

A photograph of a modern office interior. In the foreground, there is a light-colored wooden reception desk. Behind it, a white wall features the 'HENGELER MUELLER' logo in a serif font. To the left, large glass windows offer a view of a city skyline. The floor is made of light-colored tiles.

HENGELER MUELLER

International M&A

- Public Offers of US Companies shopping overseas -

Dr. Joachim Rosengarten LL.M. '92

Overview (1)

I. Set-up

II. Issues to be Resolved

III. Legal Background

IV. Corporate Law Background

V. Sequence of a Public Bid in Germany

VI. Best Strategy to Get „Full Control“

VII. Get the Price Right

Overview (2)

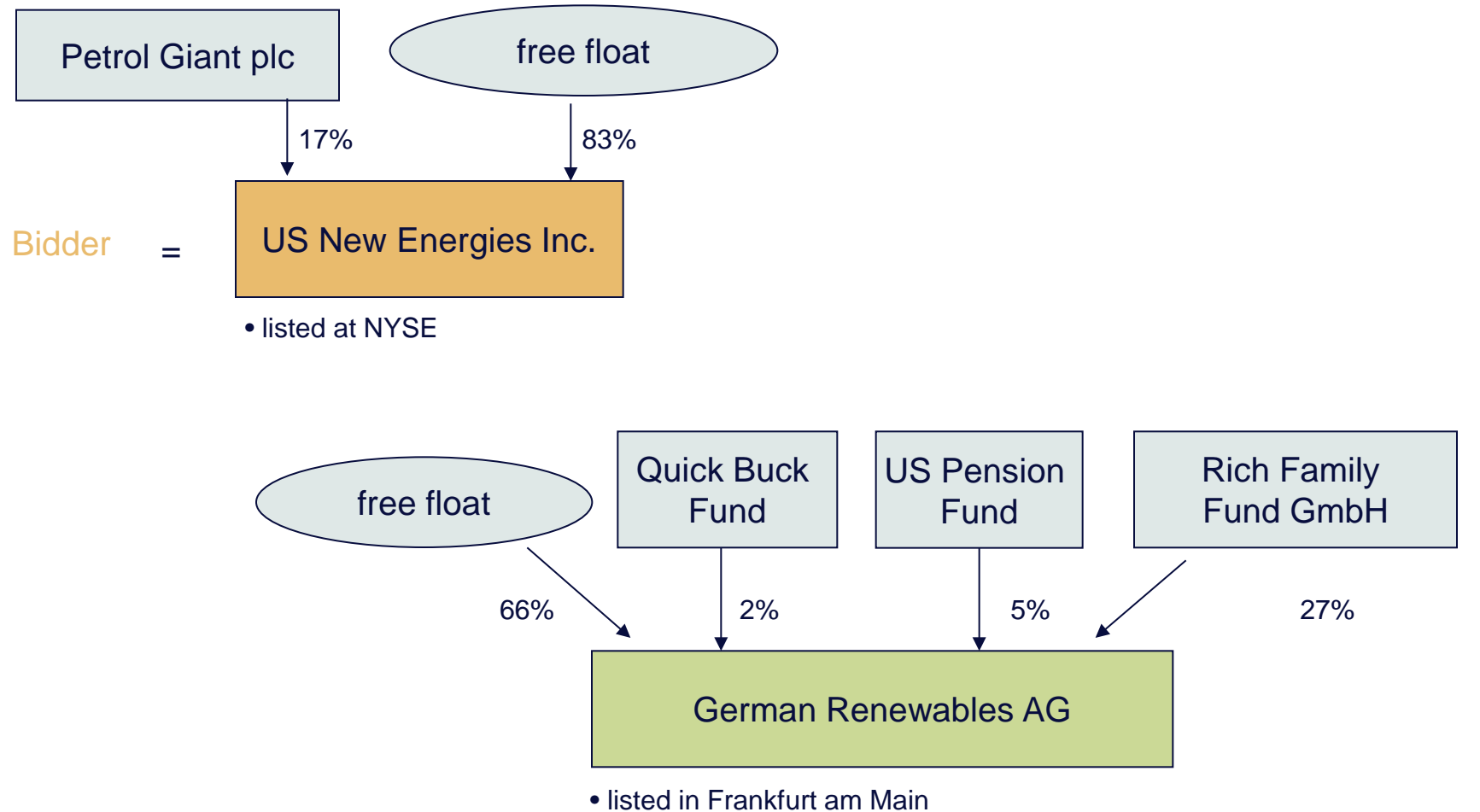
VIII. Voluntary Offers *versus* Mandatory Offers

