 Primary Securities Market Regulators

The primary securities market regulator in Germany is the BaFin, the Securities Supervision Directorate of which is responsible for overseeing takeovers of companies whose shares are listed on a regulated market in Germany.

7.3 Restrictions on Foreign Investments

In Germany, foreign investment in the energy and infrastructure sectors is heavily regulated.

According to German foreign trade and payment rules, for instance, foreign investors must notify the Federal Ministry for Economic Affairs and Climate Action (BMWK) if they are acquiring 10% or more of the voting rights in critical infrastructure companies, with other sectors having a 25% threshold. This filing is suspensory, meaning transactions cannot proceed until BMWK approval is obtained, ensuring no threat to national security or public order. These measures aim to protect Germany from potentially harmful foreign influence.

7.4 National Security Review/Export Control

Germany reviews foreign acquisitions to prevent security risks. BMWK oversees these reviews, especially for critical infrastructure sectors like energy, telecommunications and defence.

Specific Restrictions/Considerations for Investors

General rules

Non-EU investors must notify BMWK if acquiring 10% or more of voting rights in critical sectors.

Heightened scrutiny

Investments from countries with conflicting policies, such as China, face rigorous review due to concerns like Military-Civilian Fusion.

Export control regulations

Managed by the Federal Office for Economic Affairs and Export Control (BAFA) and in accordance with EU law, Germany's export controls aim to:

- prevent the proliferation of weapons of mass destruction and the destabilising accumulation of conventional military equipment in crises regions;
- regulate dual-use items; and

- avoid contributing to human rights violations.

Key regulations governing export control include:

- the Foreign Trade and Payments Act (AWG) and Ordinance (AWV);
- the EU Dual-Use Regulation (EU 2021/821); and
- various embargo regulations.

7.5 Antitrust Regulations

In Germany, antitrust filings for takeovers and business combinations are regulated by the Act Against Restraints of Competition (GWB), which is enforced by the Federal Cartel Office (*Bundeskartellamt* – BKartA). The BKartA prohibits a merger subject to notification (only) if the intended merger would significantly impede effective competition, particularly a concentration that is expected to create or strengthen a dominant position on the relevant market(s).

Key requirements for an antitrust filing include the following.

- There is no obligation to notify the intended merger to the EU Commission.
- Notification thresholds – combined worldwide turnover must exceed EUR500 million in the last business year preceding the concentration, with at least one company having a turnover above EUR50 million and another above EUR17.5 million. An exception to the second domestic threshold may apply if the value of the consideration exceeds EUR400 million.
- Concentration in terms of the GWB –any approach enabling one or several undertakings to directly or indirectly exercise a material competitive influence on another undertaking must be notified, as must the acquisition of:
  - (a) all or a substantial part of the assets;
  - (b) direct or indirect control; and
  - (c) shares if they reach 50% or 25% of the capital or voting rights.
- Pre-merger notification – if the merger is subject to notification, participating companies are obliged to notify the BKartA before implementing the transaction, providing details on the companies involved, the intended transaction and the (potentially) affected markets.

Following the filing, the BKartA reviews the documentation and considers the antitrust implications.

- In Phase I, within one month after complete notification, the BKartA informs the notifying parties either that it has no competition concerns ("one month letter") or that it will transfer the proceedings to Phase II for review.
- If transferred to Phase II, the BKartA has a further five months to conduct a detailed investigation to decide to either prohibit or clear the intended merger; conditions are possible.

7.6 Labour Law Regulations

When acquiring a business in Germany, acquirers should be aware of key labour law regulations and requirements, which include the following.

- Transfer of Undertakings (Protection of Employment) Regulations:
  - (a) under Section 613a of the German Civil Code (BGB), employees' rights and obligations transfer to the new owner in case of a business acquisition via an asset deal, while existing employments contracts typically remain in force;
  - (b) employees must be informed about the transfer and have the right to object to

their employment transfer; and
(c) dismissals due to the transfer are invalid.

