Insight:
Trends in the German public M&A market in 2021

1. Overview of the German public M&A market in 2021

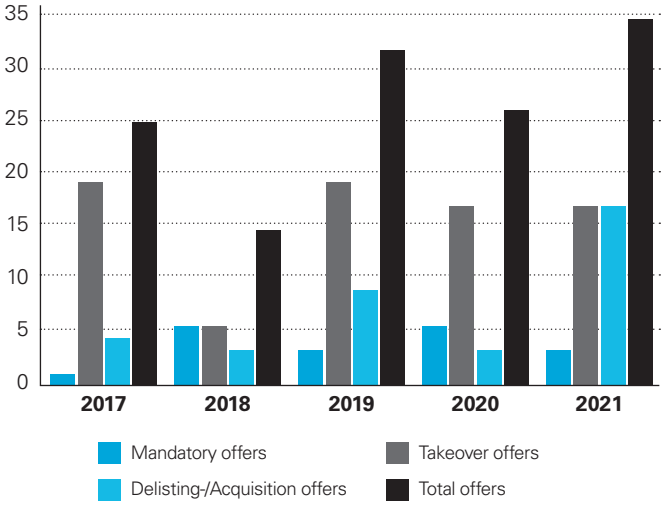
The overall boom in M&A in 2021 was confirmed in Germany's public M&A sector, with a total volume of **EUR 67.3 billion**. Despite being influenced mainly by several special factors – including the trend towards delisting and realignment of the real estate market – this development is notable due to the very high company valuations seen in 2021. The DAX 30 (or the expanded DAX 40 since September 2021) increased by almost 16% over the course of the year, from 13,718 points at the beginning of the year to 15,884 points at the end of the year. The Coronavirus-related low of 8,441 points in mid-March 2020 was offset by almost continuous price increases in 2021. If and how the boom of 2021 will continue in 2022 remains to be seen in light of geopolitical turmoil due to the Ukraine crises and rising interest rates.

Performance of the DAX 30/DAX 40 since 1 March 2019

1.1 Number and volume of offers – delisting as new trend?

Given the extensive reporting requirements under capital market laws, **access to the capital markets looks increasingly unattractive** to many companies. Almost half of WpÜG cases in 2021 were filed with the aim of withdrawing from the stock exchange's regulated market upon completion of a delisting offer. Whilst, at first glance, the boom in the public M&A market appears to be above average compared to prior years, with a total of 33 offers (and one prohibition), nevertheless 15 delisting offers were published (compared to only three delisting offers the previous year) and only 18 takeover or mandatory offers were published.

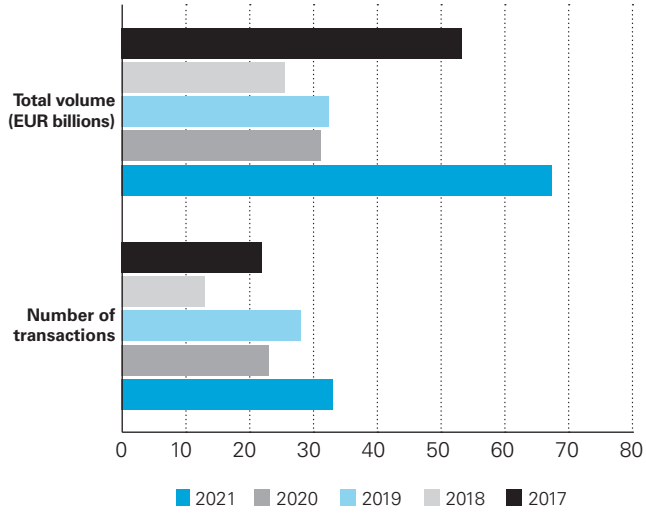
There is still a tendency to do everything possible to avoid a mandatory offer if acquisition of control is reached. In 2021, only three mandatory offers were issued, of which two were simultaneously delisting acquisition offers. Three additional takeover offers were also combined with a delisting offer.



Number of WpÜG procedures in 2017-2021 (excluding prohibitions). In 2021, two delisting acquisition offers were combined with one takeover offer and one further delisting offer was combined with a mandatory offer.

The German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*) deems publication of voluntary takeover or mandatory offers combined with a delisting acquisition offer to be admissible if the rules applicable to delistings stipulated in section 39 of the Stock Exchange Act (*Börsengesetz, BörsG*) are satisfied (in particular as regards the minimum consideration indicated in section 39 para. 3 sentence 2 BörsG). Presently, however, **many delisting offers** are made soon after a previous takeover offer for the respective target company: Easy Software (takeover offer in 2020/delisting in 2021), zooplus (2021/2021), Schaltbau (2021/2021), TLG Immobilien (2019/2021), Lotto24 (2019/2021), Tele Columbus (2021/2021) and Osram (2019/2021).

Both the number of transactions and transaction volumes – spurred on by high overall stock exchange valuations – were higher than average in 2021.