IX. Share-for-Share Transaction

X. Typical Offer Conditions in Voluntary Offers

XI. Due Diligence

I. Set-up



II. Issues to be Resolved

1. **As a first step, US New Energies wants to acquire the privately held shares (27% + 5% + 2%) and decide later upon acquiring the free float. Is that feasible?**
2. **Can US New Energies acquire quietly approx. 15% of the free float on the stock exchange before approaching the Funds?**
3. **US New Energies would like to think twice:**
 - Can US New Energies conduct a due diligence on German Renewables AG?
 - Can US New Energies make the public offer conditional upon sustained German political support for renewable energy?
4. **Assuming the shares of German Renewables AG are trading at EUR 66 per share, and the average stock price for the last three months is EUR 70 per share:**
 - Would it be possible to offer EUR 68 per share in the public offer?
 - Would it be possible to pay EUR 75 per share to the Funds and only EUR 70 per share to the public?
5. **What is the appropriate percentage of shareholding in German Renewables AG, considering that US New Energies wishes to economically combine the businesses and integrate, e. g., the R&D facilities?**

III. Legal Background Takeovers

Takeovers

- EU Directive 2004/25/EC (Takeover Directive)
- German Law or US Law?
 - Conflicts of Law
 - D: Takeover Act & Takeover Regulation
 - US: Relevant Securities Acts
- German BaFin or SEC?
 - Powers of the Authorities

