Public M&A Report 01/2024

The German public takeover market in 2023

by Dr Volker Land and Dr Stephan Schulz, Hamburg

Editorial

Improved market situation in 2023, but cautious outlook for 2024

Dear readers,

We began our Public M&A Report 01/2023 last year with the phrase "A more optimistic view of the future..." and reported on a very weak 2022. We predicted in the editorial that the figures for 2023 would return to the long-term average.

We are now pleased to present the Public M&A Report 01/2024, which validates our prediction. Even though the number of transactions (21) in 2023 was slightly less than we had anticipated, the approximately EUR 39.2 billion total offer value was almost exactly in line with our forecast.

As far as the current year is concerned, there are still lots of uncertainties. Despite inflation declining, the market is exhibiting a great deal of caution. Bidders and sellers are often unable to agree on a price. The uncertainties regarding the further development of interest rates and the numerous geopolitical risks (Ukraine, Israel, Yemen and maybe even Taiwan) are likely to persist throughout the year.

We therefore expect **the market for public takeovers in Germany to stagnate** in 2024 and there to be around **20 transactions** with a **total offer value of between EUR 35 and EUR 40 billion.**

Our market report for 2023 shows that the improved figures are mainly due to the increase in both the number and value of large- and mid-cap deals. In contrast, like in the prior year, the number of takeover bids was low compared to the long-term average. This can be interpreted as a sign of continued restraint on the part of market participants. Additionally, in 2023 the number of delisting offers was high.

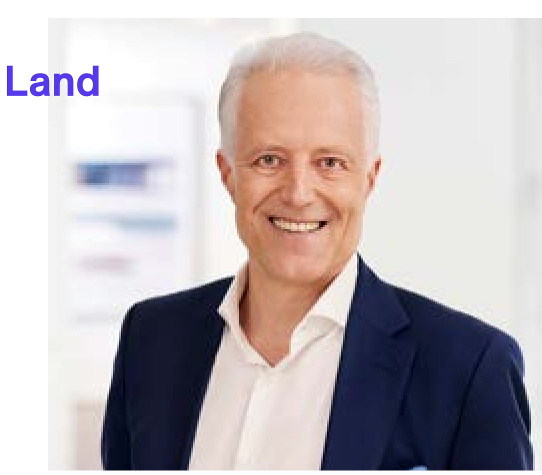
We are pleased to present two focus articles in this issue that deal with current issues in the public takeover market. *Stephan Schulz* and *Oscar Serra de Oliveira* supplement the market report with a focus article on the development of the number and price structures of delisting offers in recent years.

Our partner *Michael Brellochs* addresses the special aspects of bids and transaction structures under the title "Takeover by the major shareholder" where the bidder already owns a significant stake in the target company. This pattern often appears when markets are trending down or sideways.

We would like to thank our colleagues at Noerr who were involved in preparing and designing the Noerr Public M&A Report 01/2024, in particular *Philipp Schmoll* for drafting the section on Reasoned Opinions and *Juri Stremel* for helping with the editing.

We hope you find reading the Noerr Public M&A Report 01/2024 beneficial!

Dr Volker Land



Dr Stephan Schulz

Highlights

Significant recovery after the negative year 2022

In 2023, there was a slight increase in the number of transactions, with 21 transactions recorded, compared to the previous year (2022: 18). At the same time, the total value of those transactions[1] rose by 41.97 % to EUR 39.24 billion (2022: EUR 27.64 billion). The figure represents the third-highest total recorded since 2014, trailing only 2021 (EUR 84.09 billion) and 2017 (EUR 58.65 billion).

Large and mid-cap deals as market drivers

The significant recovery in the total offer value compared to the previous year is primarily based on the increase in the number of large-cap transactions from five to seven with an almost unchanged average offer value (decrease of 5.11 % to EUR 4.98 billion). In addition, at 11.01 %, mid-cap offers accounted for more than 10 % of the total offer value for the first time since 2015 (previous year: 4.21 %). This is because both the number (from four to ten) and the average offer value (from EUR 290.88 million to EUR 431.99 million) of mid-cap transactions increased significantly compared to the previous year. This took the total offer value in this segment from the lowest (EUR 1.16 billion) to the second-highest (EUR 4.32 billion) recorded in the period since 2014.

Continued low number of takeover bids and strong delisting trend

The number of takeover bids and their share of the total number of bids recovered slightly, with nine takeover bids being recorded. Nevertheless, these figures are still significantly lower than the corresponding figures seen before 2022. The proportion of bids with delisting as their target, which has been a trend since 2020, remained high at 40 %. Prior to 2020, this figure had always been below 20 %.

Premium development

The average premium rate[2] fell from 30.88 % in the previous year to 18.20 % in 2023. The trend regarding premiums at the upper and lower ends of the spectrum observed in the first half of the year was confirmed in the second half. There were seven offers with premium rates above 20 % and nine offers with premium rates below 10 %, while only three offers had premium rates in the 10 % to 20 % range.

[1] Expressed in market capitalisation at the offer price.

[2] Based on the volume-weighted average price of the shares of the target company in the three months (or six months in the case of delisting offers) prior to the announcement of the decision to launch the offer or acquisition of control.

Fig. 1: Number and value of offers since 2014

Source: Noerr Research

Market overview

Number and value of offers

In 2023, the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – “**BaFin**”) approved 21 public offers in accordance with the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz* – “**WpÜG**”). These offers were aimed at target companies with a total market capitalisation at the offer price (“**MCO**”) of EUR 39,243.15 million. The transactions consisted of nine takeover offers (two of which were combined with a delisting offer), five delisting-only offers, four mandatory offers (one of which was combined with a delisting offer) and three acquisition offers.