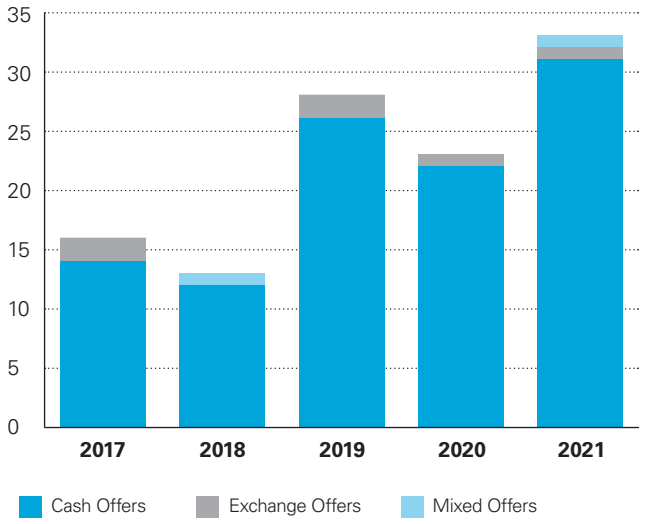


Number/volume of WpÜG transactions in 2017-2021

Year on year, **the total volume of transactions doubled to EUR 67.3 billion** (taking into account all transactions, including multiple offers for the same target company, three for zooplus and two for Vonovia/Deutsche Wohnen). The largest transaction was the takeover of Deutsche Wohnen by Vonovia, with a transaction volume of more than EUR 18 billion. Seven of the 33 offers had a volume of more than EUR 1 billion. In 13 takeover cases, the transaction volume was below EUR 100 million.

There has been a **further increase** in the practice of **concluding non-tender agreements** to reduce the transaction volume and, in consequence, also the financing volume. For example, in parallel to its takeover of Deutsche Wohnen, Vonovia also made a purchase offer to the shareholders of GSW, a subsidiary of Deutsche Wohnen, at the statutory minimum price, thereby avoiding the mandatory offer. By concluding a non-tender agreement with Deutsche Wohnen as the parent company and a 94.02% indirect shareholding, it was able to reduce the volume of financing for the takeover of GSW from EUR 6.5 billion to EUR 309 million. Last year, **non-tender agreements** were concluded with selected shareholders in a **total of 18 cases**, i.e. in more than 50% of all cases.

1.2 Consideration and premiums



Type of consideration (2017-2021)

As in previous years, **cash offers** continued to be **the norm** in 2021. Due to the time and expense associated with an exchange offer, using shares as consideration has always been the exception since the WpÜG entered into force in 2002; however, it has definitely been the preferred method in the case of very large takeovers (e.g. Praxair/Linde in 2017, completed in 2019, and the unsuccessful takeover of Deutsche Börse by the London Stock Exchange in 2016). The main factors behind the view that exchange offers require excessive time and expense include the implementation of corporate actions to create the shares being offered and the need to draw up a prospectus.

The very restrictive **judgment** on exchange offers **by the Frankfurt Higher Regional Court of January 2021** (see section 5 below) and, in particular, the definition this judgment provides of the term "**liquid share**" and the associated high legal and practical barriers, is likely to mean that shares will be considered even more rarely as an option for consideration when preparing takeover procedures.

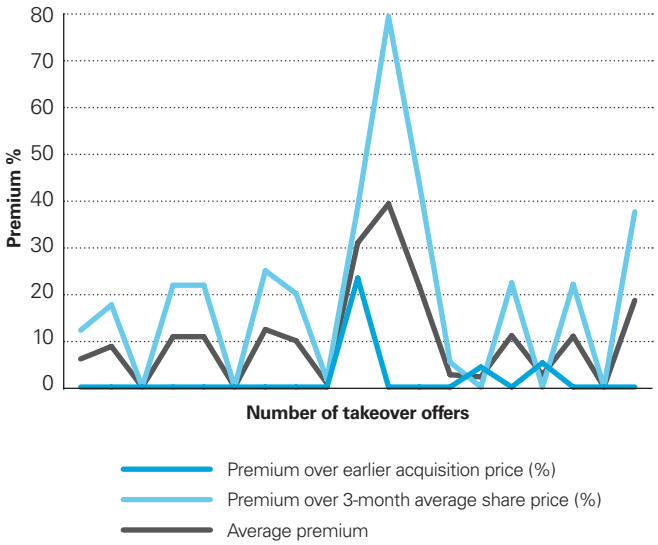
Against this backdrop, it is not surprising that only one genuine exchange offer was published in 2021 – Acorn HoldCo's voluntary public exchange offer (12 November 2021) to the shareholders of ADVA Optical Networking SE. Based on the judgment by the Frankfurt Higher Regional Court, the offer document contains a "liquidity test" in the form of a comprehensive review as to whether the bidder shares on offer meet the criteria of article 22 para. 1 of the EU-Regulation 1287/2006 implementing MiFiD regarding record-keeping obligations of investment firms, transaction reporting, market transparency, admission of financial instruments to trading (MiFID Implementing Regulation).

Offers with mixed or variable consideration in the form of a combination of cash payment and shares continue to be the exception. In 2021, in its combined takeover and delisting offer, the Dutch company CTP N.V. offered the shareholders of Deutsche Industrie REIT AG shares as alternative consideration. Consideration in the form of shares was offered as an "attractive alternative consideration" to the legally mandatory cash consideration for shareholders who wish to participate in the development of the target company and the associated business activity of the post-takeover combined companies following successful integration. The bidder had sole discretion to set the exchange ratio between offer shares and bidder shares in negotiations with the target company. Neither the WpÜG nor the WpÜG Offer Regulation (*WpÜG-Angebotsverordnung, WpÜG-AngebotsVO*) contains a legal provision regarding variable or alternative consideration. However, an extensive "liquidity test" was performed for this offer as well on the shares offered as alternative consideration in line with the requirements specified by the Frankfurt Higher Regional Court.

