DVFA
VERANTWORTUNG IM KAPITALMARKT

Long version

Guidelines for the Preparation of Fairness Opinions

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Guidelines for the Preparation of Fairness Opinions

A. Introduction

I. Goals of the Guidelines for the Preparation of Fairness Opinions

1 The guidelines described here relate to Fairness Opinions which are prepared as a basis for information and decisions for corporate transactions for the governing bodies of corporations, especially management boards and supervisory boards of stock corporations (applicable correspondingly for governing bodies of a GmbH). These guidelines were developed by the DVFA group of experts "Fairness Opinions" under the leadership of Professor Dr. Bernhard Schwetzler, HHL Leipzig.[1]

2 There is no legal obligation to obtain Fairness Opinions in Germany. Nor does the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*, "WpÜG") require Fairness Opinions for the statements made by management boards and supervisory boards on public takeover and acquisition offers. However, the guidelines are especially advisable for protecting corporate governing bodies against risks of liability when making decisions about corporate transactions (see below no. 10).

3 The fairness opinion is not a pricing instrument, but an opinion on the financial adequacy of already given or planned transaction terms and conditions. (see also no. 5). The Fairness Opinion is supposed to help the governing bodies in their decision-making process andand provide protection to them. At the same time, Fairness Opinions render the decisions of the governing bodies transparent for the shareholders and investors and can serve in the capital market as a basis for the own evaluation of the financial benefits of a transaction, depending on the extent of disclosure (see below nos. 11 and 104 et seq.). Therefore, it is common practice in Germany to obtain Fairness Opinions in large corporate transactions.

4 Fairness Opinions are primarily prepared by investment banks, financial advisors and chartered accountants. There are to date no uniform standards with regard to content and preparation. The providers frequently comply with internal requirements or the professional provisions of the Institute of Accountants (*Institut der Wirtschaftsprüfer*,

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[1] Additional members of this group are Prof. Dr. Christian Aders (vice-chairman), Prof. Dr. Dr. h.c Wolfgang Ballwieser, Prof. Dr. Christian Decher, Peter Thilo Hasler, Dr. Achim Herfs, Dr. Gerhard Killat, Dr. Sabrina Kulenkamp, Thorsten Müller, Dennis Muxfeld and Prof. Christian Strenger.

"IDW").[2] The Guidelines for Fairness Opinions of the DVFA in the year 2008 were already dedicated to this subject matter, but they were limited to Fairness Opinions for management boards and supervisory boards of bidding companies and target companies in the context of § 27 WpÜG. The present document is in this respect an update of the earlier recommendations of the DVFA. However, this document is much more broadly written and no longer relates only to public takeover offers within the meaning of the WpÜG and instead to corporate transactions in general.[3] These guidelines and the related recommendations intend to specify the standard for evaluating fairness and the methods which are supposed to be applied in this evaluation. These methods must be developed by taking into account the legal framework, and they must be described in an understandable manner for a wide range of users and should provide specific recommendations for best practices.

II. Content and functions of Fairness Opinions

1. Content

5 Fairness Opinions are expert statements about the financial adequacy of the agreed or intended consideration in a corporate transaction. Fairness Opinions are prepared in connection with the negotiated purchase and sale of shares and the acquisition of listed companies in the course of public takeover offers. The clients are the governing bodies (in the case of stock corporations: the management board (*Vorstand*) and/or the supervisory board (*Aufsichtsrat*) of the (potential) buyer and seller and, in the case of takeovers, the governing bodies of the target company.

6 The Fairness Opinion involves a comparison of the value of the consideration offered in the transaction and the value of the enterprise from the perspective of the buyer or seller. The consideration includes the planned transaction price, but also its potential adjustments, for example, as a result of earn-outs or other material, financial side agreements. In a purchase of an enterprise, common other guarantees by the seller, however, are normally not taken into account.

7 A Fairness Opinion consists formally of two sections:

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2 See IDW (2011): Guidelines of the Preparation of Fairness Opinions (IDW S 8) (Status: 17 Jan. 2011), WPg, Supplement 1, pp. 85-96.

3 These guidelines do not affect the occasions for valuations specifically regulated in the law such as structural measures under stock corporations law and mergers.

- the Valuation Memorandum which comprehensively describes the transaction, the used basis of information, the valuation method and the determination of the evaluation with regard to financial adequacy;

- the Opinion Letter which describes in an aggregated form the transaction and its final evaluation.

2. Situations in which Fairness Opinions are used

8 Fairness Opinions are obtained especially in the following situations:

- acquisitions, including public takeovers;

- divestments, namely the sale of shares or parts of an enterprise (including a "fund to fund" transactions);

- restructurings, especially debt-to-equity swaps;

- in connection with the statement about the financial adequacy of the issuing price under § 255 para. 2 German Stock Corporations Act (*Aktiengesetz*, "AktG") in the case of contributions in kind, especially share-for-share transactions;

- in connection with the reasoned statement by the governing bodies of the target company concerning a takeover/delisting offer under § 27 WpÜG, possibly in conjunction with §39 German Stock Exchange Act (*Börsengesetz*, "BörsG") para. 2, and

- in conflicts of interest, e.g., in the case of transactions with related persons or a controlling enterprise (§§ 111a, 311, 317 AktG).

9 - transactions with related persons (§§ 111a et seq. AktG) are a legally regulated case of reviewing situations in which potential conflicts of interest may arise.. The rules about a *de facto* corporate group (§§ 311 et seq. AktG) are also based on a potential conflict of interests. But even without statutory regulations for conflict situations, a fairness opinion may be required if shareholders or investors fear possible conflicts of interest in transactions, e.g. members of the seller's board of directors or management intend to assume functions with the buyer after the transaction..

3. Functions of a Fairness Opinion

10 (i) Protection: The Fairness Opinion is a major portion of the information on the basis of which the governing bodies of a company decide for (or against) a transaction or – in the case of the target company in a public takeover – for (or against) supporting an offer. The action by the governing bodies on the

basis of sufficient information is an essential prerequisite for applying the business judgment rule under § 93 para. 1 sentence 2, § 116 AktG (in more detail, nos. 14 et seq.). Therefore, the Fairness Opinion serves to protect the governing bodies against risks of liability.

11 (ii) Validation and transparency: The Fairness Opinion also serves to validate the decision by the governing bodies with regard to shareholders, analysts and, if applicable the capital market and makes the basis of the decision transparent.

12 (iii) Information: The governing bodies receive in the Fairness Opinion information about comparable transactions and market data. The Fairness Opinion accordingly enables them to make their decision for or against a transaction on the basis of objectified information. A Fairness Opinion accordingly provides assistance in making a decision.

III. Fairness Opinions outside Germany

13 Fairness Opinions are used in transactions in numerous countries with developed capital markets.[4] Differences between individual countries exist with regard to the obligation to obtain an opinion; the decision is left to the governing bodies in some countries (USA), and in other countries the decision is required by regulators under statutory authority or in regulations (Austria, United Kingdom, France and Switzerland). There are also different way of handling potential conflicts of interest on the part of the issuer (for example, the issuer must be independent in France) and the publication of the opinion. The entire opinion must be made available in some countries (France, Switzerland), while only a summary must be published in other countries (USA).