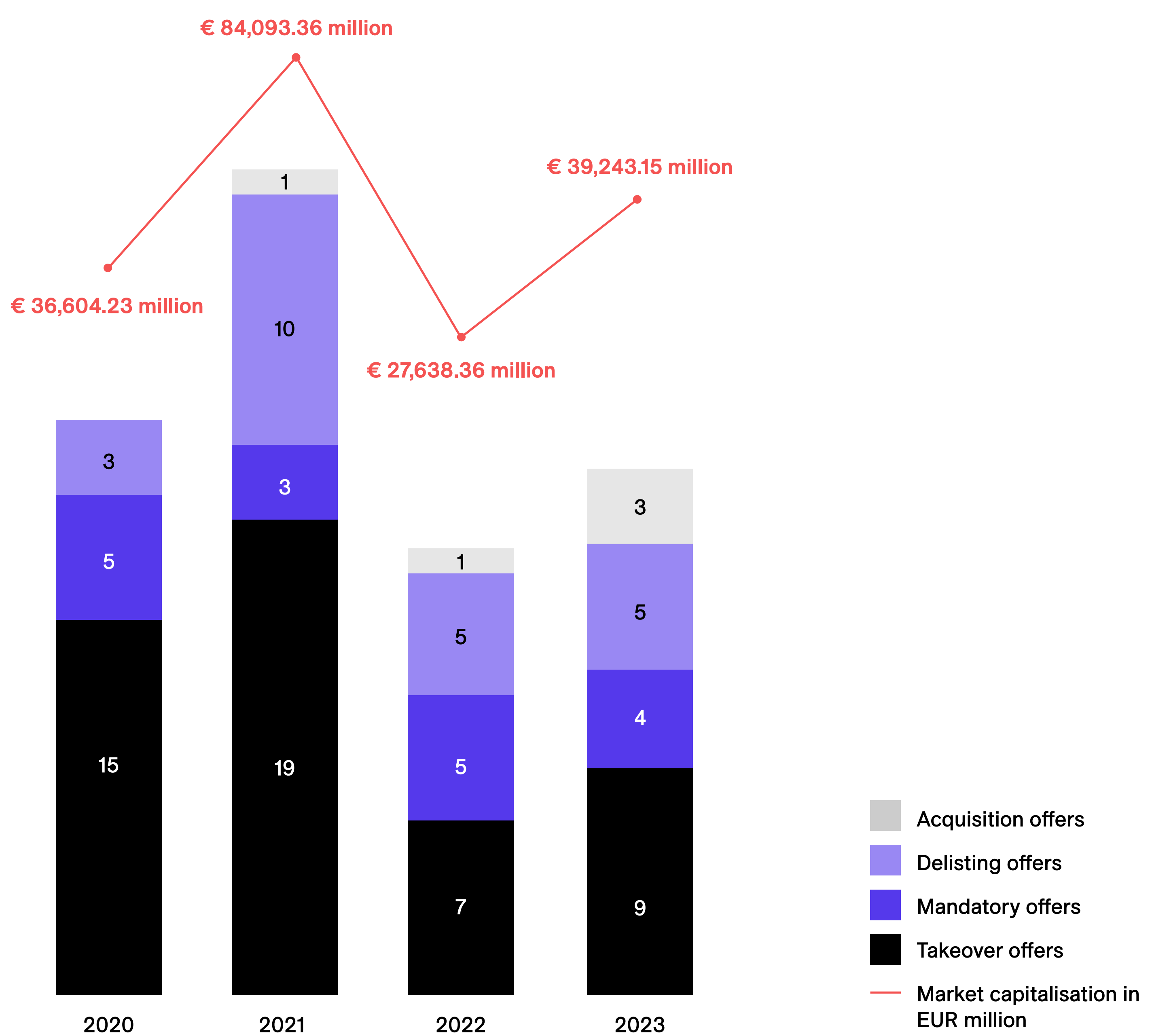


Fig. 2: Number, type and value of offers

Source: Noerr Research

The number of transactions in the German public takeover market increased slightly by approximately 16.67 % in 2023 with 21 approved and published offers compared to 18 published offers in 2022. The total number of offers thus remained in the lower half of the range recorded since 2014. However, the offer value (expressed in MCO) rose from EUR 27.64 billion in 2022 to EUR 39.24 billion in 2023. This corresponds to a percentage increase of 41.97 %. The market value in 2023 was therefore the third-highest market value recorded since 2014. Only the extraordinary years of 2017 and 2021 recorded higher values (EUR 58.65 billion and EUR 84.09 billion respectively). The market value in 2023 was also above the average of all annual market values (since 2014) of EUR 37.98 billion.

This significant increase in the total offer value compared to the previous year was based primarily on the increase in the number of large-cap transactions from five to seven with an almost unchanged average offer value (decrease of 5.11 % to EUR 4.98 billion). At 11.01 %, mid-cap offers also accounted for more than 10 % of the total offer value for the first time since 2015 (previous year: 4.21 %). This is because both the number (from four to ten) and average offer value (from EUR 290.88 million to EUR 431.99 million) of mid-cap transactions increased significantly compared to the previous year, taking the total offer value in this segment from the lowest (EUR 1.16 billion) to the second-highest (EUR 4.32 billion) recorded in the period since 2014.

As in 2022, the low number of just nine takeover bids in 2023 is noticeable. This is the third-lowest figure recorded since 2014, ahead of 2022 and 2018 (five takeover bids each), and it follows the weak year in 2022 when there were seven takeover bids. The number has otherwise always been well into the two-digit range (at least 14 takeover bids). The trend towards delisting as the target of public offers which we observed since 2020, continued in 2023. Prior to 2020, the percentage of offers that were solely or partially aimed at delisting was consistently below 20 % of the total number of approved and published offers. With eight offers of this type, five of which were delisting-only offers, this percentage was 38.10 % in 2023, slightly below the figure for 2022 (38.89 %) and significantly below the peak figure for 2021 (45.45 %), but still at an extraordinarily high level.

Development in the segments (large-cap, mid-cap and small-cap)

The transactions can be divided into three segments based on the MCO of the target companies: small-cap (MCO of the target company < EUR 100 milion), mid-cap (MCO of the target company ≥ EUR 100 million and < EUR 1000 million) and large-cap (MCO of the target company ≥ EUR 1000 million).

The development of the average MCO in the individual segments in 2023 can be illustrated as follows:

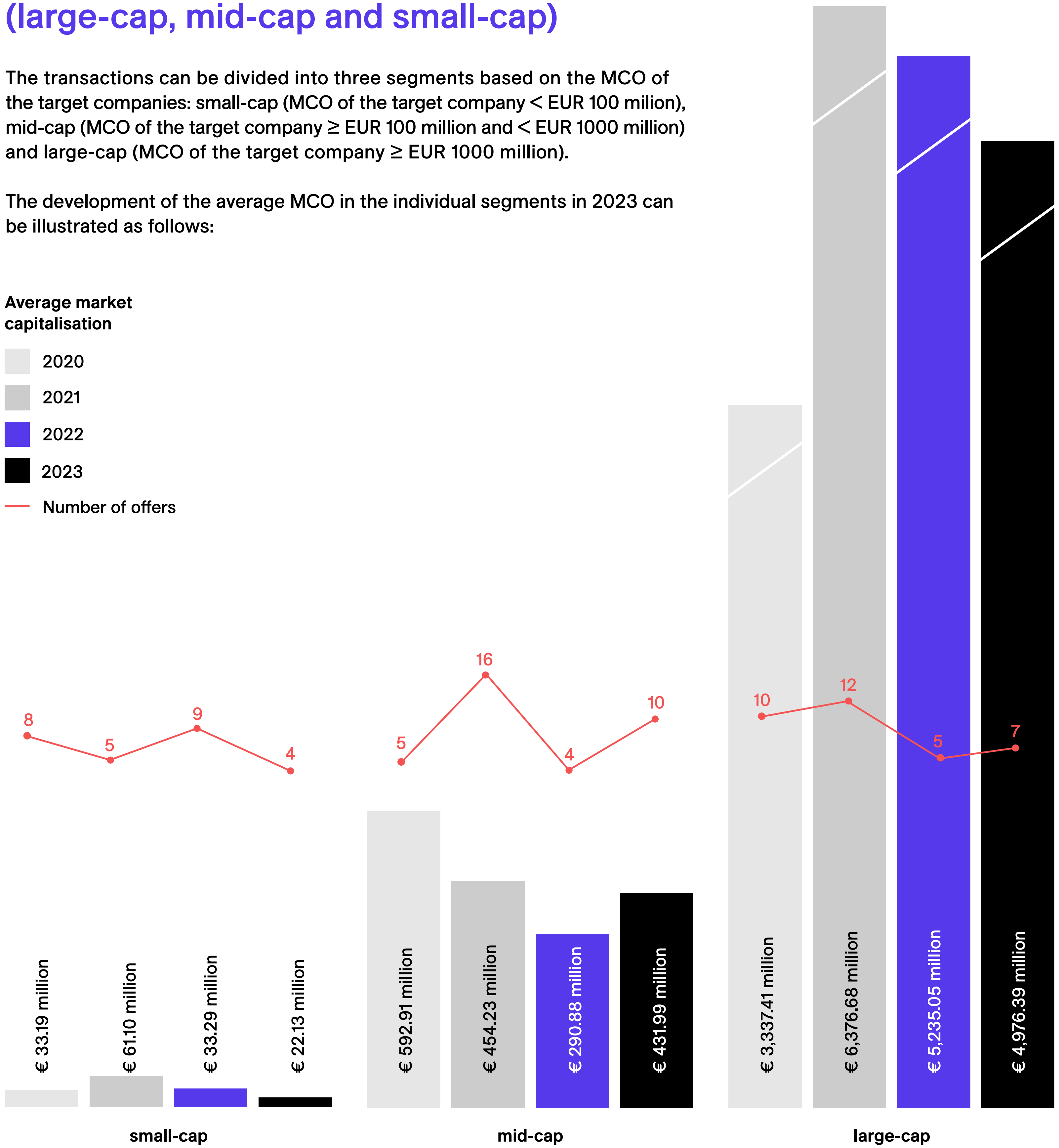


Fig. 3: Development in the segments
Source: Noerr Research

The average offer value in the large-cap segment for 2023 was EUR 4,976.39 million, which was 5.11 % less than the figure for 2022 (EUR 5,235.00 million) and remained in the lower half of the values recorded since 2014. This can be explained by the number of transactions in this segment increasing compared to the previous year. As a result, the transaction with the highest value in 2023, the delisting offer made by Oak Holdings GmbH to the shareholders of Vantage Towers AG, was unable to increase the average transaction value to the same extent as the transaction with the highest value in 2022. The previous year's transaction was also a takeover offer made by Oak Holdings GmbH to the shareholders of Vantage Towers AG, which preceded the delisting offer. Due to a low number of offers (two offers) and the delisting offer by Oak Holdings GmbH (see Noerr Public M&A Report 02/2023), an exceptionally high average value in the large-cap segment was observed in the first half of 2023 (EUR 9,276.52 million). This average value normalised over the whole year, as the values of the five large-cap offers in the second half of the year were significantly lower than the value of the aforementioned delisting offer.