Incidentally, the only **prohibition of a takeover offer in 2021** by BaFin occurred when it determined, upon reviewing the criteria specified by the Higher Regional Court, that the shares offered as consideration for the intended takeover offer by 4basebio AG to the shareholders of KROMI Logistik AG did not provide sufficient liquidity.

Bidders' willingness to offer high premiums over the statutory three-month average share price has not changed significantly compared to previous years. **Premiums of approximately 20-25%** (on top of the average share price for the past three months before publication of the notice pursuant to section 10 WpÜG) were generally accepted by the market. If we look at premiums over the purchase price paid for earlier acquisitions pursuant to section 4 WpÜG-AngebotsVO, they are normally small; the price paid for the earlier acquisition often determines the amount of consideration offered. In the case of **delisting offers**, as a rule **only the statutory minimum price without a premium** is offered.

Only in the case of the takeover battle between private equity bidders EQT and Hellman & Friedman (H&F) for zooplus was a far-above-average premium of almost 80% over the three-month average share price offered (see section 1.4 below for details on the bidding contest).



Premiums for voluntary takeover offers in 2021

Regarding **consideration**, the second takeover offer from Vonovia to Deutsche Wohnen's shareholders includes **an innovative feature**: in the offer document, the bidder declares, in a binding, irrevocable manner, that it will not increase the offer consideration during the acceptance period and the further acceptance period pursuant to section 21 para. 1 sentence 1 number 1 WpÜG. In addition, the offer document contains the statement that, from the date of publication of this offer document until the date of publication specified in section 23 para. 1 sentence 1 number 3 WpÜG, the bidder and persons acting jointly with it, or their subsidiaries, similarly shall not acquire any shares of the target company on the stock exchange or over the counter for a higher consideration than the consideration indicated in the offer or agree to such an acquisition for such higher consideration. The background to this self-imposed constraint is the fact that institutional investors, in particular some activist shareholders, gamble with the aim of obtaining a higher offer price during the offer period, a practice which this approach is designed to prevent, especially through such a second, slightly higher offer.

1.3 Bidder structures and sectoral focus in 2021

Foreign investors were more active in the German takeover market in 2021 than in previous years. If one considers not only the bidding company's domicile, but also the origin of the main shareholder of the special purpose vehicle (SPV) used as the bidder, 76% of all offers (i.e. of a total of 25 offers) were published by foreign companies. Twelve of a total of 33 offers were issued directly by foreign bidders (without resorting to an SPV). In 12 cases, private equity companies acted as bidders. For private equity investors, despite the fact that the shares held are more fungible, in principle keeping a stock market listing is unattractive due to the likelihood of strategic restructuring and/or repositioning of the acquired companies. Four of the offers made by private equity bidders were (at least also) delisting offers (Battery Funds/Easy Software; H&F/zooplus; Carlyle/Schaltbau Holding; Kublai – Morgan Stanley acting jointly with United Internet/Tele Columbus and Musai Capital/DEAG Deutsche Entertainment).

During the past year, private equity firms were noticeably involved in more large-volume transactions (transaction volumes of > EUR 1 billion) than in previous years, as demonstrated by the attempted takeover of Aareal Bank by a consortium of private equity bidders (inter alia, including Advent and Centerbridge, transaction volume EUR 1.7 billion) and the takeover and subsequent delisting of zooplus by H&F (following a bidding war with EQT: transaction volume EUR 3.4 billion) and the takeover of alstra office REIT AG by Brookfield (transaction volume EUR 2.4 billion).

As in previous years, up to the middle of 2021, there was no discernible **sectoral focus in takeover activities**. However, this changed mid-year, when the **real estate firm** Vonovia – for the second time since 2016 – published a takeover offer for Deutsche Wohnen SE. While the procedure failed initially due to the minimum acceptance threshold of 50%, the offer nevertheless signalled the beginning of a reorganisation of the real estate sector, followed by a series of bids during the second half of the year. As part of this sectoral reorganisation, Vonovia SE itself was directly involved in three of the seven procedures in the real estate sector and the second time round managed to successfully complete the takeover procedure involving Deutsche Wohnen – albeit with a higher offer consideration and waiver of the minimum acceptance threshold. This was followed by another – legally mandatory – takeover offer to the shareholders of the subsidiary Berliner GSW Immobilien AG, in which Deutsche Wohnen already held more than 90% of the shares.

Further procedures in the real estate sector included TLG Immobilien AG, for which Aroundtown published a delisting acquisition offer in the second step following its takeover offer of November 2019. The company was delisted from the

Frankfurt Stock Exchange on 9 December 2021. In addition, this was followed by the takeover of AGROB Immobilien by a Luxembourg-based subsidiary of the RFR Group, the takeover and delisting offer to the shareholders of Deutsche Industrie REIT-AG by the Dutch company CTP and the takeover offer for Hamburg-based alstria office REIT-AG by a subsidiary of private equity investor Brookfield.