- Notice periods: German labour law requires specific notice periods for termination, which vary based on the duration of employment.
- The Works Constitution Act (BetrVG) governs the establishment and operation of works councils, which represent employees at the company level. The works council has co-determination rights on employee transfers, dismissals and restructuring. A works council can be established in companies with more than five employees if requested by the employees. If a works council is established, an employer may be required to consult and disclose information to the works council. The consultation process may delay an acquisition until the works council's concerns are addressed.
- Mandatory consultation – the works council must be consulted on significant changes, including mergers and acquisitions, before final decisions are made. The works council's opinion is not legally binding on the board, but failing to consult properly can result in economic disadvantages.
- Disclosure requirements – the employer must provide the works council with detailed information about the acquisition, including reasons, consequences and measures for employees, in a timely manner to facilitate meaningful consultation.

7.7 Currency Control/Central Bank Approval

Germany does not impose specific currency control regulations that restrict the flow of capital for M&A transactions. However, anti-money laundering (AML) stipulations have an increasing impact on business operations in Germany, and adherence to such provisions is crucial. AML examination is essential to the M&A process from start to finish. This pertains to both the transaction process itself and the due diligence stage, when it is critical to evaluate the target company's compliance with AML regulations.

- Due diligence – the buyer must make sure the target company complies with AML requirements as part of the M&A transaction. This includes confirming the accuracy of the company's financial statements, spotting possible dangers and making sure the target has not engaged in any illegal activity that might result in post-transaction obligations.
- Banks and notaries in M&A transactions have a legal duty to ensure AML compliance. This entails confirming the participants' identities and informing the authorities of any questionable activities. AML requirements apply to banks that facilitate financial transactions for deals; they must carry out due diligence and report any suspicious transactions.

8. Recent Legal Developments

8.1 Significant Court Decisions or Legal Developments

Climate Protection Act

A major legal development in Germany affecting energy and infrastructure companies, particularly in the context of M&A, is the German Federal Constitutional Court's ruling on the Climate Protection Act (*Klimaschutzgesetz*) in April 2021. This ruling declared the Climate Protection Act of December 2019 inadequate for meeting Germany's climate obligations, and called for stricter measures to combat climate change. The decision highlighted the growing legal and regulatory emphasis on sustainability and climate protection in Germany.

Climate Transformation Fund

Furthermore, Germany's Federal Constitutional Court ruled in November 2023 that the reallocation of EUR60 billion in unused COVID-19 loans to the Climate Transformation Fund violated the constitutional provisions that limit government borrowing. The EUR60 billion shortfall led to an immediate funding uncertainty for several energy transition projects, reducing investor confidence and freezing M&A activity for these projects.

9. Due Diligence/Data Privacy

9.1 Energy & Infrastructure Company Due Diligence

In Germany, the due diligence process regarding public companies must respect the major principles of fairness, confidentiality and transparency.

- Insider dealing – the information disclosure may already constitute insider information. A public company needs to implement the pertinent compliance procedures (restricted team, confidentiality, self-release, monitoring).
- Information disclosure – unless the information is generally available, a public company may provide financials, business plans, legal documents and operational data to bidders only after due consideration of its interest in protecting its sensitive information.
- Board of directors' role – the board must balance the interest of confidentiality with the aim of a successful deal with the right measures/monitoring – ie, confidentiality undertakings, restricted teams, third-party review, levels of disclosure.
- Equal information – companies must give the same information to all bidders, to ensure a fair and transparent process.

9.2 Data Privacy

Data privacy restrictions impacting the due diligence process for energy and infrastructure companies in Germany include the following.