Seven public offers fell into the large-cap segment. This corresponds to an increase of 40 % compared to the previous year (2022: five large-cap offers). In 2023, the percentage of large-cap transactions to total transactions was 33.33 %, which was much higher than the average for 2022 (27.78 %) and the period from 2014 to 2023 (27.05 %). In comparison to the sobering previous year, the mid-cap segment saw a recovery in both the quantity and value of transactions. The number of public offers in this segment grew from four in the previous year to ten in 2023, a rise of 150 %, while the average offer value increased significantly from EUR 290.88 million to EUR 431.99 million, a rise of 48.51 %. This also led to a considerable increase in the total offer value: Compared to 2022, it almost quadrupled from EUR 1,163.51 million to EUR 4,319.93 million. Only the record year 2021 (EUR 7,267.68 million) saw a higher value since 2014. During that year, significantly more offers were published in the mid-cap segment (16), but the average offer value was only slightly higher (EUR 454.23 million).

In contrast to the large- and mid-cap segments, the number of transactions in the small-cap segment fell sharply by 55.56 % to four offers in 2023 (2022: nine small-cap offers), the second-lowest figure recorded to date after 2018 (three small-cap offers). The average offer value decreased from EUR 33.29 million in 2022 to EUR 22.13 million in 2023 (minus 33.52 %), a much less sharp decline. However, due to the low number of transactions compared to 2022, the total offer value in 2023 dropped by an astonishing 70.45 % from EUR 299.61 million to EUR 88.52 million, the second-lowest amount since 2014.

Distribution of offer value and number of transactions

With a combined offer value of EUR 34.83 billion, the seven large-cap offers accounted for 88.77 % of the total offer value in 2023 (EUR 39.24 billion). This number fell below 90 % for the first time since 2016, owing to a large proportion of mid-cap offers (11.01 % of total offer value). This share returned to double digits for the first time since 2015.

Among the offers in the large-cap segment, Oak Holdings GmbH's delisting offer to the shareholders of Vantage Towers AG stood out as a continuation of last year's takeover offer, valued at EUR 16.19 billion. As in the previous year, this resulted in 2023 also seeing an outstanding offer in terms of value, with the offer value in the large-cap segment (share of 46.48 %) and the total offer value (share of 41.26 %) standing out. However, due to the lower number of transactions and values of the other large-cap offers, this was less than in 2022, when the corresponding shares accounted for significantly more than half of the offer value in the large-cap segment (61.83 %) and the total offer value (58.56 %). A comparison of the years 2023 and 2022 also shows that 2023 had significantly more large-cap offers with an offer value of over EUR 2 billion (five instead of two). As a result, the combined offer value of the three largest transactions in 2023 alone (EUR 26.94 billion) almost equalled the total offer value of all 18 transactions in 2022 (EUR 27.64 billion).

The table below shows the shares of the large-cap transactions in 2022 and 2023 in the respective total offer value of the year (expressed in MCO).

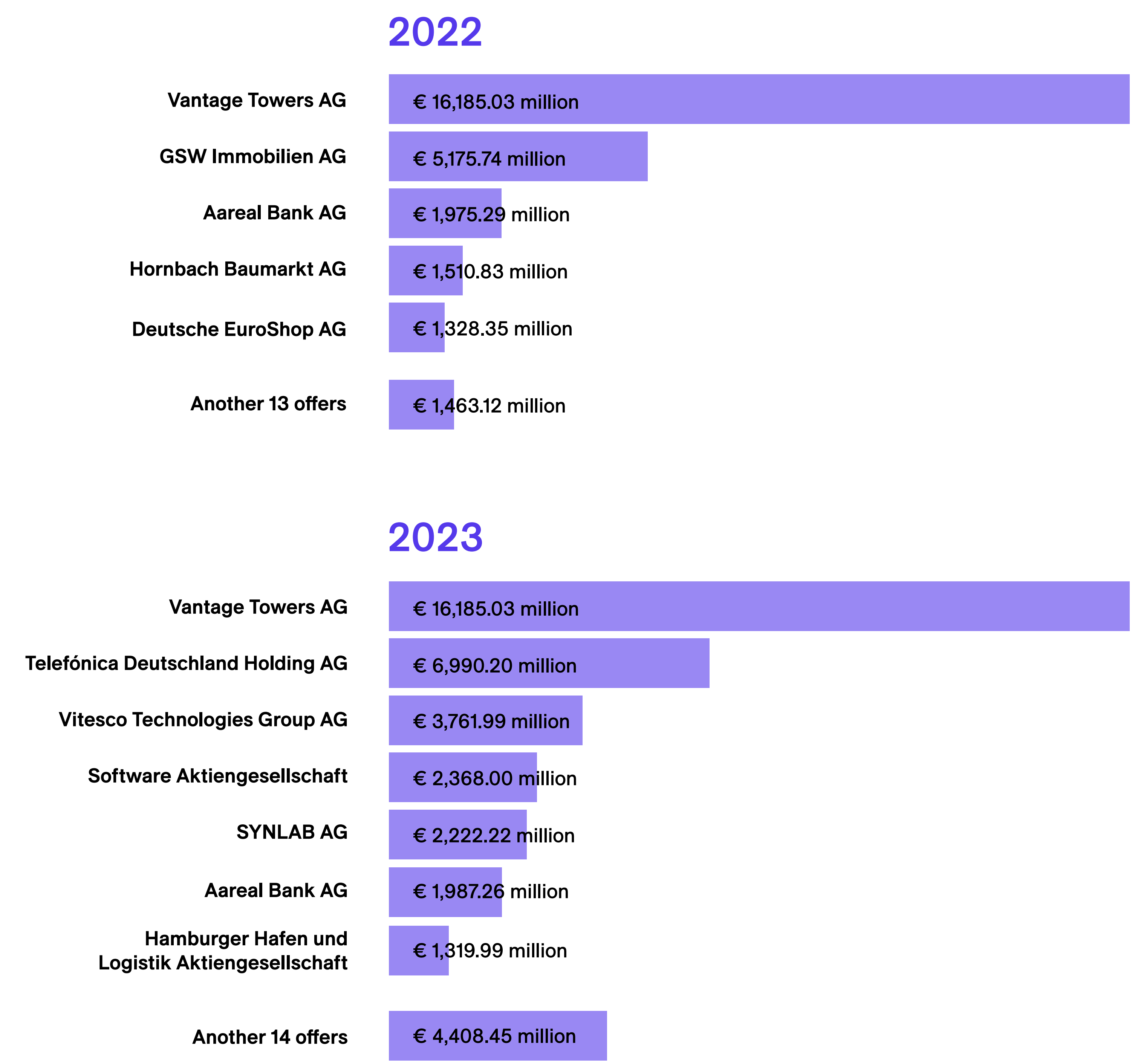


Fig. 4: Distribution of offer value and number of transactions

Source: Noerr Research

Premiums

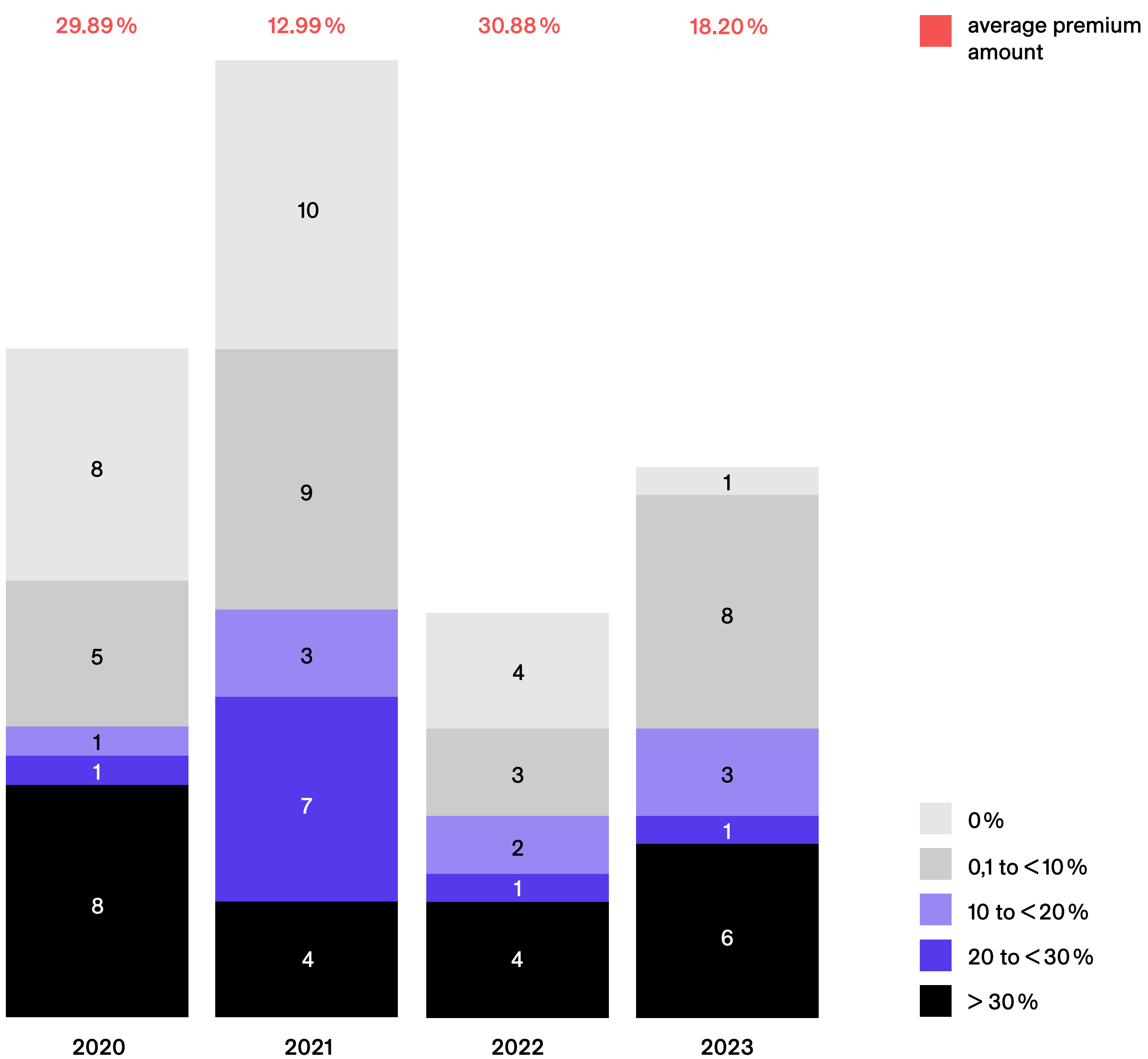
In 2023, the premium on the volume-weighted average share price of the target companies in the three months (or six months in the case of delisting offers) prior to the bidder's announcement of the offer or acquisition of control ("Three-Month VWAP" or "Six-Month VWAP") was 18.20 %.