1.4 Competing offers

In the German takeover market, **competing offers** by several bidders for the same target company are **the exception**. Most recently in 2019, there was a takeover battle for Osram, in which the Austrian strategic bidder ams ultimately triumphed against the private equity bidder Bain & Carlyle. The end point in this case as well was Osram AG's delisting last year by ams. The multiple takeover battles between bidders Deutsche Balaton and Maruho for Biofrontera AG between 2018 to 2020 attracted less public attention.

Last year, the private equity firm H&F from the USA and Swedish investment firm EQT took part in a widely reported bidding war for zooplus. Only two weeks after H&F announced its EUR 390 bid, the target company confirmed that it had held "open-ended" discussions with EQT regarding a takeover offer. In the meantime, KKR had also entered the bidding war. Although major shareholders and management board members of zooplus had already previously offered 17% of zooplus' shares for sale to the bidder H&F, nevertheless a (customary) right of withdrawal in the form of a "fiduciary out" clause had apparently been agreed in the event another bidder offered a higher price and a better concept.

In view of the impending competing offer, in mid-September H&F raised the offer price for zooplus' shares by 18% to EUR 460 per share. This increased bid caused KKR to withdraw and led to an exchange of blows between EQT and H&F: EQT raised its bid to EUR 470 per zooplus share. In turn, H&F increased the offered consideration for the second time, matching the price offered by EQT. Before the offer period expired, both bidders announced they would be working together in future, along with their intention to jointly issue an offer for zooplus at the newly increased offer price of EUR 480 per share. With the increase in the offer price, H&F had once again secured the support of zooplus' management board and managed to convince the major shareholders to sell the approximately 17% of the shares they had committed under tender agreements to H&F, provided the Americans did not offer less than a competitor. Pursuant to section 31 para. 4 WpÜG, the increase of the offer price to the final price took place in accordance with the law; the bidder concluded an over-the-counter share purchase agreement for 100 shares at EUR 480 each with an affiliated company during the offer period. However, EQT allowed its own takeover procedure to proceed, clearly counting on the fact that, because the consideration contained in its own offer was lower, the minimum acceptance threshold of 50% + 1 share would not be reached – which in fact is what happened.

A few weeks after the end of the acceptance period of the takeover offer for zooplus, the two private equity bidders, which until that point had secured around 89% of the share capital, published a **delisting offer** to zooplus' shareholders and again offered the shareholders the final takeover bid offer price of EUR 480. According to their own disclosures, H&F and EQT are "*convinced that zooplus will benefit from operating as a private company. The company would be better positioned to focus on longer-term objectives and would no longer be subject to the short-term expectations of the capital markets and the regulatory requirements of a listed company.*"

1.5 White & Case in the public takeover market

White & Case were themselves quite active as consultants on public takeovers in Germany in 2021. In transactions that finally became public, the law firm worked on the Aareal Bank takeover (volume: approximately EUR 1.7 billion) as adviser to Goldman Sachs, which was part of the consortium of bidders, along with Advent, Centerbridge, CPPIB and the LGT Group. White & Case also advised French automotive supplier Faurecia on the takeover of 60% of the shares of its German competitor Hella from the owner-families Hueck and Röpke; the total transaction volume of this public M&A transaction in 2021 (the second-largest after Vonovia/Deutsche Wohnen) was almost EUR 7 billion. Also noteworthy: Battery Ventures' support for the takeover of Easy Software AG and advice on foreign trade law and antitrust law to GlobalWafers in the takeover procedure for Siltronic AG (for more on this, see 2.3.(b)).

2. Further market trends in the German public M&A market

2.1 Influence on the takeover market by activist investors

Activist shareholders continue to influence listed companies, even in Germany, often changing the underlying conditions for public takeovers.

While formally, the takeover bid for Aareal Bank published in December 2021 by the trio of private equity investors Advent, Centerbridge and CPPIB failed because the minimum acceptance threshold was not reached, ultimately the failure was probably due to actions by activist shareholders. Both activist investors, Petrus Advisers and Teleios, had spoken out against the takeover bid from the outset despite having previously managed to get the long-standing chair of the supervisory board to resign. Petrus Advisers continued to insist on a carve-out of IT subsidiary Aareon from the Aareal Bank Group. At the shareholders' meeting in December, Petrus Advisers failed in its attempt to assert at least partial control over the supervisory board. The Frankfurt Higher Regional Court then appointed as substitute members of the supervisory board the individuals suggested by the bank.

The first, ultimately failed, attempt to merge Vonovia and Deutsche Wohnen had also attracted Elliott, yet this did not prevent the takeover on the second attempt (which succeeded once the minimum acceptance threshold was dropped). It is interesting that, in the final phase of the Vonovia/Deutsche Wohnen takeover, the hedge fund Davidson Kempner Capital attempted to block completion of the takeover bid with a provisional court injunction. It justified its claim by arguing that board members' conflicts of interest had not been adequately addressed. However, Vonovia ultimately received more than 64% of the voting rights of Deutsche Wohnen, so the hedge fund's legal proceedings came to nothing.

Hedge funds such as Elliott are active both during and possibly after a delisting, as demonstrated by the initially failed delisting of Rocket Internet. This delisting acquisition offer published in October 2020 is a special case in which Rocket Internet acted both as bidder and as target company. Rocket Internet had intended to take advantage of the drop in its share price in the aftermath of the COVID-19 pandemic to remove its share from the stock exchange. In light of the planned delisting of Rocket Internet, Elliott built up an equity position of 20.2%.