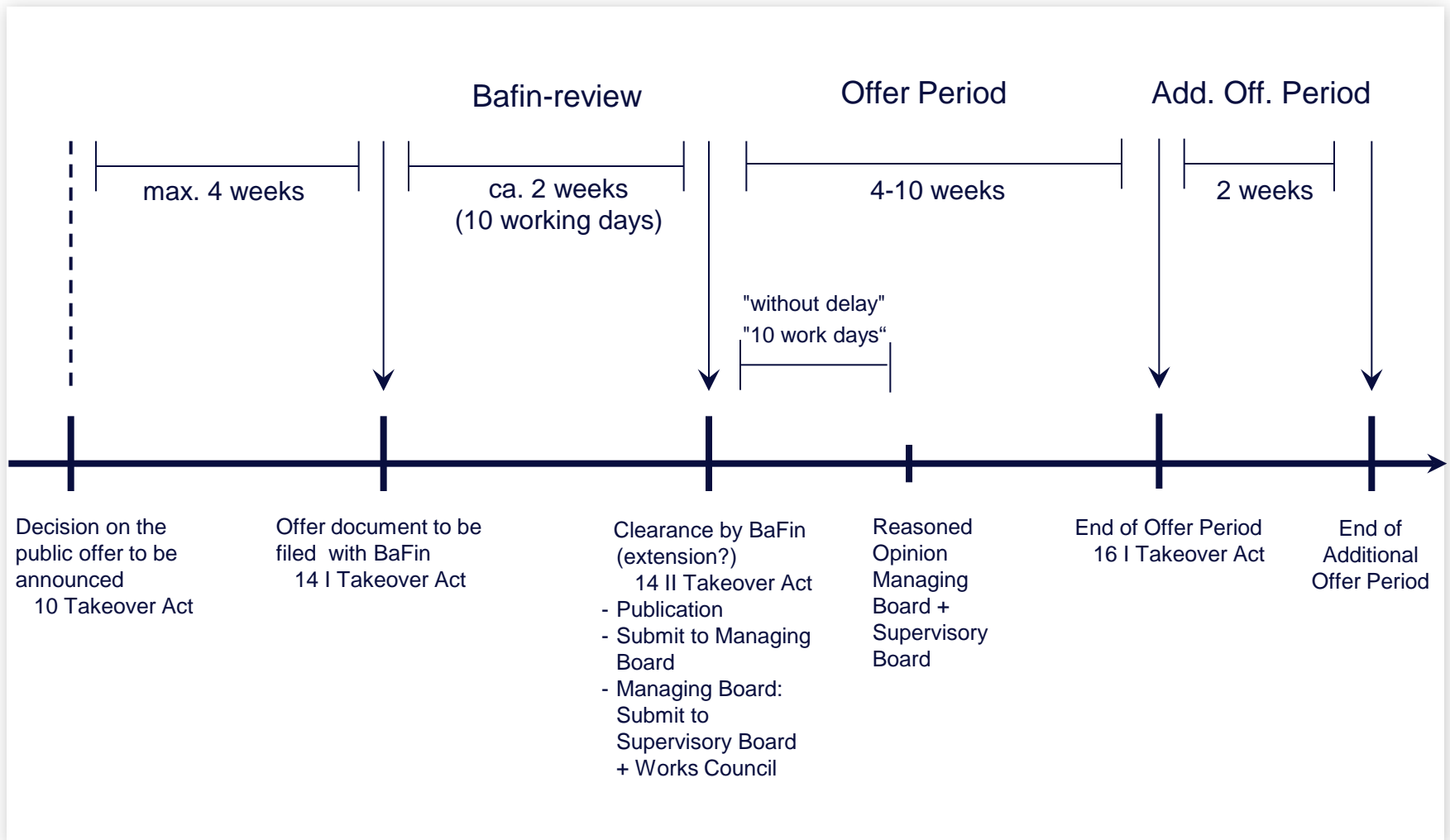
IV. Corporate Law Background

Germany

- Two Tier Board Structure
- Key Thresholds for governing a German stock corporation
 - 50% (de facto group), determined on the basis of voting power
 - 75% (domination agreement)
 - 95% (squeeze out)

US?

V. Sequence of a Public Bid in Germany



VI. Best Strategy to get „Full Control“

Stake building prior to tender offer?

- German disclosure rules
- Cash-settled swaps
- Price impact on tender offer?
- Market abuse / insider dealing

Secure shares of **key shareholders**

- SPA (unconditional / conditional)
- "Irrevocables"

VII. Get the Price Right

Cash consideration vs. share consideration

- Cash may be mandatory (§ 31(3) Takeover Act)
- Share consideration only possible with „liquid EU shares“ (§ 2(7) Takeover Act)

„Appropriate“ consideration

- Minimum: 3 months average stock price before announcement of decision (§ 5(1) Takeover Regulation)
- Best price paid during the last 6 months before publication of offer document (§ 4 Takeover Regulation)
- Consideration increased automatically in case of purchases at higher price during offer period (§ 31(4) Takeover Act)
- Consideration increased automatically in case of off-exchange purchases within one year „after offer period“ (§ 31(5) Takeover Act)

Low ball offers (ACS / Hochtief)