- The General Data Protection Regulation (GDPR) – personal data disclosed in a due diligence process must be handled in compliance with the GDPR, including obtaining consent, ensuring data minimisation and securing data.
- The German Federal Data Protection Act (BDSG) complements the GDPR and adds specific requirements for data processing, particularly concerning special categories of data (such as employee data) and the rights of data subjects. This leads, for example, to the need for additional compliance measures in due diligence processes that involve reviewing employee information.
- Sector-specific regulations provide for data protection rules, but generally do not result in restrictions of a due diligence process that go beyond the GDPR and BDSG. Special data protection obligations only arise in exceptional cases – eg, in the scope of the Metering Point Operation Act (MsbG).

10. Disclosure

10.1 Making a Bid Public

A bid may be subject to a publication requirement under the German Securities Acquisition and Takeover Act (WpÜG), which applies to voluntary offers for public companies with a registered seat in Germany and listed on a European Economic Area or German stock exchange. If a bidder already holds or plans to exceed 30% ownership, or seeks to gain control, they must publish their intent and notify the BaFin and the

relevant stock markets immediately after the decision to make the offer.

10.2 Prospectus Requirements

In general, public offerings in Germany require a prospectus, with a few exceptions. This requirement does not apply to offers of less than EUR1 million made across the EU or to fewer than 150 qualified investors per member state. A prospectus is also not required for securities with a minimum denomination of EUR100,000 nor for securities exchanges during a takeover, if a public document containing transaction details is available.

10.3 Producing Financial Statements

A public bid offer has to include information on the financing of the offer, including the bidder's:

- assets, financial position and income situation after the offer;
- participation in the target company; and
- intentions regarding the future business activities of the target company and its employees.

10.4 Disclosure of Transaction Documents

Certain transactions in Germany require the filing of transaction or transaction-related documents with different public bodies and authorities, as follows.

- For public bids, the offer document must be approved by the BaFin before publication.
- The German commercial register is publicly available and, for example, requires the publication of merger documents and articles of associations. Because of this public accessibility, parties usually decide to agree on commercial terms in confidential agreements (such as merger agreements, joint venture agreements or shareholder agreements) and include only the legal minimum requirements in a further set of documents to be filed with the register (ie, merger resolutions in case of a merger and articles of association in case of a joint venture).
- Real estate transfers must be documented and submitted to the land registry office, but these agreements are not publicly available.

11. Duties of Directors

11.1 Principal Directors' Duties

Managing directors in Germany have several key responsibilities during a business combination, including:

- a duty of care – directors must act with the diligence of a prudent businessperson, making informed and well-considered decisions;
- a duty of compliance – they must ensure that all actions adhere to applicable laws, the company's articles of association and any shareholder resolutions;
- a fiduciary duty – directors are required to act in the best interests of the company, prioritising its welfare over personal interests; and
- a duty to avoid conflicts of interest – directors must avoid any situation where their personal interests could conflict with those of the company.

While directors owe their duties primarily to the company itself, which indirectly benefits the shareholders, there is increasing emphasis on considering the interests of other stakeholders, such as employees, creditors and the broader community, especially with the rise of ESG regulations.

11.2 Special or Ad Hoc Committees

It is common for boards of directors in Germany to create special or ad hoc committees during business combinations. These committees handle specific tasks or issues, allowing the board to concentrate on strategic oversight while managing the detailed aspects of the transaction.

When directors face conflicts of interest, these committees become especially crucial. An independent committee can be formed to oversee the transaction, ensuring that decisions are made impartially and in the best interests of the company and its stakeholders.

11.3 Board's Role

The board of directors plays a key role in the M&A process in Germany, including negotiating the deal, overseeing due diligence and ensuring that the transaction aligns with the long-term goals.

Shareholder litigation is uncommon but can occur if shareholders believe the board has breached its duties, such as by failing to get the best price or providing inadequate information. Measures to mitigate the risk of shareholder litigation include:

- due diligence – thoroughly assess the target's financial health and liabilities;
- fair valuation – ensure the offer price is justifiable to avoid undervaluation claims;
- transparency – communicate openly with stakeholders to prevent litigation over disclosure issues; and
- conflicts of interest – address any potential conflicts among the target's directors, possibly using special committees.