In December of last year, it was finally possible to oblige Elliott to sell its shares as part of a public buyback offer, with Rocket Internet offering Elliott and the few other remaining shareholders EUR 35.00.

As a rule, German listed companies have a well-developed defence strategy. Nevertheless, the examples show that, in takeover plans, activists act with flexibility both in the run-up to and in the aftermath of takeover and delisting offers, and potential steps they might take should be considered when preparing bidders and target companies.

2.2 Hedging takeover transactions through agreements prior to the transactions

In Germany, bidders continue to use the full spectrum to hedge a transaction through measures and agreements prior to a transaction. Most often, **business combination agreements** or **investment agreements** are concluded, while separate delisting agreements are also concluded prior to delistings. It is now common practice not to publish such preliminary agreements in their entirety. However, the main points in these agreements are summarised in the offer document.

2.3 Impact of terms and conditions on the success of the offer

(a) Minimum acceptance threshold

A minimum acceptance threshold has become a widespread standard condition in voluntary takeover offers. **Ten out of fifteen takeover offers** specified a minimum acceptance threshold of 50% or more; however, **only in six cases** was such a threshold actually **reached or exceeded** during the offer acceptance period. Vonovia's first attempt to take over Deutsche Wohnen narrowly failed, with an acceptance rate of 47.62% versus the offer condition of 50% of share capital. Publication of the second offer only two months later was possible only because, prior to the publication of the decision to issue this bid, BaFin exempted the bidder from the one-year blocking period stipulated in section 26 para. 2 WpÜG that applied due to failure to reach the minimum acceptance threshold in the first offer. During the second attempt, Vonovia amended the offer to waive the re-set minimum acceptance threshold and on the second attempt even reached an acceptance rate of 64.78% after the end of the offer period (thereby exceeding the original minimum acceptance threshold). In order to avoid jeopardising the

success of the second takeover offer, Vonovia had also waived all other comprehensive closing conditions.

The consortium of bidders for the takeover offer to Aareal Bank shareholders (see 2.1 above) also failed as a result of not reaching the minimum acceptance threshold, as did EQT in its offer to zooplus shareholders. In the latter case, however, this was the desired outcome after the bidder reached an agreement with H&F during the offer period to co-operate and present a joint offer.

In the takeover of Aves One AG by private equity investors, the minimum acceptance threshold merely served to hedge irrevocable commitment agreements through which the bidder had already secured 87.29% of the share capital, so the minimum acceptance threshold of 85% was only a formality.

(b) Regulatory terms and conditions and the long stop date as show stopper

The significance of regulatory terms and conditions has increased sharply in recent years. This applies, in particular, to **investment control procedures**, as the sensitivity of the responsible authorities to foreign trade law has not only increased for political reasons, but is also reflected in reforms of domestic and European legal provisions. At European level, the **EU Screening Regulation** which entered into force in October 2020 provides for better coordination of foreign trade law among the 27 EU member states. The regulation is intended to promote harmonisation of various screening mechanisms at member state level, but does not confer any veto right or enforcement rights regarding transactions on the European Commission. Therefore, every member state continues to be responsible for investment control within its country – so national regulations will continue to vary accordingly.

The amendments to the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*, AWG) (1st AWG Amendment) and the Foreign Trade and Payments Regulation (*Außenwirtschaftsverordnung*, AWV) (15th to 17th AWV Amendments) during the past two years adjusted **German investment screening** to reflect new EU legal requirements and at the same time **strengthened** it in areas where, in the view of lawmakers, individual investments by a **non-EU/EFTA bidder** might harbour particular risks in terms of German security concerns. This especially applies to the area of future and high technologies and to combinations of acquisitions involving investors controlled or financed by foreign states. The catalogue of business activities obligatorily subject to investment control when being acquired by a non-EU/EFTA bidder has been greatly expanded, with a focus on the technology and healthcare/medical sector, on the basis of the EU Screening Regulation, meaning that now a greater number of transactions are subject to German investment control.

Of particular importance for cross-border situations is the fact that, last year, the UK implemented the new National Security and Investment Act (NSIA), which for the first time introduced obligatory security reviews for certain types of transactions. The NSIA also takes a sector-related approach to assessing potential national security risks associated with investments in (or the acquisition of) companies operating in the United Kingdom, and requires that a report be filed by investors acquiring shares in companies that operate in sensitive sectors.

During the past year, investment control legal proceedings had to be initiated in five cases – including the failed takeover of Aareal Bank by a consortium of private equity bidders, the takeover of Alstra Office REIT AG, the takeover of Hella by Faurecia (in Germany, New Zealand and the USA) and the takeovers of zooplus (in Austria and Spain) and Tele Columbus.