B. Legal guidelines

I. Business judgement rule as a starting point for the duties of the governing bodies

14 The corporate governing bodies of the buyer and the seller must comply with the standard of care resulting under § 93 para. 1 AktG for listed corporations and which applies in substance also for other types of corporations when deciding about "whether" and "how" a transaction will take place. The governing bodies have legal protection ("safe haven") under the business judgment rule § 93 para. 1 sentence 2 AktG in conjunction with § 116 AktG when making these decisions, especially when evaluating the adequacy of the terms and conditions of a contract. Acquisitions and divestments are typical corporate decisions. In making such decisions, the executive

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4 An overview of the most important rules is found in the Appendix to these Guidelines.

bodies act in accordance with their duties if they could reasonably assume that they were acting in the best interests of the Company on the basis of appropriate information.

15 A two-step test must be applied when evaluating whether a transaction and its terms and conditions serve to benefit the company in the proper assessment of the governing bodies, i.e., whether a transaction is in accordance with the interests of the enterprise. In the first place, the governing bodies must formally implement the transaction in a process which is appropriate for the requirements in acting with an unrelated third party ("at arm‘s length") (below, nos. 17 et seq.). Secondly, the financial conditions must be reasonable. Not every deviation in value constitutes conduct in breach of duti, but there must be a clearly indefensible disproportion between the value of all considerations involved.. Since the "benefit for the company" and the "corporate interests" are to be taken into account within the meaning of the business judgement rule, the entire evaluation of the transaction by the governing bodies extends beyond merely looking at the financial adequacy. A transaction that is not financially adequate may be justified if the company has a substantial interest in carrying out the transaction. Contrary to an overall evaluation of the governing bodies, however, the Fairness Opinion is limited exclusively to considering the financial adequacy of the transaction.

16 Obtaining a Fairness Opinion about the financial adequacy of an agreed or planned price in the context of a corporate transaction is essential in the contextof the protection under the business judgement rule. If the governing bodies of a company obtain a Fairness Opinion, this opinion is a material argument for action on the basis of reasonable information. At the same time, the examination of the financial adequacy of the price in a transaction constitutes a material element for the evaluation by the governing body making the decision whether the transaction is in the corporate interests. A Fairness Opinion also documents formal, careful negotiation at an arm‘s length basis. The existence of a Fairness Opinion by itself, however, does not relieve the management board and supervisory board of their duties. The governing bodies must properly examine the Fairness Opinion with regard to its reasonableness (see below, no. 22). Furthermore, the governing bodies must take into account additional aspects which are not the subject of the Fairness Opinion (see above, no. 15).

II. Requirements for the arm's length process

1. Negotiations as if between independent third parties

17 When a transaction takes place between the company and an independent third party, there will regularly be no doubt that the entire process of the transaction is carried out ‘at arm's length’. This is especially the case when negotiations are conducted with

multiple interested parties and the governing bodies decide in favor of the best offer (auction process).

18 In the case of transactions with a controlling company, a large shareholder or a member of a governing body, special attention must be paid on following a process similar to that between independent third parties. Conducting an auction process in which independent third parties also participate is a strong indication for a reasonable process for determining the price. However, conducting an auction process is not a substitute for evaluation of the financial adequacy in a Fairness Opinion.

2. Duty to obtain a Fairness Opinion?

19 Obtaining a Fairness Opinion is a substantial indication for action by the governing bodies on the basis of reasonable information and for the transaction process complying with arm's length principles. However, there is normally no obligation for the governing bodies to obtain a Fairness Opinion.

20 It may not be necessary to obtain a Fairness Opinion if and because the governing bodies themselves can develop an expert opinion about the financial adequacy of the terms and conditions of the transaction based on adequate information. However, obtaining a Fairness Opinion is, in any event, regularly advisable in transactions which are important from the perspective of the governing bodies, in the case of conflicts of interests involving the governing bodies or individual members of a governing body, or transactions with related persons. The financial adequacy of the terms and conditions of the transaction is validated by a qualified expert.

21 In individual cases, obtaining separate Fairness Opinions for the managing board and the supervisory board may be considered (see below, nos. 37 et seq.).

3. Verification of the adequacy of the Fairness Opinion

22 According to the case law of the Federal Supreme Court of Justice (*Bundesgerichtshof*, "BGH"), the governing bodies document compliance with their standards of care under the business judgment rule by obtaining advice from an independent expert professionally qualified to clarify the issues on the basis of a comprehensive description of the circumstances of the company and disclosure of the necessary documents, and furthermore by subjecting the provided advice to a careful check with regard to adequacy.[5] The governing bodies must correctly and completely describe to the issuer of the Fairness Opinion the set of facts to be evaluated and they must

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5 BGH, judgment dated 20 Sept. 2011 – II ZR 234/09 = ZIP 2011, 2097 no. 18; BGH, judgment dated 28 April 2015 – II ZR 63/14 = BB 2015, 1743 no. 28; see already BGH, judgment dated 14 May 2007 – II ZR 48/06 = ZIP 2007, 1265 no. 16.

examine the Fairness Opinion carefully with regard to adequacy and accuracy of the applied foundations and facts. This includes an examination of whether the Fairness Opinion is based on accurate and complete facts and answers all questions involving the evaluation of financial adequacy free of any internal contradictions or whether additional questions arise on the basis of the Fairness Opinion. The Fairness Opinion should be discussed by the issuer in a meeting of the governing body and the meeting should be documented accordingly.

23 The information in the Fairness Opinion which is essential for evaluating adequacy is found in the Valuation Memorandum. The governing bodies place value on receiving the valuation manner for examination in a timely manner prior to the decision. Especially the value ranges shown in the valuation method and how they are derived using the underlying valuation methods must be carefully checked by the governing bodies with regard to adequacy.

III. Legal requirements for the adequacy of consideration

24 The terms "financial adequacy" or "fairness" are not defined in statutory law. However, there are legal requirements for the adequacy of the consideration in the case of corporate group relationships or in transactions involving related persons. Transactions in a *de facto* corporate group cannot be disadvantageous for the controlled company within the meaning of § 311 AktG. Transactions with related persons must be examined by the supervisory board above a certain volume with regard to whether the conditions are appropriate in the market (§ 111b AktG). In the case of public takeover offers, the rules on minimum price under the WpÜG must be complied with. The evaluation of financial adequacy of consideration is one of the duties of care of the governing bodies in the case of corporate transactions. The legal requirements, however, are related to the procedure and not the value (see above, no. 15).

1. Seller's perspective

(i) Cash consideration

25 The Fairness Opinion will regularly present a value range for the financial adequacy of the consideration on the basis of various valuation methods and valuation parameters. This range reflects the assessment of the value of the shares in the company from the perspective of the seller. The assessment is made using the forecast of cash flows for the investors and how they are valued using the methods described in section C.IV.4. If the the transaction object is listed on an exchange, the stock price must be included when suitable as a basis for determining the value.