11.4 Independent Outside Advice

Directors typically seek independent advice during a takeover or business combination to make informed decisions and meet their fiduciary duties, including:

- legal advice – ensuring compliance with laws, drafting documents and assessing legal risks;
- tax advice – not only tax due diligence but also tax structuring of the deal is usually provided through external advisers;
- financial advice – evaluating the financial aspects of the transaction, including valuation and deal structuring; and
- technical advice – providing an assessment of the technical status of the assets to be acquired and thereby limiting the risk of an acquisition of unfit assets and the mitigation of environmental risks.

Trends and Developments

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Chatham Partners

Chatham Partners is a specialised and sector-focused boutique law firm located in Hamburg, Germany. Founded in 2016 by former lawyers and partners of Freshfields and Latham & Watkins, Chatham Partners now has a full-service offering for energy, infrastructure and real estate projects. Its special expertise ranges from land-grab and acquisition, through regulation, to the development of and investments in large-scale and complex energy assets. The team's thorough understanding of the entire life cycle of a project and focus on the development, realisation and operation of assets allows for a deeper understanding of the industry, its assets and challenges. This is paired with high-end corporate/M&A, tax and finance expertise, which enables the firm to provide advice on transactions that is second to none in terms of quality, efficiency and execution.

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Overview of the M&A Landscape in Germany's Energy and Infrastructure Sectors

With the objective of achieving climate neutrality by 2045, Germany's decarbonisation and energy transition targets are driving a transformation of the energy and infrastructure sectors. As a result, there has been a lot of activity in the M&A market as investors look for opportunities in infrastructure, sustainable energy solutions and clean energy technologies. Sectors like offshore wind and hydrogen are at the forefront of the M&A landscape.

Although this industry is not immune to inflation, the continuous energy revolution presents significant investment potential. Rising energy prices may have substantial economic impact, but they have also helped to generate broad public acceptance of green energy projects, and public support for creating a green economy has increased, creating an environment that is friendly to investment (and investors).

Portfolio deals involving solar and wind assets as well as acquisitions of end-of-life assets (mainly for repowering purposes) continue, offering steady opportunities in the market. While not new, these transactions continue to attract significant interest. Political Berlin and investors have recently concentrated on offshore wind farms and hydrogen generating plants, which are seen as the main foundations of Germany's future energy mix.

Offshore wind is playing a decisive role in scaling up Germany's renewable energy market. Recent auctions already have attracted significant M&A interest, and will continue to do so, as successful bidders seek to find partners for their projects while unsuccessful bidders look for a market share through the secondary market.

Hydrogen is also gaining importance, particularly as a solution for decarbonising carbon-heavy industries. The hydrogen infrastructure in Germany is yet to be created, causing market players that used to be mere energy offtakers to enter into strategic partnerships to create integrated supply chains.

Offshore wind energy: market developments through massive expansion targets and current auctions

Following on from one of the most fundamental legislative changes two years ago, Germany has formulated new expansion targets which are quite ambitious: 30 GW by 2030 and 70 GW by 2045. With currently 8.5 GW installed capacity of offshore wind, the investment opportunities are obvious, particularly as Germany has developed a mature offshore market.

However, not only Germany has set new heights in expansion targets: the global offshore wind market is expected to grow significantly by 13% per year to become a USD1 trillion industry over the next two decades. This would result in 10% of investments in renewables-based power plants being attributed to offshore wind globally.

In the last two years of auction rounds, Germany tendered the largest volumes for offshore wind worldwide, with 8.8 GW in 2023 and 8 GW in 2024, which have not proven wrong: two major new players have entered the German market and together with the other awarded bidders are willing to pay more than EUR16 billion to realise the projects. The high bid fees were the results of a competitive dynamic auction with uncapped negative bids for projects that are not pre-surveyed and relatively smaller amounts for pre-surveyed sites, where bidders had to compete under qualitative criteria and a financial component.