Just how important the condition can be that an investment control procedure be successfully implemented in connection with a **long stop date** was recently demonstrated by the failure of the takeover of Munich-based wafer manufacturer Siltronic AG by the Taiwanese chip supplier GlobalWafers. To be completed, the offer published in December 2020 by a German subsidiary of GlobalWafers stipulated that various conditions had to be met by 31 January 2022 ("long stop date"). This also included the issuance of a clearance certificate by the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*, BMWi), now the Federal Ministry for Economic Affairs and Climate Action (*Bundesministerium für Wirtschaft und Klimaschutz*, BMWK). With the date of 31 January 2022 for screening by the ministry rapidly approaching and with **BaFin having rejected any postponement of the long stop date as an option**, GlobalWafers attempted to establish in court through an emergency petition that a clearance certificate

was deemed to have been issued ("*Genehmigungsfiktion*"). With the dismissal of the petition and the appeal filed against it, the takeover failed due to lack of clearance by the ministry on the specified long stop date. Based on its own statements, it was not possible to complete all the screening steps by the specified deadline. Upon expiry of the long stop date, one of the conditions of the takeover offer had not been met and as a result completion of the offer was barred. According to the publication by the court, failure to meet the condition triggered a **termination fee** of EUR 50 million. However, in the court's view, it should be noted that ultimately, both the long stop date set as a condition of acquisition and the termination fee were **voluntary, self-imposed risks on the merits** which the bidder was willing to assume (see section 5 below for more on the judgment by the Higher Administrative Court).

3. Exemptions pursuant to sections 36 & 37 WpÜG

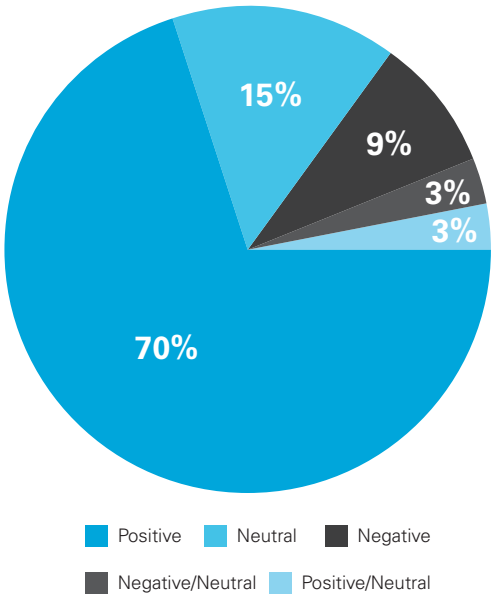
Pursuant to section 35 WpÜG, a party gaining control over a target company generally must submit a mandatory bid to the outside shareholders to enable them to divest. However, the WpÜG stipulates that, upon request, BaFin may exempt the bidder from the obligation to submit a mandatory bid provided that certain legally defined preconditions have been met. Such an exemption is generally possible as part of a discretionary decision by BaFin if a mandatory bid does not appear to be absolutely necessary in order to protect investors.

Last year, a total of **nine exemption decisions** were published pursuant to sections 36 & 37 WpÜG. Four of these involved the reorganisation of the pooled voting rights of the family shareholders of Nemetscheck SE and two were related to Stöer SE & Co. KGaA, in favour of whose shareholders eight exemption decisions had already been issued the previous year. According to BaFin, the reorganisation of voting rights at Nemetscheck was carried out in order to keep the target company's share portfolio together as far as possible or to bundle the portfolio in such a way as to ensure that a legal entity close to the Nemetscheck family would continue to exercise influence in a sustainable way in future. This would not give the target company's outside shareholders any reason, worthy of protection, to take an extraordinary decision to divest as part of a mandatory bid. Both exemption decisions in the Ströer case were similarly structured and were rendered necessary by additions to the voting rights pool. In this regard, following standard administrative practice by BaFin, it does not matter whether the party joining the voting rights pool can (help to) produce decisions. According to BaFin, a much more decisive factor (alone), based on the wording and protective intent of section 30 para. 2 WpÜG, is the fact that, from the viewpoint of outside shareholders, the parties to a pooling agreement are perceived as a block of shareholders based on their internal ties. In this case, too, formal acquisition of control would not be a reason to demand a mandatory bid.

Of particular note – especially against the backdrop of the COVID-19 pandemic – is the exemption decision in the TUI AG matter. Following the COVID-19 relief measures already instituted, in December 2020 the company agreed a further package of financing with private investors, banks and the federal government. Among other things, this provided for two silent partnership interests by the Economic Stabilisation Fund (ESF) as stabilisation measures within the meaning of section 22 of the Stabilisation Fund Act (*Stabilisierungsfondsgesetz*, StFG), the performance of which was tied to implementation of certain financing measures. In its decision published on 4 January 2021, BaFin ruled that **acquisition of control by private investors as a pure incidental consequence of the rescue scenario** was absolutely necessary to eliminate the impending insolvency of TUI AG. In the case of such government rescue and/or relief measures, outside shareholders' interests in a mandatory bid would have to take second place.

4. Statements by the target company

As in previous years, market practice has once again confirmed that the issuance of **separate reasoned statements** by the management and supervisory boards is the exception. In 31 out of 32 cases, a joint statement was published by both bodies, the management board and the supervisory board (in the case of HELLA GmbH & Co. KGaA, by the supervisory board and the general partner). The one exception was the takeover procedure for AKASOL AG by a bidding company of U.S. automotive supplier Borg Warner, during which, because of the dual role of the management board chairman, who simultaneously serves (at least indirectly) as the target company's largest shareholder, separate statements were issued by the management board and the supervisory board.