26 Action by the governing bodies will regularly be found to be in accordance with their duties when complying with the requirements for conducting the selling process at arm's length, i.e., conducting an auction process and/or obtaining a Fairness Opinion.

27 When evaluating the financial adequacy, the relevant governing bodies must take into account whether the perspective selling price is within the range or above the determined values.

28 Participation by the seller in the financial benefits, e.g., net synergies (sum of synergies, negative synergies and costs for realizing synergies), improvements of performance and optimization of the capital structure, which the buyer can realize is not legally mandatory. However, an informed decision under the business judgment rule will require an identification of these financial benefits, to the extent possible, so that the negotiated outcome can be measured against them.. Only then can the governing bodies evaluate the financial adequacy of the consideration (see on this point nos. 74 et seq.). In the case of a sale of listed shares, the premium on top of the stock price shows the extent to which the buyer wants to allow the seller to participate in the financial benefits of the transaction.

29 When selling a share in an enterprise which is integrated in the seller's corporate group, the evaluation of the financial adequacy of the selling price must take into account the previous financial benefits or losses achieved in the corporate group by the company being sold.

(ii) Consideration in the form of shares

30 If the Seller receives shares/stocks in the buyer as consideration, the financial adequacy of the selling price is determined on the basis of the relationship between the value of the participation being sold compared to the value of the received shares. A Fairness Opinion involves in such situations also evaluating the financial benefits from the transaction which can be achieved in addition to evaluating the value of the received shares. If the shares offered as consideration are listed on an exchange, the stock price must also be taken into account.

2. Buyer's perspective

31 The concepts applied for evaluating the financial adequacy of a selling price apply in general for evaluating the financial adequacy of a purchase price with the difference that the financial adequacy of the consideration is within or below the range.

IV. Special aspects in public takeover offers

32 A public takeover offer is addressed to the shareholders of the target company. The financial adequacy of the offered price is the central aspect for the shareholders with

regard to a recommendation that the shareholders accept the offer in the context of the statement pursuant to § 27 WpÜG.

33 The management board and the supervisory board of the target company must issue a statement on the public takeover offer pursuant to § 27 WpÜG, in particular on the financial adequacy of the offered price. The goal of the statement under § 27 WpÜG is to create transparency by the governing bodies for the decision to be made by the shareholders.

34 The provision in § 31 WpÜG in conjunction with §§ 4-6 of the WpÜG Offering Regulation (*WpÜG-Angebotsverordnung*) contains rules about the minimum price. The offer price normally exceeds the minimum price in practice. However, this is not by itself sufficient to be able to affirm the financial adequacy and recommend accepting the offer. The governing bodies of the target company must address in detail the adequacy of the offered price. This is done by comparing the offered price with the value for each share.

35 The statement under § 27 WpÜG is often made on the basis of a Fairness Opinion[6] which provides a judgment about the adequacy of the offered price on the basis of different valuation methods and resulting ranges. The governing bodies are legally not bound by the results of the Fairness Opinion when making a recommendation to the shareholders in the statement. There is business discretion in this regard.

36 The governing bodies of the target company, however, not only have to address the amount of consideration, but also the likely consequences of a successful offer for the target company as well as the goals pursued by the bidder with the offer. This can include a discussion of expected value creation potentials of the bidder and synergies arising between the bidder and the target company, especially if reference has already been made to these financial benefits in the transaction documentation. The Fairness Opinion comments on the offeredpremium and, if appropriate, on the reasonable participation in the financial benefits, on which the governing bodies can base their decisions after adequate plausibility checks have been carried out. This requires an examination about the extent to which an offered premium on top of the stock price is within a common range in the market. The common nature of a premium in the market can be an argument for recommending the acceptance of an offer. In contrast, a below-average premium or a complete waiver does not necessarily result in an obligation to recommend rejecting the offer or to abstain from issuing a statement. However, the

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6 During the period from 2017 to 2022, 77.4 % of the statements under § 27 WpÜG were supported by at least one Fairness Opinion. See. finexpert-Value Trust German Takeover Report 2022, p. 18.

governing bodies will be subject to an increased effort in stating reasons if they cannot use a Fairness Opinion as a basis.

C. Preparation of a Fairness Opinion

I. Mandate

1. Client

37 The client for a Fairness Opinion are generally the governing bodies of the seller or the buyer.

38 In the case of a stock corporation, the management board and the supervisory board can jointly or separately request a Fairness Opinion. If the management board and the supervisory board e.g., issue a joint statement under § 27 WpÜG, this statement can also be based on a common Fairness Opinion.

39 Major transactions are regularly subject to the approval of the supervisory board (§ 111 para. 4 sentence 2 AktG). Obtaining a Fairness Opinion is advisable in such transactions. The supervisory board should insist on receiving comprehensive information from the management board so that the supervisory board can itself assess the opportunities and risks. Otherwise, the supervisory board would be violating its duties of care. Although the supervisory board can rely on the accuracy of the analyses and statements of third parties (valuation reports, due diligence results etc.) submitted by the management board, the supervisory board must check the information with regard to adequacy in discussion with the management board and also any external advisors. If the management board has requested the Fairness Opinion, the issuer should explain the valuation work and result also to the supervisory board.

40 Separate Fairness Opinions are always advisable when conflicts of interest can arise within a governing body, for example, because representatives in the supervisory board are related to the buyer /bidder, e.g. because they have positions within the buyer's/bidder's corporate group or when members of the management board of the target company are supposed to be offered new positions at the bidder after a successful takeover or if the proposed transaction involves personal financial benefits. If appropriate, obtaining an independent Fairness Opinion can be advisable, in order to confirm a Fairness Opinion prepared by the transaction advisor.

2. Addressees

41 The clients are the exclusive addressees of the Fairness Opinion. The shareholders of the involved companies whose interests are also protected by the Fairness Opinion, however, are not addressees. This also applies in the situation that the Fairness Opinion is issued for a statement under § 27 WpÜG. This is different from the question about

whether and in which form Fairness Opinion should be disclosed to the shareholders (nos. 104 et seq.). There is no legal duty to disclose because there is no legal obligation to obtain a Fairness Opinion.

3. Engagement letter

42 The engagement letter should regulate the following points:

- client (governing bodies of the company);
- description of the transaction for which the Fairness Opinion is supposed to be prepared (type of transaction, parties to the transaction, role of the client in the transaction, potential or agreed transaction price);
- intended purpose of the Fairness Opinion, if appropriate, clarification about what is not covered by the mandate;
- information bases:
  - duties of the client when procuring information;
  - duty to issue a declaration of completeness;
- form and scope of the Fairness Opinion (divided into the Opinion Letter and Valuation Memorandum, possibly an additional memorandum about the facts with a compilation of the documents provided for the valuation work);
- rules for disclosure (where, to whom, in which form, which parts);
- secrecy and confidentiality (rules on the procedure if there is an expectation that additional questions about the content of the Fairness Opinion will be posed in the shareholders' meeting/general meeting of the client);
- rule on liability;
- effective date of the valuation;
- fee structure, and
- statement about any potential conflicts of interest on the part of the issuer.