Although the grid build-out and the close proximity of some projects (and the associated wake effects) impose some challenges on developers, the market has shown clear investor interest for German offshore projects. Still, projects between 1 GW and 2 GW, with cost-intensive development, technical challenges and high bid fees, are facing a tense supply chain with limited capacities during the peak development phases of the projects. As a result, investors will to some extent be required to mitigate and diversify the associated risks to the extent possible and required by internal policies.

Strategic joint ventures (JVs) and partnerships, as well as divestment considerations, are on the rise, with large M&A volumes underway. At the same time, the European Union has adopted key pieces of legislation that may have a direct impact on the auction design for offshore wind. This concerns not only the introduction of two-sided contracts for difference (CfDs) in the case of state subsidies, but also the design of pre-qualification and qualitative criteria. It remains to be seen how Germany's implementation will affect the offshore landscape and what further influences from non-European countries can be expected via the supply chain.

Hydrogen in Germany: M&A activities aiming for an integrated supply chain

While renewable energy sources such as wind and solar power are central to Germany's overall energy transition, hydrogen is seen as a complementary technology that can address challenges relating to energy storage, grid stability and industrial emissions. In particular, the substantial offshore wind expansion will make hydrogen a cornerstone of Germany's energy transition strategy. As the government seeks ways to meet the country's ambitious decarbonisation goals, hydrogen will play a key role in transforming industries that used to be hard to decarbonise, such as the heavy industries in West and South Germany.

Market developments in Germany's hydrogen sector

Germany's commitment to hydrogen is defined in its National Hydrogen Strategy, published in 2020 and updated in 2023, which sets out a roadmap for scaling up hydrogen production and infrastructure. The strategy identifies hydrogen as being critical to achieving Germany's climate neutrality goal by 2045, with an emphasis on green hydrogen produced through electrolysis powered by renewable energy. Therefore, Germany's hydrogen market is witnessing rapid growth, driven not only by financial support but also by rising industrial demand.

The German government has committed significant amounts to hydrogen development through its National Hydrogen Strategy, with EUR9 billion earmarked for hydrogen projects, EUR7 billion for domestic expansion, and EUR2 billion for international partnerships. In addition to national initiatives, the European Green Deal has also bolstered hydrogen development.

Demand drivers from various industries

Industrial demand for hydrogen is on the rise, particularly in sectors that are difficult to electrify. The chemical and steel industries are among the largest consumers of hydrogen, as they require high temperatures and specific chemical reactions that cannot easily be achieved with electricity alone. Hydrogen is seen as a viable alternative to fossil fuels in these industries, where it can be used as both a feedstock and an energy source.

For example, the steel and heavy industry, which is responsible for a significant portion of global

carbon dioxide emissions, is actively exploring hydrogen as a means to decarbonise production. Major players in Germany are piloting hydrogen-based steelmaking processes that could significantly reduce emissions.

From scratch: infrastructure construction

Germany is facing the challenge of providing infrastructure that can accommodate the demand for hydrogen. The creation of hydrogen "clusters" or hubs in industrial regions is part of the strategy to increase efficiency by co-locating production, storage and offtake. However, the northern part of Germany in particular is expected to emerge as a key region for hydrogen development, due to its proximity to offshore wind farms that provide the renewable energy needed for green hydrogen production.

At the same time, large-scale, industrial offtakers are traditionally located in industrial areas in Western and South Germany, requiring a transportation and distribution network for hydrogen. The existing gas infrastructure is being adapted to deliver hydrogen, with plans to develop dedicated hydrogen pipelines and storage facilities. Needless to say, this infrastructure roll-out can become a bottleneck for the hydrogen ramp-up.

M&A trend in H2: integrated supply chain v classical offtake

Over the past few months, new forms of offtake agreements have emerged in the hydrogen sector. Unlike the electricity grid, which allows straightforward power purchase agreements (PPAs), the hydrogen infrastructure – comprising production, transportation and distribution networks – is not yet (fully) established.