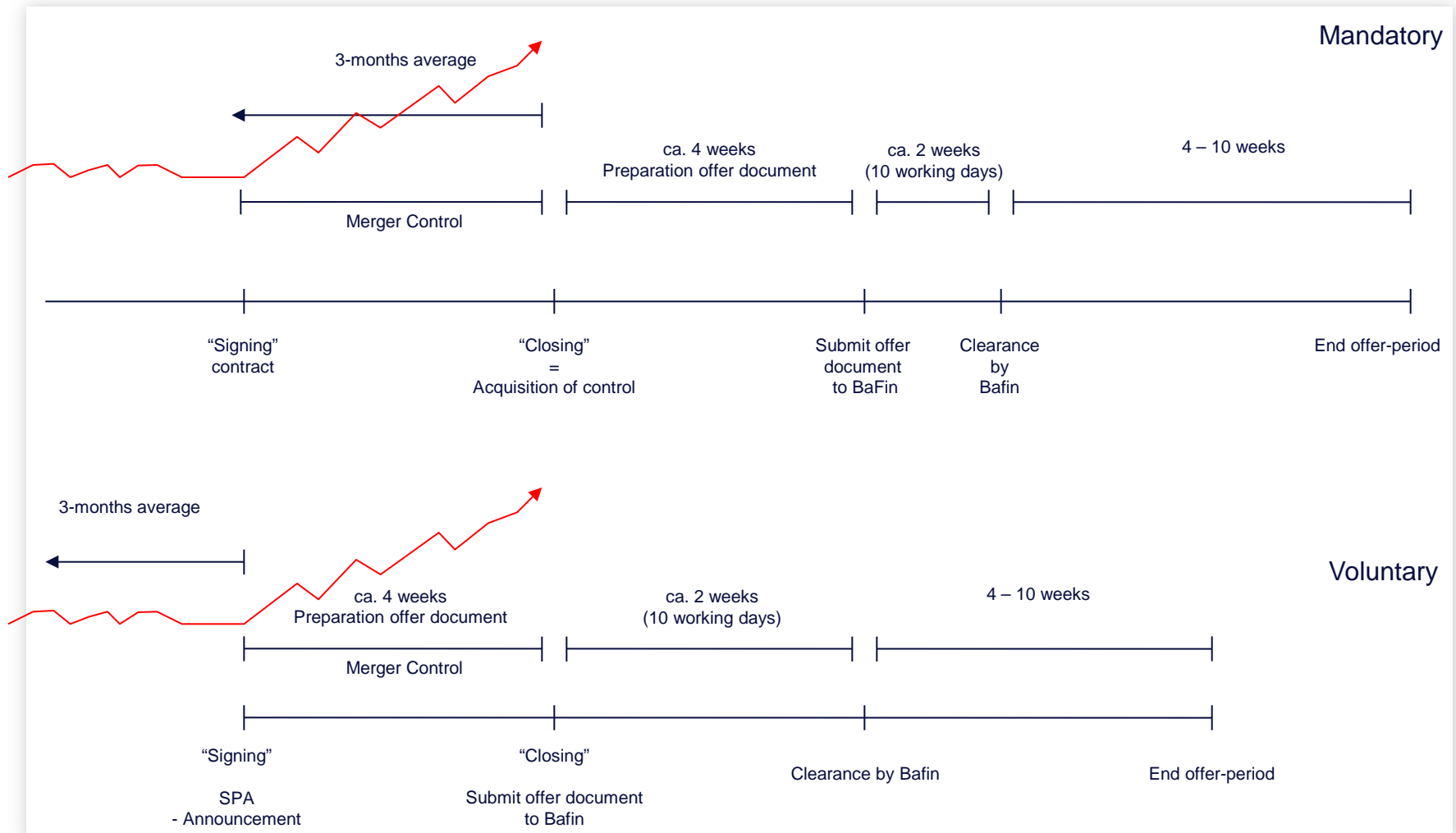
VIII. Voluntary Offer *versus* Mandatory Offer (1)

Acquiring control (at least 30% of the voting rights) triggers Mandatory Offer

- Exemptions / Waivers

In practice mandatory offer avoided by "pre-emptive" voluntary offer

VIII. Voluntary Offer *versus* Mandatory Offer (2)



IX. Share-for-Share Transaction

US Shares?

- Listing in Europe

Valuation Issues

- 3-month-average stock price (7, 5 Takeover Regulation)
- NewCos as bidders

Timing Issues

- Shares must be available when launching the takeover bid
- Prospectus

X. Typical Offer Conditions in Voluntary Offers

Acceptance threshold (usually between 50% and 75%; can be lowered until one day before the expiry of the acceptance period)

Material Adverse Change

- **Business MAC** (no material deterioration of target's economic situation)
 - To be structured in a measurable way, e. g. percentage devaluation of EBIT
 - Proper definition required
- **Market Mac** (no material deterioration of financial markets)
 - E. g. percentage devaluation of DAX or other stock market index

Absence of certain (frustrating) actions by management

Regulatory approvals

- **Merger Control**
- **Foreign Trade approval?**

XI. Due Diligence

General limits on due diligence

Equal treatment of bidders?

Partner Profile

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Recent Transactions

- Sale of Tire Pressure Monitoring Systems Business by BorgWarner to Huf Group
- Sale of Premium Paper Business by M-real to Hahnemühle
- Acquisition of Internormen Group and of Begerow Group by Eaton Corporation from Franger family, respectively Tesch family
- Joint Venture in China for DEUTZ AG

Curriculum Vitae

- Born 1962 in Hamburg
- University of Hamburg (Dr. jur.)
- Université de Lausanne, Switzerland
- Boalt Hall School of Law, University of California at Berkeley (LL.M.)
- Admitted to bar 1991
- Hengeler Mueller since 1992
- Partner since 1997

Memberships

- Co-Chair Frankfurt, German-American Lawyers Association
- IBA, ABA

Practice Areas

- Mergers & Acquisitions (incl. public takeovers)
- Corporate (incl. corporate restructuring, corporate governance)
- Commercial Contracts
- Company Succession
- Counsel to companies in various industries (e.g. automotive, aviation, chemicals, fashion, electronics, energy, heavy engineering, high-tech, infrastructure, newspapers/magazines, paper/forestry, pharmaceuticals, telecoms, web portals)