Votes in the reasoned statements by target companies in 2021

In 22 of 32 cases, the target companies' management bodies voted in favour (this does not include double-counting of the positive statements issued as part of H&F's takeover of zooplus). As a result, compared to the previous year, there was an increase in the percentage of procedures in which the management board and supervisory board welcomed the offer by the respective bidders, from approximately 57% (13 of 23) to around 69%. It should be stressed that, in takeover bids, it has become the norm for the offer to receive positive support from the management board and the supervisory board. Positive statements by management of the target company are often guaranteed in advance through corresponding agreements in a business combination agreement, usually in exchange for wide-ranging commitments from the bidder.

The percentage of cases in which the management board and the supervisory board issued **neutral statements** has dropped from around 26% in the previous year to around 16% (6 of 32 evaluated statements) now. Here, management tends to differentiate between "basically positive, but price too low" and "basically negative" (see chart). In the case of the alternative exchange offer by CTP N.V., management recommended tendering the shares, but only rated the cash payment offered as neutral. In its statement, the management of AGROB Immobilien AG **differentiated between common and preferred shares**, issuing a neutral statement on the former, while it recommended that holders of preferred shares not accept the offer as it deemed the consideration to be inadequate.

Only in three cases (SMT Scharf AG's statement regarding the combined mandatory and delisting offer, ORBIS AG's statement regarding the mandatory bid and Leoni AG's statement regarding the partial acquisition offer) did the management board and supervisory board issue a clearly negative vote. In each case, this was based on an offer price that was too low or inadequate.

During the past year, there were **only three cases** (out of 33 – compared to four out of 23 cases the previous year) in which **works councils and/or employee representatives** exercised their right to publish **their own statement** alongside that of the management bodies. By contrast, it is established practice for management to obtain fairness opinions. While such expert statements were obtained in around 65% of cases (15 of 23) in the previous year, the percentage increased to 75% of takeover procedures in 2021. It is noteworthy that **fairness opinions** were obtained **in all takeover procedures** (with the exception of the special case of Vonovia/GSW (as subsidiary of the additional Vonovia target company Deutsche Wohnen)). Only in the case of delisting offers do companies usually waive a neutral company valuation by third parties, as the statutory minimum price is normally offered.

5. Judgments relevant to takeover law

In 2021, there were two cases in which the starting point for disputes involving takeover law was the consideration offered to shareholders of the target company. In addition, for the first time, the decision by the Federal Economics Ministry under investment control law pending in connection with a takeover procedure was subject of an administrative court case.

As already noted above (1.2), the Frankfurt Higher Regional Court issued a widely noted decision regarding the question of when the shares offered in an exchange offer are liquid within the meaning of section 31 para. 2 sentence 1 WpÜG. The **term liquidity** of shares within the meaning of this provision is not defined in greater detail in either the

WpÜG itself or in the WpÜG-AngebotsVO. While to date the literature has contained various approaches to defining the features of liquidity, in the past BaFin has issued a "forecast decision for individual cases" (most recently on 6 March 2020 as part of the prohibition against Heidelberger Beteiligungsholding AG/Biofrontera AG).

Biofrontera filed an appeal against the prohibition with the competent Securities and Takeover Division of the Frankfurt Higher Regional Court. According to the judgment in this case issued by the Frankfurt Higher Regional Court on 11 January 2021 (WpÜG 1/20), the liquidity concept specified in article 22 para. 1 of the MiFID Implementing Regulation should be the decisive factor in determining the liquidity of the shares; it states that a share is liquid if it is traded daily, the free float totals at least EUR 500 million and either the average number of transactions involving the share is not below 500 or the average daily transaction volume is not below EUR 2 million.[1] The court has thereby endorsed the interpretation of the features of liquidity that is found in the literature and is consistent with European law. BaFin also now appears to have adopted this understanding and it refers directly to the criteria developed by the Frankfurt Higher Regional Court in its 23 February 2021 prohibition in the 4basebio/KROMI Logistik case.

Should BaFin adhere to this **strict interpretation**, many potential bidders would in future be prevented from issuing an exchange offer, making it absolutely imperative to take a case-by-case approach. As already noted in the description of the exchange offers published in 2021 (see 1.2 above), in the offer document, bidders now have to perform a detailed liquidity test on the shares offered for exchange, as for example in the voluntary public exchange offer by Acorn HoldCo to the shareholders of ADVA Optical Networking SE in 2021.

The shareholders' request that the consideration be increased eight years after the takeover of Celesio by McKesson was the subject of two German Federal Court of Justice judgments of 23 November 2021 (II ZR 315/19; II ZR 312/19).

The Federal Court of Justice had ruled in 2017 that creditors of a target company's **convertible bond** may not be better positioned than the regular shareholders in a public takeover. According to the Federal Court of Justice, Celesio's minority shareholders, who had accepted McKesson's public offer at the price of EUR 23.50, were entitled to the same consideration offered to the convertible bond creditors (EUR 30.95 per Celesio share). As a result of this decision, McKesson had to pay additional costs totalling around EUR 370 million.

In the case of the funds of Davidson Kempner (Case no. II ZR 312/19) and the funds of Polygon and Blackwell (Case no. II ZR 315/19), this time the lawsuits were filed by minority shareholders who had not accepted the public takeover offer at EUR 23.50 per share - unlike the case decided in 2017 - but nevertheless wanted to be compensated in an amount equivalent to the convertible bonds. The Federal Court of Justice dismissed these appeals and stated that although section 31 para. 1 sentence 1 WpÜG requires the bidder to offer adequate consideration, shareholders are not entitled to claim any consideration – regardless of the amount – if they did not accept the offer during the offer period. Following the same reasoning, they reached a similar decision in the parallel case concerning any rights under swap agreements through which shares could be allocated.