II. Issuer

1. Selection of the issuer

43 • The issuer of the Fairness Opinion should be selected on the basis of qualification and reputation. Potential issuers are e.g., consulting firms, valuation firms, accounting firms and investment banks.

44 • If an accounting firm is the auditor of one of the parties to the transaction at the same time, the restrictions on services which are not related to the audit must be complied with. In general, mandating an involved auditor is not advisable.

45 • The question arises when making the selection about the extent to which the issuer must be objectively independent from the client. Objective independence requires that the advisor issues information without being influenced by direct or indirect requirements with regard to the result. The circumstances for the issuance of the mandate must be described for this purpose when performing the mandate.[7]

46 • The question of independence also arises when the advisor involved in the transaction also prepares the Fairness Opinion. In the case of successful completion, the transaction advisor normally receives a success fee which could influence the advisor's judgment. However, it is common practice, anyway, to mandate the transaction advisor with preparation of a Fairness Opinion because the transaction advisor knows the transaction and has the required expertise. This is beneficial in the case of a tight schedule.

47 • There are no legal requirements in this regard. However, in order for the Fairness Opinion to fulfill its functions of protection and transparency (see above, nos. 10 et seq.), all circumstances which can form a basis for a conflict of interests for the issuer should be disclosed, in any event, so that the shareholders and the capital market can consider and evaluate this. This applies not only in the situation in which the issuer is a transaction advisor, but also for other business relationships with the client. Specifically in the case of major transactions, such as public takeover offers, obtaining several Fairness Opinions is also common. It can make sense to supplement a Fairness Opinion from an already involved transaction advisor with an additional, independent opinion.

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7 BGH, judgment dated 28 April 2015 – II ZR 63/14 = ZIP 2015, 1220 no. 36.

The governing bodies of the company should critically examine in each specific situation whether the involved transaction advisor or an independent third party should be mandated to prepare the Fairness Opinion.

As a general rule, we recommend that an independent advisor be retained.

2. Compensation

49 The compensation can be freely agreed. Since the Fairness Opinion is supposed to serve as an information basis and provide assistance in making a decision, the compensation should not be success-based.

50 The purposes of the Fairness Opinion are only achieved if the Fairness Opinion is based on an objective, independent valuation which is not influenced by any inappropriate considerations. The compensation does not have to be disclosed to the shareholders.

3. Information basis

51 The issuer of the Fairness Opinion needs sufficient information to be provided, in order to be able to carry out the valuation work. Obtaining the necessary information is generally the responsibility of the client. This should be specified in the engagement letter (see above, no. 42). Obtaining information by the client relates primarily to information about the subject matter of the transaction. Procuring and analyzing information related to the capital market such as e.g., stockprices, comparable companies, comparable transactions, multiples and observable takeover premiums are a material part of the Fairness Opinion and are the responsibility of the issuer. This also applies for all publicly available data (industry and market studies, research reports, reports by analysts).

52 The scope of the required information depends on the situation. If the Fairness Opinion is prepared for the seller or for the target company in the case of § 27 WpÜG, the client has access to all internal corporate information, especially data from internal and external accounting, the planned accounts and possibly vendor due diligence reports and information memoranda.

53 If the Fairness Opinion is prepared for the buyer, such data about the transaction object may not be available or may not be available to the same extent. The issuer will then have to rely on information which the client has received from its advisors or the seller or the target company (information memoranda, due diligence reports, analyses by transaction advisors). Independent access to a data room enables the issuer to carry out the own evaluations of the available financial information.

54 If the Fairness Opinion is prepared for the buyer, normally all financial benefits from the transaction should be taken into account when evaluating the adequacy of the transaction price (see below, nos. 78 et seq.). The governing bodies of the buyer should already have prepared these analyses by themselves or with the assistance of third parties. It is not the responsibility of the issuer of the Fairness Opinion to identify and plan these financial benefits. This should be specified in the engagement letter.

55 The issuer should check the adequacy of the information received from the client. This applies especially for planned accounts and assessments of synergies. However, independent due diligence by the issuer is not necessary. To the extent the issuer believes that relevant information is missing, the issuer should point this out in the Opinion Letter.

4. Execution of the mandate

56 • The execution of the mandate begins with the preparation of the engagement letter with the above discussed content such as the definition of the mandate, the description of the planned transaction, specifying the applicable valuation method, the necessary information from the client, agreeing on a schedule and the form and scope of reporting as well as the compensation.

57 • The issuer of the Fairness Opinion is generally free with regard to whether the issuer conducts the valuation work in the offices of the client or at the issuer 's own offices or possibly in a digital manner. At the start of the issuer 's work, the issuer will address a comprehensive request to the client for the necessary information. After a first review of the received information, especially the annual financial statements and consolidated financial statement and the client accounts, it is advisable to conduct an in-person question and answer meeting (Q&A meeting) together with the client to clarify open questions. This can be supplemented as needed by means of a written Q&A catalog. The accuracy of the provided information and the completeness of the information which is relevant for the evaluation should be confirmed by the client in a declaration of completeness. In addition, the issuer of the Fairness Opinion should present the results of the issuer 's analysis to the governing bodies and provide sufficient answers for the related questions by the governing bodies.

III. Content of the Fairness Opinion

1. General rule

58 There are no legal requirements for the content of the Fairness Opinion. However, since the Fairness Opinion serves to document the action on an informed basis and for purposes of transparency (nos. 10 et seq.), the published portion of the Fairness

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Opinion should clearly state the basis and with which methodology the issuer has arrived at the result.

The Fairness Opinion consists of the Opinion Letter and the Valuation Memorandum. See above no. 7 with regard to the structure of the Fairness Opinion.

60 The Opinion Letter should name the client, provide a brief description of the transaction, state the time period for the valuation work and disclose any conflicts of interest. The Opinion Letter (in the case of a positive evaluation) often only contains a very brief statement about the financial adequacy of the consideration in the transaction stating that the proposed consideration is "*fair from a financial perspective*" or what additional information should be provided.

2. Structure

61 The following recommendations go beyond the legal requirements and in part also beyond present practice.

(i) Valuation Memorandum

62 The Valuation Memorandum contains the comprehensive explanation about the valuation of the target company performed by the issuer. This should describe the methods used for the valuation, the basis of information that is used and the approach when making the assessment.The projections for future cash flows for the investors, the determination of the applied costs of capital and the terminal growth rate assumed for determining the terminal value should be described for the applied discounting method. In the case of multiples-based valuation methods, the selection of the used peer group companies, the value driver variables applied for calculating the multiples and their reference in terms of time as well as any premiums or deductions made in determining the value should be explained.

63 The aggregate description of the determination of value is provided by means of value ranges; how the assessment was made is explained on the basis of these value ranges.

64 The following recommendations apply for the structure and content of the Valuation Memorandum:

65 • The result of the evaluation of the financial adequacy and the most important steps in determining the adequacy are explained in an executive summary.

66 • In a further section, the mandate and the execution of the mandate are described. Especially the scope and quality of the information provided by the client, e.g., the use of results from any conducted due diligence examination, and the relevance for making the assessment should be addressed.