The takeover and delisting offer made by TPPI GmbH to the shareholders of Schumag Aktiengesellschaft and the mandatory offer made by Baumann Vermögensverwaltung GmbH to the shareholders of SPOBAG AG were not considered because BaFin was unable to determine the Three-Month VWAP or Six-Month VWAP for these. In addition, only the premium on the Three-Month VWAP of the listed A shares was considered with regard to the takeover bid by Port of Hamburg Beteiligungsgesellschaft SE to the shareholders of Hamburger Hafen und Logistik Aktiengesellschaft, as determining a Three-Month VWAP for the unlisted S-shares was impossible.

The highest premium of 57.48 % was offered to the shareholders of Software Aktiengesellschaft as part of the takeover bid by Mosel Bidco SE, a holding company which is controlled by funds managed or advised by the private equity investor Silver Lake. This premium was significantly lower than the two highest premiums in 2022 (141.16 % and 127.11 %). Only SD Thesaurus GmbH's offer to the shareholders of Bauer AG included no premium.

The average premium amount in 2023 dropped by 12.68 percentage points or 41.06 % compared to 2022 (30.88 %). Thus, there were six offers in the highest premium category of more than 30 %, two more than in 2022 and 2021. Looking at the total number of all offers with premiums above 20 %, there was also a slight increase in 2023 compared to the previous year with seven offers in this category (2022: five offers), but still a significant decrease compared to 2021 (eleven offers). However, it should also be considered that the total number of offers in 2021 was significantly higher than in 2023, meaning that the percentage of all offers with premiums of over 20 % in 2021 was 33.33 %, which was just below the corresponding percentage in 2023 (36.84 %). The number of offers without premiums fell sharply from four in the previous year to one in 2023, although this finding is tempered by the fact that there were three offers in 2023 with premiums of less than 1 %. Nevertheless, the number of (almost) premium-free offers remains at a low level compared to 2020 and 2021.

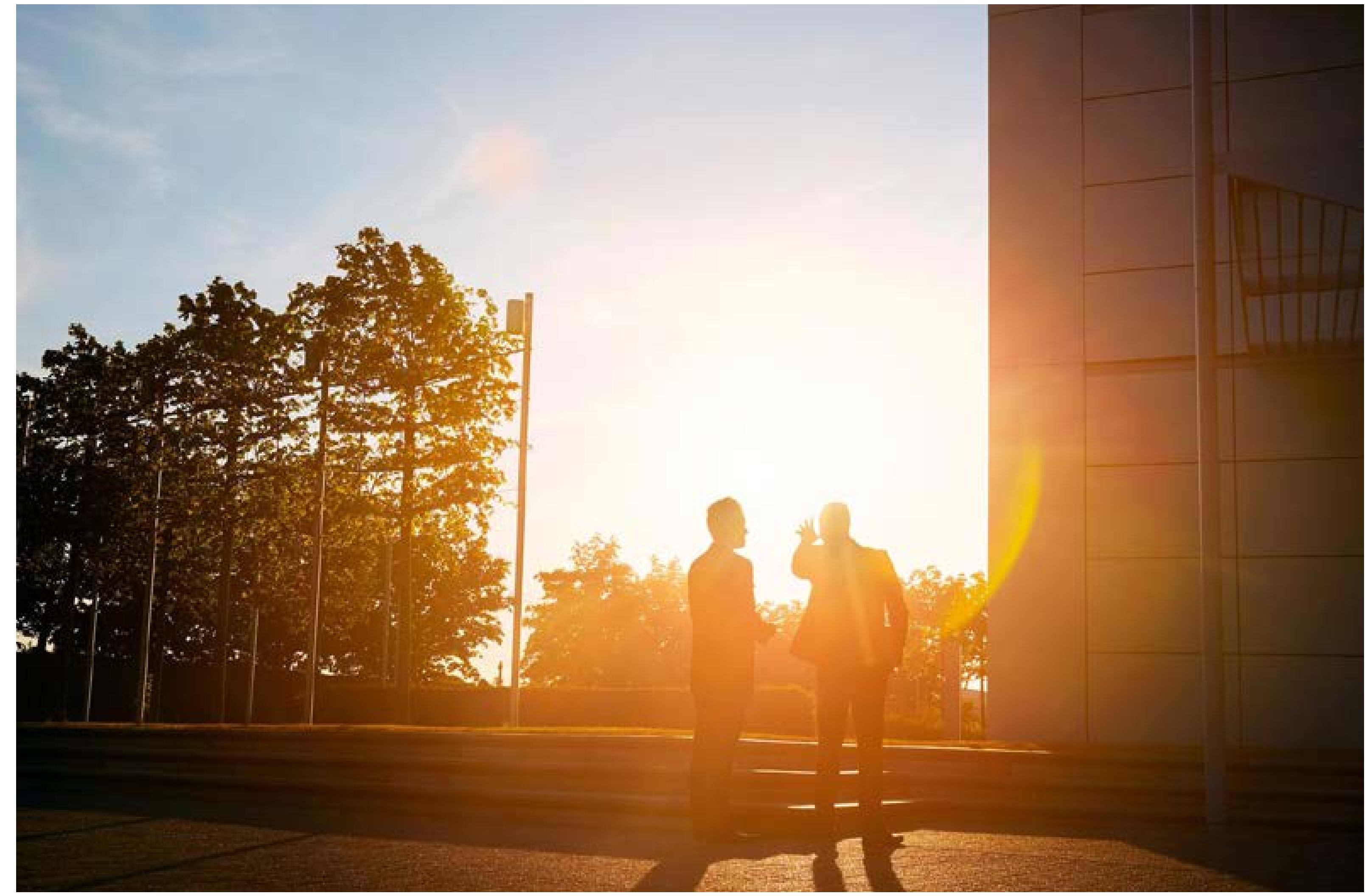
The following chart illustrates the premiums provided for the offers in 2023, divided into different categories, as well as the corresponding premium average, and compares them to the premiums and average values of previous years.



	2020	2021	2022	2023
average premium amount	29.89 %	12.99 %	30.88 %	18.20 %
0 %	8	10	4	1
0,1 to < 10 %	5	9	3	8
10 to < 20 %	1	3	2	3
20 to < 30 %	1	7	1	1
> 30 %	8	4	4	6

Fig. 5: Premium amount

Source: Noerr Research



Compared to the first half of 2023, the average premium rate increased from 16.11 % to 21.08 % in the second half of the year. This increase was significantly influenced by the fact that three out of four (almost) premium-free offers in 2023 occurred in the first half of the year. Without these offers, the average premium would have been 21.98 % in the first half of 2023.