In connection with the planned takeover of Siltronic by the Taiwanese bidder GlobalWafers, for the first time in the history of German investment control a bidder used a summary proceeding to petition the court for a ruling under investment control law. In its judgment of 31 January 2022 (OVG 1 S 10/22), the Berlin-Brandenburg Higher Administrative Court upheld the ruling by the Berlin Administrative Court of 27 January 2022 (4 L 111/22), which had rejected the application for provisional relief in the form of a determination that the clearance certificate was deemed to have been issued ("*Genehmigungsfiktion*") pursuant to section 58a para. 2 AWV.

The background to this procedure, which to date is unique in Germany, was the planned takeover of Siltronic AG by the Taiwanese bidder GlobalWafers (for more on this, see 2.3 (b) above). With the dismissal of the petition and the appeal filed against it, the takeover on the specified long stop date failed due to lack of clearance by the ministry. Based on the ministry's own statements, it was not possible to complete all the screening steps by the specified deadline.

Tacit approval, in which clearance is deemed to have been issued ("*Fiktion*") pursuant to section 58a para. 2 AWV

1 For more on this, see also: Dr Alexander Kiefner/Dr Matthias Kiesewetter: Liquidity requirements in public exchange offers pursuant to section 31 para. 2 sentence 1 WpÜG, Bank and Capital Market Law Journal (BKR) 2021, 265; Dr Thyl Haßler: (Die Liquiditätsanforderungen bei öffentlichen Tauschangeboten gemäß § 31 Abs. 2 Satz 1 WpÜG, Zeitschrift für Bank- und Kapitalmarktrecht (BKR) 2021, 265; Dr. Thyl Haßler): Commentary on: Frankfurt Higher Regional Court, 11 January 2021, WpÜG 1/20: Liquidity of shares as consideration within the meaning of section 31 para. 2 sentence 1, Company and Business Law (GWR) 2021, 167 (Liquidität von Aktien als Gegenleistung i.S.v. § 31 Abs. 2 S. 1 WpÜG, Gesellschafts- und Wirtschaftsrecht (GWR) 2021, 167)

(Clearance in an investment control procedure) assumes that the screening period specified in section 58a para. 2, 2nd alternative in conjunction with section 14a para. 1 number 2 AWV has expired. According to section 14a para. 6 sentence 1 number 1 AWV, the subsequent requirement for documents by the Federal Economics Ministry pursuant to section 14a para. 2 sentence 5 AWV results in a suspension of the screening period. Pursuant to section 14a para. 6 sentence 2 AWV, the suspension ends only when all the additionally requested documents have been sent. The Federal Economics Ministry is not limited to a one-off additional request, but rather may also submit several additional requests up to the date when the period ends, depending on the information obtained as the screening procedure progresses. The court saw grounds to reject the admissibility of a "provisional" **clearance based on a finding that a clearance certificate was deemed to have been issued ("*Freigabefiktion*")**, because deeming clearance to have been issued clearly would result in the creation of legal certainty. According to the Higher Administrative Court, therefore, it was questionable whether the requested determination regarding the effect of deeming the clearance certificate to have been issued ("*Fiktionswirkung*") could be stated by the court at all in the form of a provisional order. This is a case of genuine anticipation of the main case, because in a reasonable evaluation, only the full legal effects of the presumption (of deeming clearance to have been issued, "*Fiktion*") may be requested for the validity of their acquisition before the **long stop date** expires if the contractual legal consequences for which they are striving should actually materialise.

6. Conclusion and outlook

- In 2021, nearly half of all takeover procedures were related to delistings. It is quite likely that this trend towards retreating from the capital markets will continue and that once again, in future, listed companies' expanded opportunities for financing will no longer be regarded as an overwhelming advantage when compared to the voluminous catalogue of obligations these companies face. This will likely apply precisely because of the current crisis-related special factors in the capital markets which will further complicate efforts to meet forecast and transparency obligations.
- The liquidity requirements that the Frankfurt Higher Regional Court specified in early 2021 for shares intended to be offered as consideration as part of an exchange offer have been fully adopted by BaFin in practice and are reflected in the offer documents for the initial mixed offer and the offer with shares as alternative consideration. If BaFin continues to adhere to this practice, smaller bidders with a free float of < EUR 500 million and/or low daily transaction volumes will be permanently denied the option of using their own shares as consideration.
- Activist shareholders will continue to influence listed German companies, both within the context of takeover procedures and in the regular course of business (including with respect to currently topical ESG issues). Potential activities by these shareholders should be analysed in advance, even following a successful takeover.
- The year 2021 demonstrated once again that terms and conditions can jeopardise the success of a takeover bid. Even with a diligent preliminary audit, it is not entirely within the parties' ability to control whether regulatory screening procedures can be completed successfully. The minimum acceptance threshold has again proven to be a barrier to bidders. A careful examination of interests is therefore required before publishing an offer. Only time will tell whether Vonovia's strategy in its second offer for Deutsche Wohnen – of excluding from the outset any increase in the consideration offered – will be copied in practice to defend against investors who are speculating.

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