67 - The background of the transaction is explained. This includes especially an exact description of the enterprise's position in its market and competitive environment. In the case of the buyer company, the importance of the transaction for the company to be valued and the incorporation of the company in the business strategy should be described.

68 - It is advisable when valuing the transaction object that this is done in two steps: First, the target company is valued in its existing structure as a stand-alone business; in a second step, especially in the case of a Fairness Opinion for the buyer, a separate determination of the financial benefits of the transaction based on the business plan and including synergies may be considered (more detailed below, nos. 78 et seq.).

69 - The calculations carried out to determine the equity value and the financial benefits should be explained in detail (see on this point, nos. 88 et seq.).

70 - Finally, the reasons for the judgment expressed in the Fairness Opinion and the described value ranges must be discussed.

(ii) Opinion letter

71 The actual Opinion Letter is often very short. However, since the Fairness Opinion also serves the purpose of transparency and information for the capital market (see above, nos. 11 et seq.), it is advisable to provide to the reader of the Opinion Letter the information needed to verify how the issuer of the opinion arrived at the judgment. The level of detail of this information is generally in the discretion of the issuer; the issuer will coordinate this with the client. Especially the following points must be addressed:

- intended use;
- valuation date;
- time period for the work;
- statement about any conflicts of interest or independence;
- description of the transaction;
- information basis for the opinion;
- details in the form and development of the business plan which forms the basis of the valuation

  - extent of discussions with management about the business model and verification of the adequacy of the business plan by the valuation expert;
  - conducting benchmarking analyses;
- description of the valuation method;
- standards applied when preparing the Fairness Opinion;
- details about the valuation methods (e.g., market value and value of capital methods, number of peer group companies and comparable transactions, determination of the costs of capital);
- final reasons for the judgment about the financial fairness of the issuer.

72 We recommend disclosing the entire range of value in the Opinion Letter due to reasons of transparency unless there are important reasons not to do so.

3. Professional and organizational requirements for issuers of Fairness Opinions

73 Firms which prepare Fairness Opinions must take care to avoid conflicts of interests by establishing internal rules for organization and communication. This involves especially compliance with the following requirements in the process for preparing a Fairness Opinion:

- installation of a Fairness Opinion Review Committee;
- assuring the professional qualification of the issuers of the Fairness Opinion, and
- separation in terms of organization and personnel in the Fairness Opinion Review Committee from the working groups which are providing advice in the corresponding transaction and/or preparing the Fairness Opinion.

IV. Financial adequacy

1. Fundamental criteria for evaluation

74 Issuers of Fairness Opinions must evaluate the financial adequacy of theconsiderations offered exclusively according to financial criteria. This involves valuing the consideration and comparing the respective values. The buyer and the seller will determine as a general rule the value for the transaction object using the method described in nos. 83 et seq. If the transaction object is listed on an exchange, the suitability of the stock price as the standard for the valuation must be examined. If the stock price is appropriate according to this examination, values derived from the stock

price (see nos. 92 et seq.) are in principle weighted equally with regard to their importance.

75 The seller and, in the case of consideration in the form of shares, also the buyer will initially use their respective stand-alone values on a going concern basis without any change in the planning, including the measures contained in the planning, as the basis for evaluating the transaction. In addition, the amount of the overall financial net benefits that can be generated is important for both parties when evaluating the fairness of the transaction. This results for both parties in principle in a requirement to estimate and allocate these benefits.

76 If the acquisition of the target company is to be paid for in whole or in part through shares in the company held by the buyer or a new company established by the buyer, a company valuation must be carried out for both companies from the perspective of both parties. If the bidding company is listed on the exchange, the discussion in no. 74 with regard to the suitability of the stock price and any consideration of that price applies.

77 Corporate transactions are only "fair from a financial perspective" if the transaction parties do not place themselves economically in a worse position when the transaction is carried out. This is the situation when the value of the consideration to be received exceeds the value of the consideration to be rendered from the perspective of the seller. This includes taking into account the financial benefits from the planned transaction. This applies for the seller as well if the value of the consideration to be rendered exceeds the value of the consideration to be received .

2. Criteria for the evaluation by the buyer

(i) Cash consideration

78 The consideration of the buyer is determined by paying cash when acquiring a company. The received consideration consists of the stand-alone value of the company to be acquired (the transaction object) and the value of the financials benefits that can be generated for the buyer. If the transaction objects is listed on the exchange and the stock price is aappropriate, the stock price and any additionally offered premium must be compared with the determined value and included in the evaluation (see no. 74).[8] The evaluation of financial fairness is made subject to the assumption that the intended

[8] The minimum price rule under § 31 WpÜG influences the amount of the bid but not the evaluation of its fairness.

quota of shares in the target company is achieved in exchange for the offered consideration.[9]

79 Since the financial benefits which can be realized normally accrue primarily to the buyer, these benefits must be included and valued in evaluating the financial adequacy of the considerations offered. The allocation of the financial benefits to both parties to the transaction and the portion of these benefits attributable to the buyer as determined by the offered purchase price for the target company must also be taken into account.

(ii) Consideration in shares

80 If payment for the purchase is made with shares in the buyer or a new company created by the buyer, the seller receives shares in the buyer or a legal entity (NewCo) created for the transaction in exchange for transferring the seller's shares.[10] The consideration corresponds for the buyer to the new shares of the purchasing company contributed to NewCo; the consideration corresponds to the shares in the newly created joined company which have been received in exchange.

81 The value of the consideration from the buyer's perspective is the value of the granted shares. In the event that the contributed shares are listed on the exchange and the stock price is an appropriate basis for determining value, this price must be included in the evaluation.

82 The value of the received consideration for the buyer is determined by two factors: The value of the newly created company consists of the stand-alone values of both companies and the value of the entire financial net benefits from the transaction. Including and valuing the benefits from the transaction is also necessary for the buyer when evaluating fairness. The buyers's quota of shares in the NewCo is determined by the fixed share exchange ratio. In addition to the stand-alone value of the exchanged shares, the respective stock price must be reflected in the evaluation in the case that the shares are listed and the listing is suitable as a standard. In addition, the allocation of the determined financial benefits to both parties and any offered premium on top of the stock price for the target company must be considered.

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9 This means that the evaluation of the probability that this quota of shares can be achieved with the existing offer is not part of the Fairness Opinion.

10 It is assumed below that in a share for share deal, the ionbuyer's shares and the transaction object will be contributed to a new company (NewCo), and the buyer and the seller will receive in exchange shares in the NewCo. In the event that the buyer finances the transaction using a capital increase and the issuance of newer shares to the seller, the consideration corresponds to the granted new shares. The same effects result economically in both situations.

3. Evaluation criteria for the seller

(i) Cash consideration

83 The consideration of the seller consists in this situation in granting shares in a company, and the consideration of the buyer consists of the price offered as a cash payment. The stand-alone value of the shares in the transaction object again must be determined for valuing the seller's consideration. In addition, any losses from the elimination of positive effects from affiliation in a corporate group must be taken into account as negative synergies. If the transaction object is listed on the exchange and the stock price is an appropriate standard for evaluation, that price and any offered premium must be included in the analysis.