The average premium for the eight[3] takeover bids in 2023 was 29.59 %, which is 1.12 percentage points or 3.65 % lower than the corresponding average for the seven takeover bids in 2022 (30.71 %). On average, a bidder in a 2023 takeover bid was therefore willing to pay nearly the same premium for the first-time acquisition of control over the target company as in the previous year.

[3] The takeover and delisting offer to the shareholders of Schumag Aktiengesellschaft is not taken into account because BaFin was unable to determine the Three-Month VWAP or Six-Month VWAP for this.

by Lawyer Dr Philip M. Schmoll, Frankfurt am Main

Reasoned statements pursuant to Section 27 WpÜG

In 2023, the corporate bodies of target companies published a total of 21 reasoned statements pursuant to Section 27 WpÜG on the 21 public offers. These were all joint reasoned statements by each target company's management and supervisory boards.

Overall evaluation of the offer

The final assessment of the boards of the target companies on the 21 offers made in 2023 were as shown in the following chart.

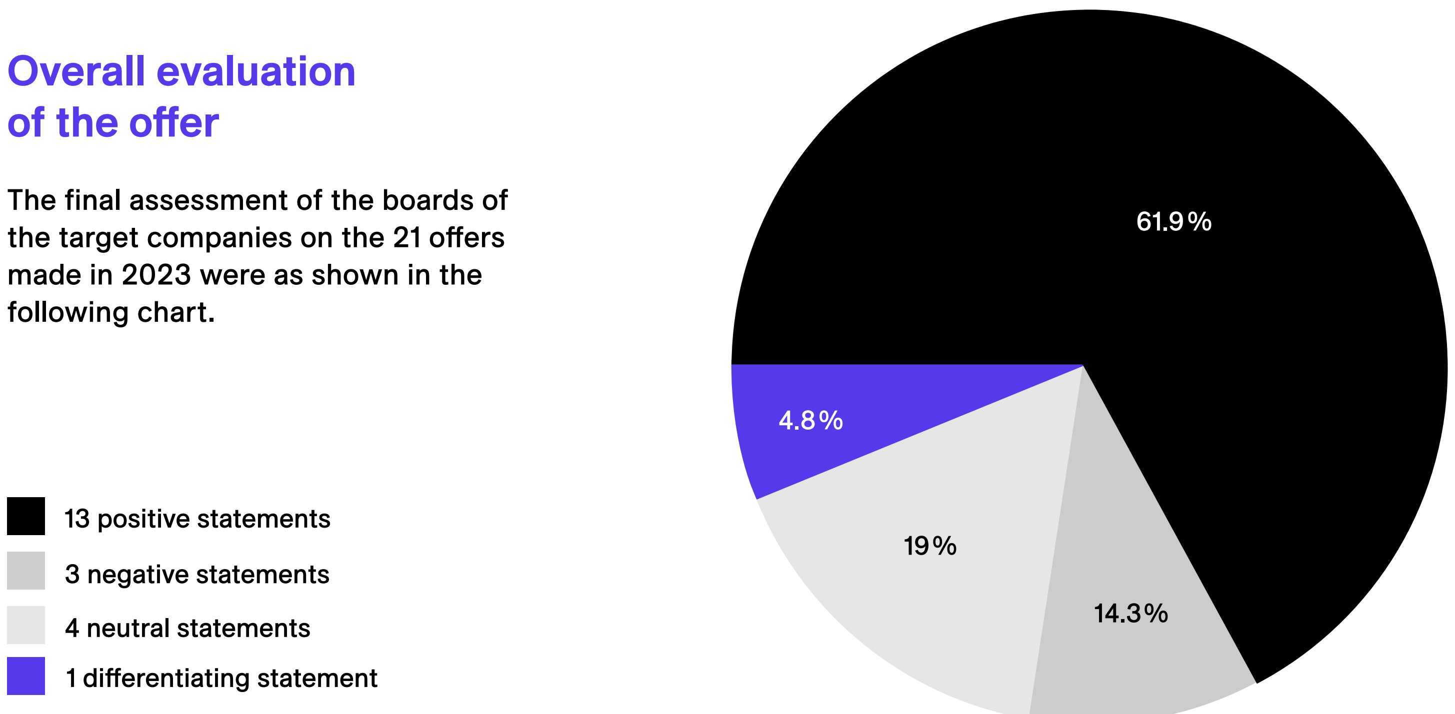


Fig. 6: Reasoned statements pursuant to Section 27 WpÜG

Source: Noerr Research

Special addendum by the Chairman of the Management Board

The chairman of the management board revealed in a special addendum to the joint reasoned statement of the supervisory and management boards of GK Software SE regarding the voluntary public takeover offer of Fujitsu ND Solutions AG that he would not be voting on the resolution pertaining to the joint reasoned opinion because of an irrevocable undertaking he had given the bidder. Nevertheless, he also stated that he shared the assessments and the recommendation for acceptance published in the joint reasoned opinion.

Negative statements

The inadequacy of the consideration offered was the primary reason for all negative opinions, including the joint reasoned statements of the management and supervisory boards of Voltabox AG and Klöckner & Co. SE and the joint reasoned statement of the general partner and the supervisory board of exceet Group SCA (despite a business combination agreement). In particular, the consideration was said to fail to reflect the intrinsic/fundamental value of the shares of the relevant target company. Voltabox AG's management and supervisory boards also criticised the background to Triathlon Holding GmbH's mandatory offer for being unclear and not adhering to any strategic or economic considerations.

Neutral statements

The neutral statements were justified by the corporate bodies as follows:

- MS Industrie AG: The consideration was considered appropriate and the bidder's intentions positive. Nevertheless, no recommendation to accept the offer was made because of the similar level of consideration and recent share prices.
- SNP Schneider-Neureither & Partner SE: The consideration for short-term and long-term investors was assessed differently. In addition, there were neither long-term burdens due to integration measures nor synergy potential between the bidder and target company.
- SYNLAB Aktiengesellschaft and Vitesco Technologies Group AG: Valuation of the offer price was considered not appropriate. Nevertheless, potentially attractive exit opportunity through the offer for risk-averse or short-term orientated investors in the current market environment. In addition, general agreement with the intentions of the bidder (SYNLAB) and reference to the individual situation and preference of the individual shareholder (Vitesco).

Differentiating statement

The management and supervisory boards of Hamburger Hafen und Logistik Aktiengesellschaft distinguished between the different classes of shares in their recommendations. They did not issue a recommendation ("neutral statement") with regard to the unlisted share class held exclusively by one shareholder. The corporate bodies provided several reasons for this, including the fact that the full offer principle under Section 32 WpÜG required the offer to apply to this class of shares as well as the fact that the sole shareholder of this class of shares had already concluded a non-tender agreement with the bidder. In addition, the offer price was the same as the statutory minimum price, which meant that it did not adequately reflect the value of this class of shares. On the other hand, the management and supervisory boards recommended that the shareholders of the other share class accept the offer.

Fairness opinions

Fairness opinions were obtained from external advisors on the appropriateness of the consideration offered to support twelve of the 21 reasoned statements (57.1%). The reasoned statements that were not supported by fairness opinions mainly related to mandatory and delisting offers.

The management and supervisory boards of Klöckner & Co. SE, Software Aktiengesellschaft, SYNLAB Aktiengesellschaft, Vitesco Technologies Group AG and Telefónica Deutschland Holding AG obtained multiple fairness opinions. In each case, the boards appointed their own advisors. Vitesco Technologies Group AG's management board obtained two fairness opinions. The underlying offers in each of these reasoned statements were in or just below the large-cap segment. In addition, individual board members of the target companies were in the bidder's camp in both cases.

Date of submission of the reasoned opinions

The reasoned statements in 2023 were submitted on average 9.4 days after the offer document was published (previous year: 9.7 days). In 15 of the 21 reasoned statements (71.4%), the corporate bodies of the target companies knew that the respective bidder would make a public offer because they had concluded a transaction agreement with the bidder before the offer was announced pursuant to Section 10 WpÜG ("Section 10 Announcement"). These reasoned statements were published on average 9.0 days after publication of the offer document (previous year: 8.8 days).

by Stephan Schulz and Oscar Serra de Oliveira, Hamburg

In focus

Delisting offers

Since 26 November 2015, one requirement generally placed on an issuer's application for revocation of the admission of securities to trading on the regulated market ("delisting") is that an offer to acquire all securities subject to the application ("delisting offer") has been published in accordance with the provisions of the WpÜG.[1] The number of such offers has increased in recent years, as we noted in the Noerr Public M&A Report. In this issue, we would like to take a closer look at this development and analyse the typical price structures of delisting offers since the regulation came into force.