In response, offtakers are increasingly turning to participation models and JVs as a way to bypass the constraints of the still-developing hydrogen grid. By acquiring stakes in renewable energy generators, such as wind and solar farms, offtakers can ensure a dedicated supply of renewable electricity to power individual electrolysers for hydrogen production.

Furthermore, JVs between offtakers and either energy producers or project developers allow for the co-development of electrolysers with single offtakers (being the industrial plants of one of the JV partners). Whereas these structures ensure a well-integrated supply chain for the offtaker, they impose a single-offtake risk for the other JV partner – requiring very detailed governance and exit mechanisms.

Joint venture and joint development structures as an alternative to classic acquisitions

Traditional mergers and acquisitions are often seen as the default strategy for investors seeking to enter new markets. However, in recent years, JVs and joint development agreements (JDAs) have emerged as increasingly attractive alternatives to classic acquisitions, particularly in the rapidly evolving fields of renewable energy, hydrogen generation and large-scale infrastructure projects.

Whereas a JV involves the creation of a new entity that is co-owned by two or more parties, each of which contributes capital, resources or expertise to the venture, a JDA is a contract-based partnership where two or more parties collaborate on the development of a specific project without necessarily creating a new legal entity. They are often combined, leading from a contractual collaboration to an incorporated JV. Such an approach offers flexibility, in case a project does not develop as one of the partners intended, making it particularly interesting to market players in the energy and infrastructure

sectors by also allowing an easier wrap-up in case of failure.

Advantages over classic acquisitions

Several factors contribute to the growing preference for JVs and JDAs in energy and infrastructure M&A, as follows.

- Early access to assets: JVs and JDAs provide investors with early access to high-value assets, particularly in the development stage of large-scale projects like offshore wind farms or hydrogen production facilities. By partnering early, investors can secure a foothold in strategic assets before they are fully operational.
- Risk sharing and capital pooling: one of the primary advantages of JVs and JDAs is the ability to spread risk among multiple parties. Large-scale projects always carry significant development, construction and operational risks. JVs allow participants to distribute these risks across multiple stakeholders, which is particularly beneficial for projects that are capital-intensive and have long payback periods.
- Access to specialised expertise: JVs and JDAs enable market players to combine their strengths and expertise in specific areas. Typical arrangements comprise local developers that collaborate with international strategic or financial investors. Both parties can leverage each other's capabilities, which is critical in highly regulated and specialised industries like hydrogen production or offshore wind.
- Facilitating entry into new markets: for international investors, entering a new market often involves new regulatory environments. JVs with local partners provide a way to mitigate these challenges, and can also ensure access to the local partner's established relationships in the market. This is particularly relevant in a market where public acceptance of projects can be a determining factor in their success.
- Limitation of exposure: compared to full acquisitions, JVs and JDAs require lower upfront investment, making them more accessible for new market players who wish to test the waters in a new market or technology before committing to a full-scale acquisition.

Key considerations for structuring JVs and JDAs

While JVs and JDAs offer significant advantages over classic acquisitions, they also require careful structuring of the contractual relationships, since the partnerships may well exist over several decades.

- Governance structures: the partners should agree on clear decision-making processes, including how day-to-day operations will be managed, how major decisions will be made, and how disputes will be resolved. Parties tend to have lengthy negotiations about the management of conflicts of interest and the handling of so-called related party matters, where a partner is involved in two sides of a transaction – not only through its shareholding in the joint venture company but also as the company's contractual partners. Specific scenarios usually comprise project development agreements or offtake arrangements.
- Funding obligations and Final Investment Decision (FID) mechanism: early-stage projects in the infrastructure and energy sectors tend to entail significant financial uncertainty, so it is always crucial to decide on clear and workable funding mechanisms. In such situations, the early developmental stage of the project can make it more difficult for participants to agree on funding sources and com-

mit to providing funds upfront. Choosing a FID process can help to overcome this issue. It lets partners postpone significant financing obligations until specific project requirements are satisfied. Moreover, it guarantees flexibility by allowing participants to move forward independently with the project should mutual financial commitments fail, therefore preventing the complete stagnation of the project development because of a funding gap.
- Exit strategies: JVs and JDAs are usually agreed upon with a specific objective in mind. Therefore, the parties must plan for how the arrangement will end. Exit strategies may include buyout provisions, sale of the venture to a third party (including drag-along and tag-along rights), or dissolution of the partnership if the project fails.