84 The realization of financial benefits from the transaction is not possible for the buyer without the tranfer of the shares by. Therefore, it is generally advisable to also include the financial benefits and their allocation in the evaluation in a Fairness Opinion for the seller. The potential must be quantified and reflected in the evaluation especially if the seller or the target company is in favor of carrying out the implementation of the transaction based on the anticipated benefits.

85 In other cases, the valuation of the benefits can be difficult for the seller because the seller no longer participates in the financial benefits of the transaction after the exit. In some situations, there is also no exact knowledge about the measures that will be carried out by the buyer after the transaction and the financial effects of these measures. If the necessary assessment of the financial benefits by the seller is not possible in a reasonable time and at reasonable expense, the evaluation of the fairness from the perspective of the seller in the case of a listing on the exchange can be carried out indirectly by comparing the offered premium on top of the stock price with offered premiums in comparable transactions. If the transaction object is not listed on the exchange, the evaluation is based on a comparison between the stand-alone value including any existing negative synergies from the sale, and the offered purchase price.

(ii) Consideration in shares

86 In this situation, the consideration consists in the granted shares of the company and the seller receives as consideration shares in the newly created company (NewCo). The stand-alone value of the granted shares must again be determined when valuing the consideration of the seller. In the case of a public listing , the above discussion about suitability and reflecting the stock price and the offered premium applies.

87 The value of the consideration offered to the seller is determined by the total value of the joint NewCo company (as the sum of both stand-alone values of the buyer and seller and the value of the financial benefits) and the seller's shareholding in the joint company. The latter results from the proposed share exchange ratio. Here again, in

addition to the stand-alone values of the exchanged shares in the event of a public listing and the suitability as a benchmark, the respective stock price must be reflected in the valuation , In addition, the allocation of synergies to both parties and, in the case of a public listing, any offered premium on top of the stock price for the target company must be taken into account.[11] Since the seller does not exit in this situation and, therefore, directly participates in the benefits from the transaction, the assessment and valuation of the benefits is necessary, in any event, for evaluating the financial fairness from the seller's perspective. Based on the valued financial benefits, the evaluation of their allocation is also possible.

4. Methods for valuation and evaluating the adequacy of the offered consideration

(i) General rule

88 An enterprise valuation must be carried out to evaluate the financial adequacy of the consideration and the transaction price. The following guidelines apply here:

89 • Various methods: The issuer of the Fairness Opinion can use the methods for determining the equity value which are recognized in business management. The application of multiple valuation methods is recommended, especially income oriented valuation methods such as Discounted Cash Flow methods, and market-oriented valuation methods using trading and transaction multiples as well as analyses of market capitalization of the valuation object. The valuation methods are generally equivalent. However, they have different advantages and disadvantages, so that in individualcases it may be necessary to give preference to one valuation method, togive it less weight or not apply it at all, thus deviating from the general principle of equal ranking of the methods. A deviation must be made transparent and the reasons must be given by the issuer of the Fairness Opinion.

90 • Value ranges: Depending on the selected input factors, different equity values can emerge. The issuer of the Fairness Opinion must take into account the resulting uncertainty about the value by presenting the result asvalue ranges.

91 • Valuation date principle The Fairness Opinion must clearly state the date to which the valuation relates. In general, the valuation date should be the point in time of the decision by the governing bodies about carrying out the transaction. If the Fairness Opinion is prepared in connection with a statement pursuant to § 27

[11] The offer for the shareholders of the target company can be beneficial despite a negative takeover premium if this adverse impact is more than offset by participating in the future financial benefits from the transaction.

WpÜG, the valuation date is the date on which the statement is published. The level of information which could have been obtained with a reasonable exercise of care as of the valuation date must be taken into account in the valuation.

(ii) Valuation methods

- Income oriented valuation methods

92 The issuer of the Fairness Opinion can choose between several income oriented valuation methods. These methods determine the enterprise value by discounting the projected cash flows for the investors (value of future success) plus the value of any assets which are not needed for operations. The determination of value generally is on a going concern basis. In order to determine the present value of the cash flows for the investors, costs of capital are used which adequately represent the expected return from an alternative investment which is adequateto the investment being valued. The equity value is accordingly solely determined from the earning capacity of the equity, i.e., its capacity to generate financial surpluses for the owners of the enterprise. Different variations of the Discounted Cash Flow Method (the "DCF" method) are used. The determination of the equity value by discounting free cash flows with the Weighted Average Cost of Capital ("WACC") and the subsequent deduction of net debt is the most common approach for determining the equity value in international practice. The liquidation value may only be consideredas the equity value in the event that the present value of the financial cash flows resulting upon liquidation of the entire enterprise (the liquidation value) exceeds the value as a going concern.

93 DCF models have the following benefits, among others, with regard to Fairness Opinions:

- They link to the criteria for an investment decision based on the net present value method andits orientation on income.

- They reflect expectations with regard to the amount and the timing of financial cash flows, especially with regard to potential scenarios for business plans.

94 The necessary assessment of future cash flows must be carefully described both for the stand-alone valuation as well as for quantifying the financial benefits from the transaction. Exclusively corporate taxes must be included in the valuation. The assessment and determination of the relevant costs of capital must be shown. Reasons must be given for the assumptions that have been made for the valuation (structure of capital, growth rate when determining the terminal value, the model for determining the costs of capital etc.). The influence of changes in central assumptions and input variables for the determined equity value must be clarified by means of sensitivity analyses. If the corresponding input factors are uncertain, they must be assumed as a range or as a random variable. The description of the result of the valuation accordingly

is not a specific number for the value and instead must be provided as a value rangeof equity depending on the assumptions made.

- Market-oriented valuation methods

95 In addition to Discounted Cash Flow methods, multiple methods can also be used for determining the company value; they are in principle equivalent tothe Discounted Cash Flow methods. The multiple method represents a comparative market valuation. The enterprise value results as a product of a reference variable (frequently sales or profits) of the company with the corresponding multiple which is regularly derived from prices for appropriate listed peer group companies (tradingmultiples) or comparable transactions (transaction multiples). The benefit of the method using multiples is that observable transaction prices or stock prices serve as the starting point for the valuation. The comparability of the peer group companies with the valuation object is very important for the suitability of this valuation method.

96 It must generally be taken into account that tradingmultiples normally represent a stand-alone valuation by the capital market with regard to the individual shares in the listed company and do not take into account financial benefits from the transaction and "c*ost to achieve*" (costs for carrying out the transaction and costs for integration). Compared to this, transaction multiples are based on agreed purchase prices for corporate shares and should already reflect the benefits and *cost to achieve* and also the parameters for the transaction. In order to establish the necessary equivalence with the company being valued, therefore, adjustments to the reference prices by additions and deductions can be necessary, such as e.g., takeover premiums and deductions for liquidity, in order to obtain as the end result an estimate for the value of the shares. The reasons for any additions and/or deductions must also be given. The selection of the peer group companies or comparable transactions must be documented. Any compression of the multiples that might have been carried out for the peer group companies must be explained. It also makes sense in this situation to represent the result of the valuation as a possible value range due to the range of multiples applied to the various peer group companies.