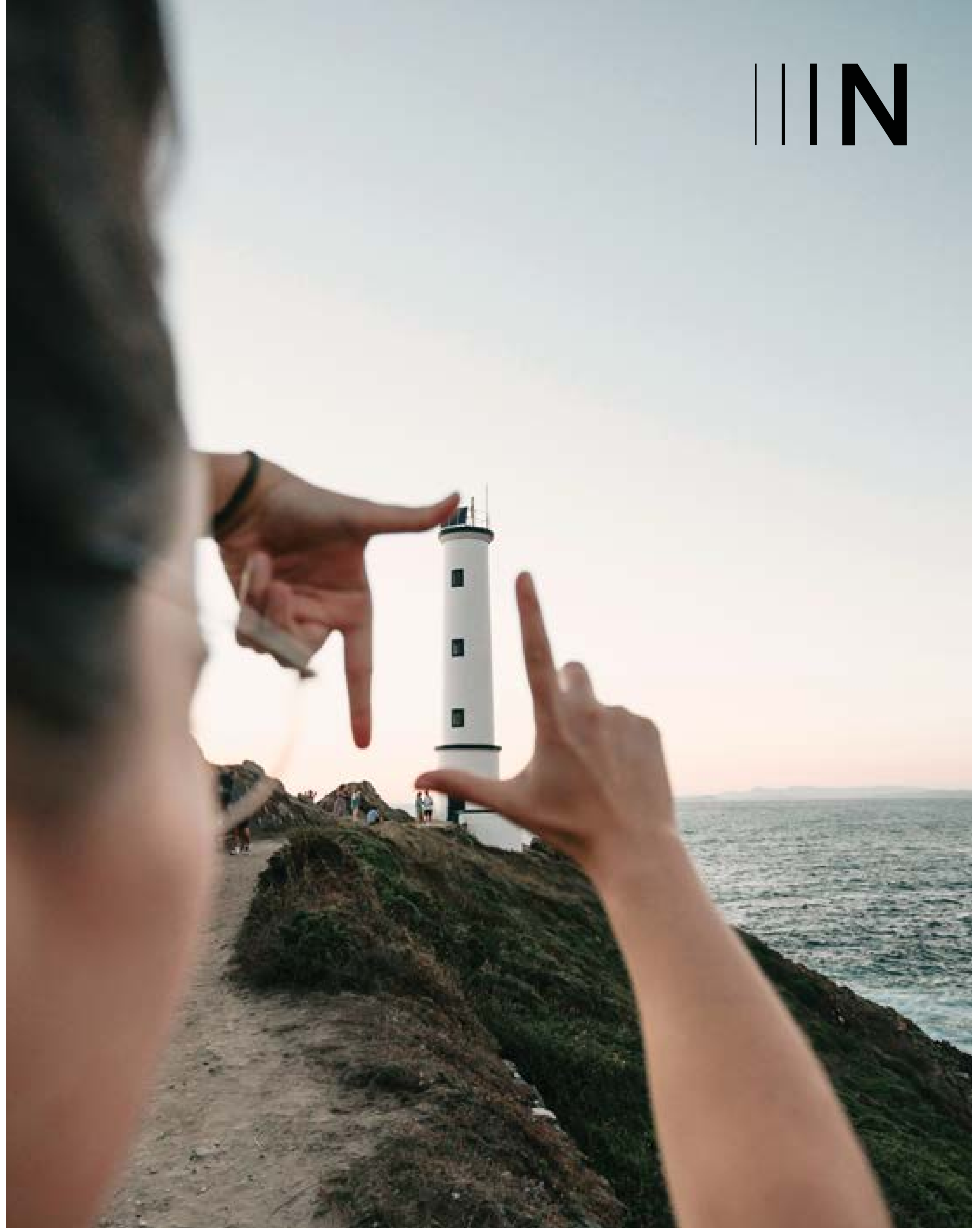
Legal basis

Minimum price rules

The "normal" rules of the WpÜG generally apply to delisting offers. More specific requirements apply to the calculation of the minimum consideration. In takeovers or mandatory offers, the consideration offered by the bidder must be equal to at least the Three-Month VWAP prior to the publication of the Section 10 Announcement.[2] The consideration must also correspond to at least the value of the highest consideration granted or agreed by the bidder, a person acting jointly with the bidder or their subsidiaries for the acquisition of shares in the target company within the six months prior to publication of the offer document.[3] These regulations apply analogously to delisting offers with the proviso that the consideration must be paid in cash and must correspond to at least the Six-Month VWAP prior to the publication of the Section 10 Announcement (instead of the Three-Month VWAP).[4]

Delisting offers:

- their purpose is to enable the company to apply for delisting,
- the consideration must be paid in cash and be equal to at least the six-month VWAP (instead of the three-month VWAP) or relevant prior acquisitions,
- otherwise, the rules of the WpÜG apply to delisting offers,
- they can be combined with a takeover or mandatory offer,
- the bidder is typically a shareholder with a significant stake or a new investor; only in rare cases is the target company itself the bidder.



Combination with takeover or mandatory offer possible

A delisting offer does not have to be made solely for the purpose of preparing for delisting. It can also be combined with a mandatory or takeover offer. In this case, however, compliance with the requirements of Sections 30 et seq. of the WpÜG and Section 39(3) BörsG, i.e., stricter regulations in each case, is required.

Person of the bidder

It is not mandatory that the delisting offer is submitted by a shareholder or an investor not yet holding an interest in the target company. In principle, the target company itself can also submit a delisting offer if it is permissible to acquire treasury shares by this means. However, in practice, it is very rare for the target company itself to act as the bidder. Since the current version of Section 39 BörsG came into force, this has only happened in three cases[5], all of which were unusual. In all three cases, non-tender agreements were concluded with major shareholders.[6] As a result, the financing requirements for the offer were reduced to such an extent that the company was able to pay the consideration from its existing cash resources.

In practice, delisting offers are usually submitted by investors who already hold a significant stake in the target company. In the delisting-only offers published since the entry into force of the current version of Section 39 BörsG, the average stake held by the bidder before the start of the acceptance period is around 68.89 %.

[1] Section 39(2) sent. 2 no. 1 of the German Stock Exchange Act (Börsengesetz – "**BörsG**"). Exceptions apply if a secondary listing of the shares on a regulated market in Germany or abroad remains in effect after the delisting.

[2] Section 31(1) WpÜG in connection with the first sentence of section 5(1) of the Securities Act Offer Ordinance (WpÜG-Angebotsverordnung – "**WpÜG-AV**").

[3] Section 31(1) WpÜG in connection with the first sentence of section 4(1) WpÜG-AV.

[4] Section 39(3) sent. 2 BörsG.

[5] Rheintex Verwaltungs AG (2017); Rocket Internet SE (2020); a.a.a. Aktiengesellschaft allgemeine Anlagenverwaltung (2022).

[6] Rheintex (94.3 % of the share capital); Rocket Internet (49.64 %); a.a.a. (96.76 %).

Development of the number and type of delisting offers

The number of published delisting offers shows that their share of the total number of public offers under the WpÜG has increased significantly since 2020. While this share was still below 20 % in previous years, it later hovered around 40 % of all offers. At the same time, there has also been an increase in combined delisting takeover bids. While there was not a single such offer until 2019, since then an average of over 20 % of delisting offers have been combined delisting takeover offers.