Antitrust limitations for JVs and JDAs

JVs are often only incorporated (or acquisitions acquired) after the necessary merger clearances have been obtained. However, JDAs and arrangements that are similar to consortia are sometimes entered into without the same level of scrutiny, which may result in antitrust problems. In situations where JVs or JDAs involve market players who are competitors, these risks become substantial. Even though JVs and JDAs are intended to facilitate co-operation on infrastructure or energy projects, they have the potential to mistakenly lead to the exchange of sensitive market information between competitors.

This risk becomes obvious in the context of bidding consortia, which are frequently seen in offshore wind auctions or regarding infrastructure projects tendered by public bodies. Exchange on pricing strategies, cost structures and future corporate developments is usually required to make the joint offer successful, although it also has the potential to result in anti-competitive behaviour. Mitigation measures comprise a restriction of the extent of information that is shared and ensuring that information interchange is directly relevant to the joint project. Anti-competitive behaviour can also be prevented by setting up clean teams, in which only a small group of individuals who are not involved in commercial activities are granted access to sensitive information.

Project financing of large-scale energy and infrastructure projects

In the process of acquiring a greenfield project, one of the most important questions to ask is how the development cost and construction cost financing should be structured. In light of the fact that the costs of construction are quite high, particularly for offshore wind and large-scale infrastructure projects, a common approach is to secure funding through external debt, at least to a certain extent.

Market development for debt financing

In the recent past, the market for debt financings continued to appeal to project developers and investors. Needless to say, the costs of debt financings have increased over recent months as a result of the rise in interest rates and the rise in construction expenses, which are caused by inflation and the general rise in the cost of materials.

In addition, lenders' requirements in terms of project contracts have been more stringent. This is because lenders want to have certainty that a probable or unforeseen increase in higher construction costs is adequately covered, either by the construction business or by the sponsor. In this regard, prospective investors might think about purchasing the project at a later date, after the debt financing has already been established, in order to have more accurate anticipa-

tion regarding the potential financial risks that may be involved.

On the other hand, new market players are causing more competition under debt providers. In the past, "traditional" banks were the only ones providing funding, but funders (such as pension, insurance and infrastructure funds), institutional investors and green bond providers are now also gaining a slice of the pie, in the market. The reason for this development is that it is becoming increasingly appealing to have green finance on the books to diversify portfolios and to gain solid long-term profits from green projects.

As a result of this new development, the market has become more competitive, and the developers of a project now have more leeway in terms of negotiating terms and can choose the circumstances that are most favourable to them.

Impact of new funding schemes on debt financing

Another impact on the overall structure of financing might occur with a change to the remuneration system. While PPAs are currently more attractive to ensure a sufficient income stream, recent European legislation might offer a different opportunity. Under the amended regulation on the internal market for electricity, two-sided CfDs will become the mandatory model of direct state price support schemes for investments in renewable electricity facilities as of 2027.

However, the highly discussed change will only be relevant for asset classes that are subject to state funding. Whereas state funding has been relevant for onshore wind and solar in particular, investments in offshore wind in Germany have not required state funding since the first EUR0 bids in 2017. Also, the European legislation remains unclear on whether member states must include provisions under which projects would still be able to apply merchant or PPA remuneration models even if those projects qualified for state subsidies, which would allow more flexibility on financing structures. Implementation by Germany is currently still pending, and its actual implementation will be decisive for future project financing structures.

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