- Stock prices

97 The stock price should in general also be used as a basis for determining the value of the transaction objectin the case of listed companies. Taking this into account results simply from the fact that in the case of voluntary takeover offers and mandatory offers, the bidder must offer a reasonable consideration to the shareholders of a target company pursuant to § 31 para. 1 WpÜG which is derived from the stock prices and the prices for previous purchases.

98 The price for corporate shares results in free capital markets from supply and demand. The price is determined essentially by an estimated benefit (marginal benefit) for the respective buyer and seller. The stock price can especially be influenced in the context of public takeovers already prior to announcement of the intent to submit a takeover offer as a result of takeover rumors or the parties' trading activities. In the case of public takeovers, but also in the case of structural measures, the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, "BaFin") refers to the date on which the transaction is announced for the purpose of calculating the minimum price. Furthermore, the liquidity of the shares must be considered when analyzing the stock price by the issuer of the Fairness Opinion. To the extent there are clear differences between the value derived from the informative stock prices and the value determined using other valuation methods, the reasons for these deviations should be discussed.

- Additional evaluation standards

99 In addition to the mentioned valuation methods, additional standards for valuation can be included in the analysis of the financial adequacy of the consideration. This can include prices before and after the acquisition, estimates by analysts, purchase price indications in the context of bidding procedures or values based on substance such as e.g., the net asset value in the case of real estate holding companies.

(iii) Evaluation of the financial fairness

100 Based on the guideline that there are various methods, the issuer of the Fairness Opinion performs an overall evaluation of the results of the valuation and the value ranges. It is generally not necessary to compress the ranges of values from different valuation methods into an additional, tighter range or even a specific value. It is sufficient for a confirmation of financial fairness that the issuer of the Fairness Opinion is convinced upon weighing the value ranges under different valuation methods and the general benefits and disadvantages of the individual methods as well as potential limitations in a specific situation, that the value of the consideration for the buyer or seller is financially reasonable in the transaction being evaluated and that this must be evaluated "*fair from a financial point of view*".

101 Buyer's perspective: The consideration is financially reasonable if its value is not above the range which was determined for the value of the transaction object (incl. the buyer's individual financial net benefits).

102 Seller's perspective: The consideration is financially reasonable if its value is not below the range which was determined for the value of the transaction object (taking into account the loss of potential financial effects from being an affiliate in the seller's corporate group).

103 The issuer of the Fairness Opinion is not limited to confirming or rejecting financial fairness. The issuer can point out in the evaluation which importance the evaluation e.g., of the stand-alone values and the consideration of takeover premiums and financial net benefits have in the issuer's assessment.

D. Disclosure

I. Legal requirements

104 There are not rules in the law about disclosure of Fairness Opinions in Germany. The overview for other legal systems (see the Appendix) shows that a disclosure is standard there at least in the form of a summary. Disclosure of a Fairness Opinion in connection with the reasoned statement under § 27 WpÜG is under discussion. Legal writings derive from the duty to provide complete information to shareholders a duty to at least disclose the Opinion Letter. It is common practice for the Opinion Letter to be attached to the statement.

105 The sale or purchase of enterprises and participations in enterprises is normally not submitted to the general shareholders meeting for approval.[12] Therefore, there is also no disclosure of a valuation report or any obtained Fairness Opinion. The shareholders can demand in this situation information about the material parameters of the Fairness Opinion on the basis of the right to information under § 131 para. 1 AktG. However, a disclosure of the Fairness Opinion in the general shareholders meeting or on the company's website cannot be demanded.

106 The question arises for the governing bodies whether a disclosure increases the acceptance of their decision. The question arises for the issuer whether disclosure can lead to risk of liability. The legislature did not include an explicit provision on liability for the governing bodies in connection with the statement under § 27 WpÜG. According to the predominant view, the management board and supervisory board have no liability under the principles governing prospectus liability in civil law. Liability under § 823 para. 2 BGB is also rejected because § 27 WpÜG is argued not to constitute a protective statute for the benefit of the shareholders. §§ 93, 116 AktG are precluded as a norm for establishing liability because no harm to the company is conceivable as a result of the statement. These general guidelines definitely apply for the issuer of the Fairness Opinion who only delivers an attachment to the statement by the management board and the supervisory board.

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[12] See with regard to no requirement for participation by the general shareholders meeting, District Court (*Landgericht*, "LG") Munich, judgment dated 20 December 2018 - 5 HK O 15236/17 (nos. 27 et seq.); Court of Appeals (*Oberlandesgericht*, "OLG") Frankfurt a.M, judgment dated 7 December 2010, 5 U 29/10 (on a requirement for submission in the case of acquiring a participation).

107 Liability exists in general only towards the client. The shareholders are not the addressees of the Fairness Opinion and, therefore, also have no contractual basis for a claim asserting liability.

108 Fairness Opinions for the buyer/bidder are not disclosed because they can weaken the negotiating position. Share for share transactions can be an exception because in this situation the financial adequacy of the exchange ratio for the shareholders of the seller and the buyer can only be assessed with difficulty. Disclosure promotes transparency.

II. Select international jurisdictions

1. USA

109 There is no legal obligation in the USA to obtain Fairness Opinions. However, it is common practice to obtain a Fairness Opinion in large transactions of listed companies, especially if the consent of the shareholders must be obtained (buyer) or if the shareholders have to accept the offer (target company) and the board must make a recommendation.

110 This practice is based on a fundamental decision by the Delaware Supreme Court in the year 1985 (*Smith vs. Van Gorkom*, 488 A.2d 858 (Del. 1985)). The court found that there was a violation of a duty of care by the board of the target company because the board did not try to determine the intrinsic value of the shares of the own company as the basis for deciding whether the offered price was reasonable when making its decision to recommend to the shareholders that they accept an offer. The board was held to not have exercised its discretion on an informed basis. It was stated that if the board had obtained an independent expert report determining the value, this could constitute proof that the board had satisfied its duty of care.

111 Subsequent decisions have also been based on whether the board had a sufficient basis of information for its decision. In a further leading case in Delaware (*Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182 (Del. 1986)), the standard of care for the board of the target company was specified in the case of takeovers. It was held that the board must try to negotiate the best possible price for the shareholders. Obtaining a Fairness Opinion is an indication that the board has satisfied the "*Revlon*" standard.

112 If a transaction requires approval by the shareholders, be it on the side of the buyer or the seller, a so-called S-4 Registration Statement and/or a Proxy Statement must be published prior to the voting. Such an approval is necessary e.g., under the Listing Rules for the NYSE and the NASDAQ if more than 20% new shares are issued for the purpose of carrying out a transaction. Both disclosure documents are subject to duties of disclosure also with regard to the Fairness Opinion obtained for the transaction and are examined by the SEC. The disclosure duties are very broad. Initially, the actual Opinion Letter must be published with its exact wording. The information which the issuer receives from the client or which the issuer has referred to (e.g., data about comparable transactions and multiples when evaluating the peer group) must be disclosed. If the issuer has received multi-year planning as the basis for a DCF valuation, this planning must be published. Furthermore, the applied valuation methods must be summarized. The compensation for the issuer must be disclosed. The issuer of the Fairness Opinion is normally also the transaction advisor. This must also be pointed out and the transaction fee must be stated. In these situations, the

compensation for the Fairness Opinion is part of the overall fee and is only due earlier than the rest.