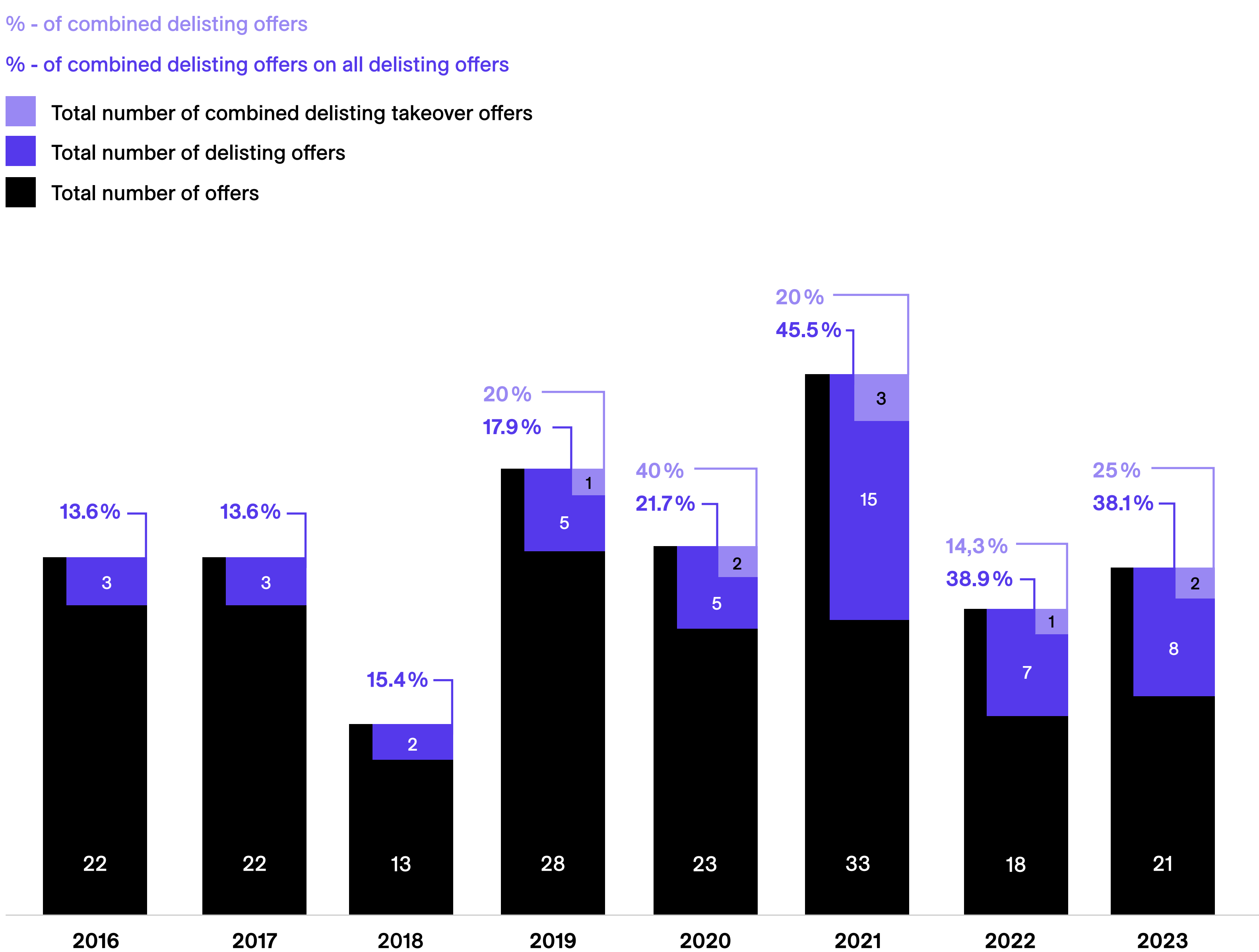


Fig. 7: Share of delisting offers in the total number of public offers since 2016

Source: Noerr Research

Price structure

An analysis of the 43 delisting offers since 2016 for which a price-related minimum price threshold can be determined[7] shows that an average premium of just 4.6 % of the Six-Month VWAP was paid. This figure increases just slightly to 6.2 % when only the bids combining delisting and takeover[8] are considered. Therefore, in contrast to takeover-only bids, bidders are not, or only to a very limited extent, willing to pay a premium if the purpose of their bid is to facilitate delisting of the company. This observation becomes even more apparent in absolute figures. Of the 43 offers analysed, the premium offered in 30 of them was less than 2 %. Only six offers included premiums of 10 % or more of the Six-Month VWAP.

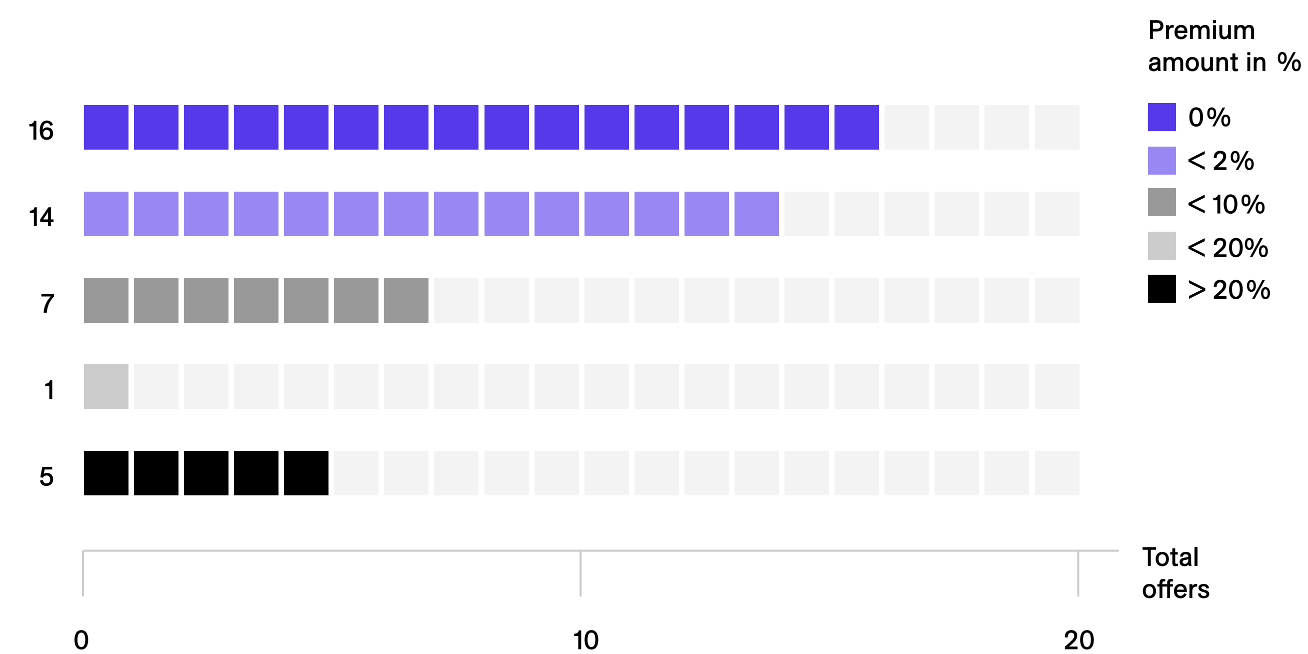


Fig. 8: Premium amount for delisting offers

Source: Noerr Research

Conclusion

Delisting offers are an increasingly important type of transaction in the German public M&A market. Such offers are often made by shareholders who already hold a significant stake in the target company. High premiums on the statutory minimum price are rare.

[7] In five cases (Rheintex Verwaltungs AG (2017), WESTGRUND Aktiengesellschaft (2020), Nucletron Electronic Aktiengesellschaft (2021), GSW Immobilien AG (2022) and Schumag Aktiengesellschaft (2023)) no Six-Month VWAP could be determined. The minimum consideration in such cases is calculated in accordance with section 5(4) WpÜG-AV using the enterprise value of the target company on the basis of a company valuation.

[8] Seven of the 43 offers analysed featured such combination.

by Michael Brellochs, Munich

Takeover by the major shareholder

In the last two years, there have been public offers by major shareholders, i.e., shareholders who already held a controlling stake[1] or a significant stake below the control threshold under takeover law[2] prior to the Section 10 Announcement. The phenomenon is not new: If the market is moving downward or sideways and the share price of the target company falls, the investment changes from the perspective of a major shareholder. In some cases, these opportunities are used by major shareholders to increase their stake or launch a takeover bid. There have been similar cases before, for example during the coronavirus pandemic[3] or the financial crisis following the Lehman insolvency.[4]

The motivation can vary. Selling the investment is no longer attractive if the share price falls. It is also more favourable to increase the stake, for example in order to pass the control threshold under takeover law and subsequently not be obliged to make a mandatory offer in the event of further share acquisitions, or to prepare for the integration of a target company or a delisting, which in practice is usually only considered if the investor holds shares above a threshold of 60 to 80%. A downward or sideways market can therefore be used not only by strategists or financial investors for a public offer, but also by major shareholders who can otherwise stabilise the shareholder base and, if necessary, protect the target company against uncoordinated takeover attempts.

A bid by a major shareholder differs in some legal and practical aspects from a takeover by a third party.

Typical characteristics of offers from a major shareholder:

1. less due diligence,
2. less contact to the management board of the target company,
3. fewer irrevocable undertakings or block purchases,
4. lower premium,
5. neutral or negative reasoned statements of the target company are accepted,
6. supervisory board of the target company must deal with conflicts of interest.