2. United Kingdom / UK

113 Companies normally have no obligation in the United Kingdom to publish a formal Fairness Opinion in connection with M&A transactions. However, the board of directors can have an obligation to obtain external advice in the following situations, in order to examine whether the terms and conditions of a transaction are fair and reasonable:

- In the case of a company which carries out an M&A transaction on the exchange which is subject to the UK Takeover Code of the Panel on Takeovers and Mergers. In such circumstances, the board of directors of the company which is the subject of the offer (and under certain circumstances, also the company which makes the offer) is required "to obtain competent independent advice about whether the financial conditions of offers (...) are fair and reasonable", as is stated in Rule 3 of the Takeover Code. The fact that the board of directors has obtained such advice must be confirmed to the shareholders, but no formal report or Fairness Opinion has to be published.

- In the case of a company whose shares are admitted to listing in the Premium Listing Segment of the London Stock Exchange plc and are, therefore, subject to the Listing Rules of the British Financial Conduct Authority ("FCA"). If such a company intends such a transaction with related companies or persons (as defined in the Listing Rules), the company can have the obligation under chapter 11 of the Listing Rules, depending on the volume of the transaction, "to obtain a written confirmation from a sponsor (i.e., a financial institution such as e.g., an investment bank which is registered with the FCA as a sponsor" and owes its primary obligations under supervisory law to the FCA and not to the company) stating that the conditions for the planned merger are fair and reasonable with regard to the shareholders." The content of the statement by such a sponsor does not have to be disclosed to the shareholders.

- It is also common practice in the market for a company with a premium listing (e.g., in the same category as described above) states as part of the recommendation by the board of directors to the shareholders to vote with "Yes" that the company has been advised by a financial advisor in connection with "important transactions" (i.e., transactions having a certain volume, based on the size of the company in accordance with the Listing Rules). However, there is no formal obligation to obtain or disclose a Fairness Opinion that is issued in this context.

114 A comparable obligation can also exist for British listed corporations which issue shares as non-cash consideration (e.g., as payment for an acquisition when acquiring assets). Under certain circumstances, the company must obtain an independent valuation and a report which confirms that the value of the non-cash consideration received for the shares is not below the face value and any premium on the issued shares. Such a report must be provided to the counterparty in the transaction, but there is no obligation to make the report available to the public (although some companies might voluntarily decide to do so).

3. France

115 A target company in France must obtain a Fairness Opinion in the case of a takeover offer if there is a fear that there is a conflict of interests in the board of directors of the target company.[13] Typical cases for such a conflict of interest include takeover offers by a shareholder which already has control, contractual arrangements between members of the board of directors of the target company and the bidder.

116 Fairness Opinions are normally obtained by listed companies also in the case of other transactions, in order to limit the risk of liability for the governing bodies.

117 If a Fairness Opinion is obtained in the case of a public takeover, the issuer should be independent. The Fairness Opinion must be published either as part of the offering document or as an attachment to the statement by the board of directors of the target company.

4. Austria

118 § 13 Austrian Takeover Act (*Übernahmegesetz*, "ÜbG") in Austria requires: "The target company must appoint a suitably qualified (§ 9 para. 2) independent expert to provide advice throughout the process and to examine the response made by its governing bodies (§ 14). The appointment of the expert requires the approval of the supervisory board."

119 Pursuant to § 9 para. 2 ÜbG, both accountants as well as credit and financial institutions are suitable experts, but normally an accountant is appointed in practice. The expert is also required by § 14 para. 2 ÜbG to evaluate in writing the offer, the statement by the board of directors of the target company as well as any statement by

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[13] See Règlement général de L′Autorité des marchés financiers (AMF) Article 261-1, para. I (in the official English translation): "The target company of a takeover bid shall appoint an independent appraiser if the transaction is likely to cause conflicts of interest within its Board of Directors, Supervisory Board or competent governing body that could impair the objectivity of the reasoned opinion mentioned in Article 231-19 or jeopardize the fair treatment of shareholders or bearers of the financial instruments targeted by the bid."

the supervisory board. If the board of directors and/or supervisory board expressly discuss the adequacy or lack of adequacy of the offer and possibly additionally issue a final recommendation pursuant to § 14 para. 1 ÜbG in the statement which the expert evaluates, this takes place in practice on the basis of a Fairness Opinion. In other transactions, for example, in the case of transactions with related parties or in transactions in which the adequacy of cash compensation must be evaluated in connection with reorganizations or exclusion of shareholders, it is quite common for Fairness Opinions to also be issued. Fairness Opinions are especially obtained for the purpose of reducing the risk of liability of members of boards of directors, managing directors and members of supervisory boards who are not liable under the Austrian business judgement rule if they have acted on the basis of a well-informed decision.[14]

5. Switzerland

120 There is normally[15] no duty in Switzerland to obtain a Fairness Opinion in the case of public takeover offers, but it is indeed common practice for the target company to request a Fairness Opinion which is intended to support the board of directors of a target company when issuing its statement about the takeover offer (report). Pursuant to Art. 30 para. 5 of the Takeover Regulation, a Fairness Opinion is an "integral part of the report". The basis for the valuation, the valuation method and the applied parameters must be disclosed.[16] Pursuant to para. 6, the "third party retained for the Fairness Opinion must have special qualifications and must be persons who act independently of the bidder, the target company and in joint consultation with them." The special qualification for preparing a Fairness Opinion can be determined by the Takeover Commission by means of an administrative order. The statements including the Fairness Opinions are normally accessible for the shareholders through the company's website. All statements (including Fairness Opinions) are also published on the website of the Swiss Takeover Commission.[17]

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[14] See already nos. 8 et seq. with regard to practical use and nos. 14 et seq. with regard to the similar legal situation in Germany in connection with the business judgement rule.

[15] A legal duty to obtain a Fairness Opinion can exist if the board of directors of the target company must respond to the offer for the transaction and if not at least two of the members of the board of directors are independent and free of conflicts of interest.

[16] Regulation of the Takeover Commission on public Purchase Offers (Takeover Regulation - *Übernahmeverordnung*, "UEV") dated 21 August 2008 (status on 1 January 2016), https://www.fedlex.admin.ch/eli/cc/2008/745/de (accessed: 10 May 2022).

[17] See e.g., 0805 - Bank Linth LLB AG, public purchase and partial exchange offer by the Liechtensteinische Landesbank AG to the shareholders of Bank Linth LLB AG

https://www.takeover.ch/transactions/detail/nr/0805 (accessed: 10 May 2022). See also, Berndt, *Thomas/Froese, Hendrik/Leverkus, Lennard/Ornik, Roman* (2014), comply or explain as a solution for Swiss Fairness Opinions? – Analyses of differences in valuation and lack of transparency – identified improvements, Der Schweizer Treuhänder, pp. 748-753.

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