1. Less Due Diligence

Firstly, a major shareholder usually already knows the target company and therefore has little or no need to carry out a due diligence review. Although the authorisation of a due diligence by the target company would also be permissible under stock corporation law in favour of the major shareholder if it is in the interests of the company (it would therefore not fail due to the confidentiality obligation under stock corporation law or the principle of equal treatment). However, the practical need for an in-depth review is often less important than it would be if the offer was from a third party. For example, Schaeffler only used publicly available sources of information (in particular Vitesco's 2022 annual report and interim financial reports) to prepare the offer document for taking over Vitesco.[5] Vitesco only supported Schaeffler by providing information for assessing any regulatory clearance requirements in relation to the implementation of the offer.[6] The Spanish Telefónica parent company also only used generally accessible sources of information to prepare the offer document for the acquisition offer to the shareholders of Telefónica Deutschland – known under the O2 brand – and did not separately verify the accuracy and completeness of this information.[7] Furthermore, the offer documents of Octapharma AG for SNP Schneider-Neureither & Partner SE[8] and SWOCTEM GmbH for Klöckner & Co. SE[9], for example, indicate that no due diligence review was carried out on the target company. In the case of the Cinven/SYNLAB bid, on the other hand, a due diligence review was carried out prior to the Section 10 Announcement.[10]

1 Examples: Telefónica/Telefónica Deutschland (2023); Schaeffler/Vitesco (2023); Cinven/SYNLAB (2023); KKR/OHB (2023); Vodafone/Vantage Towers (2022).
2 Examples: TPPI, Prof. Prefi/Schumag (2023); SWOCTEM, Prof. Loh/Klöckner (2023); Deutsche Balaton/Biofrontera (2022).
3 Examples: EP Global Commerce/Metro (2020); Optima/InTiCa (2020).
4 Example: Skion, Susanne Klatten/Altana (2008).
5 Schaeffler's offer document from 15 November 2023 (page 6).
6 Schaeffler's offer document from 15 November 2023 (page 6).
7 Telefónica's offer document from 5 December 2023 (page 9).
8 Octapharma's offer document from 26 June 2023 (page 5).
9 SWOCTEM's offer document from 27 March 2023 (page 6).
10 Cinven's offer document from 23 October 2023 (page 11).

2. No early contact with the management board of the target company

If a due diligence review and the support of the target company's management board are not necessary in advance from the perspective of the major shareholder, it may make sense for the major shareholder to refrain from contacting the target company's management board prior to the Section 10 Announcement. This reduces the risk of confidentiality gaps or publication by the target company, which would lead to a rising share price prior to the Section 10 Announcement and thus to an increased minimum price. According to press reports, the CEO of Telefónica Deutschland was surprised by the announcement of the acquisition offer from the Spanish parent company during a press conference on the quarterly figures.[11] Schaeffler also refrained from approaching Vitesco's management board prior to the publication of the decision to submit the takeover bid.[12] Nevertheless, following an increase in the offer price by Schaeffler, a business combination agreement was entered into between Schaeffler and Vitesco.[13] The management board was also not approached prior to the announcement of the Section 10 Announcement in SWOCTEM GmbH's takeover offer to the shareholders of Klöckner & Co. SE.[14] As the offer contained virtually no premium (see also number 4 below), it was not supported by Klöckner's management in the reasoned statement.[15] In contrast, Cinven first contacted the management board of SYNLAB in March 2023[16], subsequently entered into discussions and concluded an investor agreement with SYNLAB prior to the publication of the Section 10 Announcement.

3. Fewer irrevocable undertakings or block purchases

Irrevocable undertakings or block purchase agreements with major shareholders are less common in case of a takeover by a major shareholder. Such agreements only make sense if there are other major or block shareholders in the target company whose support the bidder wishes to secure in advance of the offer. This can occur[17], but is usually the case if other institutional investors (including hedge funds) are involved in the target company and are to be won over to the offer. It is less common for a target company to have more than one major strategic shareholder at the same time.

4. Lower premium

If the bid by the major shareholder also or primarily serves to cross the control threshold under takeover law in order to subsequently be able to increase the share without submitting a mandatory offer – which may be higher than the offer price – a low premium may be offered on the share price of the target company. This intention will not always be clear from the offer document because a control transaction usually also pursues other objectives.[18] Nevertheless, there are always offers in which a major shareholder who already holds a stake close to the 30 % threshold prior to the offer tenders only a low premium. This may be sufficient to collect a large enough number of shares in the offer and thus exceed the control threshold. An example of this is the takeover bid by SWOCTEM GmbH to the shareholders of Klöckner & Co. SE: The bidder held 29.97 % of Klöckner shares prior to the Section 10 Announcement and the premium was 0.5 % on the minimum price and 2.5 % on the closing price on the day prior to the publication of the decision to launch the bid.[19] The takeover bid by Deutsche Balaton Biotech AG to the shareholders of Biofrontera AG didn't even offer a premium on the relevant three-month average price at all.[20] Both the SWOCTEM/Klöckner offer and the Deutsche Balaton/Biofrontera offer were successful insofar as the 30 % threshold was exceeded.

5. Neutral or negative reasoned statement

A low premium can cause the management of the target company to issue a neutral or negative reasoned statement. In the cases of SWOCTEM/Klöckner and Deutsche Balaton/Biofrontera, the offer was categorised by the management as financially inadequate, so in its reasoned statement, the target company recommended the offer not to be accepted.[21] Nevertheless, the offers were successful (see number 4 above). The Cinven/SYNLAB acquisition offer was somewhat different: Cinven had initiated an initial public offering for SYNLAB in 2021 at an issue price of EUR 18.00, followed by the acquisition offer in 2023 at a price of EUR 10.00. Although this still represents a premium of 23 % on the closing price on the last trading day prior to the publication of the decision to make the offer, the offer price was significantly below the issue price at the time of the IPO. Against this background, the reasoned statement of SYNLAB's management board and supervisory board was neutral, as the offer price did not reflect the long-term value of SYNLAB in their view.[22] In the end, the acceptance rate was around 35 %, meaning that Cinven held around 85 % of SYNLAB's share capital after settlement.

6. Dealing with conflicts of interest on the supervisory board

If the major shareholder is "represented" by one or more persons on the supervisory board of the target company, conflicts of interest may arise on the supervisory board during the implementation of the bid. Although member(s) of the supervisory board may come from the major shareholder's sphere of influence, as members of the corporate bodies of the target company, they are obliged to act exclusively in the interests of the target company. This means, for example, that they must maintain confidentiality towards the major shareholder. In practice, therefore, a committee is usually formed on the supervisory board that does not include anyone from the major shareholder's sphere of influence. This committee performs the tasks of the supervisory board in connection with the takeover, in particular preparing the reasoned statement in accordance with Section 27 WpÜG. Examples of this are the transaction committees on the supervisory boards of Telefónica Deutschland[23], Vitesco[24] and SYNLAB[25]. However, the organisation of the committee and the delimitation of its tasks from those of the plenary differ in practice.

Conclusion: The above examples may suffice to show that acquisition or takeover bids by a major shareholder differ from bids by third parties at various points. They occur repeatedly, especially in downward or sideways markets. Due to the proximity that a major shareholder typically has to the company, such processes can often be initiated and implemented quickly without the close involvement of the target company, as opposed to a takeover by a third party. This means that listed companies should remain in close contact with their major shareholders in order to be able to help shape and support any processes that are initiated in the interests of the company.

11 https://www.handelsblatt.com/technik/it-internet/o2-telefnica-will-deutschlandtochter-komplett-uebernehmen-/29486080.html (last accessed on 6 February 2024).
12 Vitesco's press release from 15 November 2023 (https://www.vitesco-technologies.com/de-de/press-events/press/23-11-15; last accessed on 6 February 2024).
13 Vitesco's reasoned statement from 27 November 2023 (page 85).
14 Klöckner's reasoned statement from 31 March 2023 (page 30).
15 Klöckner's reasoned statement from 31 March 2023 (page 62).
16 SYNLAB's ad hoc announcement from 13 March 2023.
17 Example: Cinven's offer document from 23 October 2023 (page 24).
18 In contrast: SWOCTEM's offer document from 27 March 2023 (page 51): offer serves to exceed the 30 % threshold and is not aimed at acquiring a majority stake.
19 SWOCTEM's offer document from 27 March 2023 (pages 33 and 37).
20 Deutsche Balaton's offer document from 15 July 2022 (page 24).
21 Biofrontera's reasoned statement from 29 July 2022 (page 51); Klöckner's reasoned statement from 31 March 2023 (page 62).
22 SYNLAB's reasoned statement from 2 November 2023 (page 67).
23 Reasoned statement Telefónica Deutschland from 13.12.2023 (page 54 f.).
24 Reasoned statement Vitesco from 27 November 2023 (page 80).
25 Reasoned statement SYNLAB from 02 November 2023 (page 65).

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