NOERR

Public M&A Report 01/2025

The German public takeover market in 2024

by Dr Volker Land and Dr Stephan Schulz, Hamburg

Editorial

A remarkable year full of complex dynamics

Dear readers,

We are pleased to present to you the Public M&A Report 01/2025.

2024 was remarkable for the German market for public takeovers and full of complex dynamics.

The number of transactions was strikingly high and, with 32 transactions, almost reached the record level of 2021. The market volume totalled EUR 44.11 billion, which is an average value in a multi-year comparison. At the same time, however, the average value of these transactions has been the lowest since 2020. 14 offers with a value of less than EUR 100 million show that market participants in the small-cap segment were very active in 2024.

An increasing level of activity is expected for the German M&A market in 2025. We assume that this will also be the case in the market for public takeovers. The regulatory environment relevant to public M&A has not undergone any significant changes in the past year. It remains to be seen whether the adjustments to delisting planned by what is referred to as the traffic light coalition in the Future Financing Act II will be taken up by the next federal government. However, we believe that the trend towards delisting will continue regardless of this.

We therefore assume that the market volume will increase slightly in 2025 (approx. EUR 50 to 65 billion). The number of transactions is likely to decline, albeit primarily in the lower market segments, meaning that a higher value per transaction can be expected.

Two authors contribute feature articles in this Public M&A Report 01/2025:

Philip Schmoll deals with “Takeovers of issuers in the open market”. In our opinion, too little attention is paid to this topic, although it is of considerable economic importance. The strict rules of the German Securities Acquisition and Takeover Act do not apply in the open market, so that independent practices for public offers have developed there due to considerations of expediency. Philip Schmoll takes a closer look at these in his article.

Jörg-Peter Kraack presents the recently published preliminary ruling of the German Federal Court of Justice of 22 October 2024 in his article on “Is the attribution of voting rights of acting in concert contrary to European law?”. In this ruling, the highest German civil court referred the question to the European Court of Justice as to whether the provisions of securities trading law on acting in concert (section 34(2) of the German Securities Trading Act) are in conformity with European law. This matter is unresolved due to differing opinions in the legal literature. As there is a parallel provision in section 30(2) of the German Securities Trading and Takeover Act, the possible effects of a verdict from Luxembourg on takeover law practice in Germany are obvious. In his article, Jörg-Peter Kraack sheds light on what could be in store for us in this respect.

We would like to thank all of our colleagues at Noerr who were involved in preparing and designing the Noerr Public M&A Report 01/2025, in particular Philip Schmoll for drafting the section on reasoned opinions and Bastian Stromann for his editorial support.

We hope you enjoy reading the Public M&A Report 01/2025!

Dr Volker Land

Dr Stephan Schulz

Highlights

Significantly more transactions with a lower average value

With 32 transactions, the number of public takeover bids in 2024 almost reached the level of the record year of 2021 (33 transactions). The total number of offers thus increased significantly after the negative year 2022 (18 offers) and the recovery year 2023 (21 offers). Despite the sharp increase in the number of transactions, the total offer value of EUR 40.11 billion in 2024, measured by market capitalisation at the offer price (**"MCO"**), was only 2.22% higher than the previous year's figure of EUR 39.24 billion. The average offer value per bid, which stood at EUR 1.86 billion in 2023, therefore, fell by 32.80% to EUR 1.25 billion in 2024.

Trend towards delisting increases again

The high number of pure and combined delisting offers already observed in previous years increased significantly once again compared to 2023, from eight to 20. Overall, almost two thirds of all offers in 2024 involved delisting, compared to 38.10% in 2023. In contrast, the share of takeover bids in the total number of offers fell from 42.86% in 2023 to 37.50%. This continues the trend observed in the 2020s away from takeover bids towards delisting offers.

High number of small-cap and large-cap transactions

In 2024, eleven offers (including six delisting offers) were submitted in the large-cap segment (offer value above EUR 1 billion), which represents a noticeable increase compared to the same period of the previous year (seven large-cap offers). However, the average offer value of these transactions was EUR 3.43 billion, the lowest value since 2020. There was a significant increase in market activity in the small-cap segment. In 2024, bidders approached the target companies' shareholders in 14 cases with offers of less than EUR 100 million each. In 2023, there were only four small-cap offers. The average offer value rose from EUR 22.13 million in the previous year to EUR 31.15 million in 2024. While almost every second offer in the previous year fell within the mid-cap segment, only seven of the 32 offers in 2024 were in the range from EUR 100 million to EUR 1 billion.

Stagnation in average premiums paid

Across all offer types, the average premium paid on the volume-weighted average prices of the shares subject to the examined offers rose by around 1.3 percentage points from 18.20% to 19.54% compared to the previous year. In the context of takeover bids, the average premium paid was 31.17%, slightly higher than the 29.59% average control premium offered in the previous year.

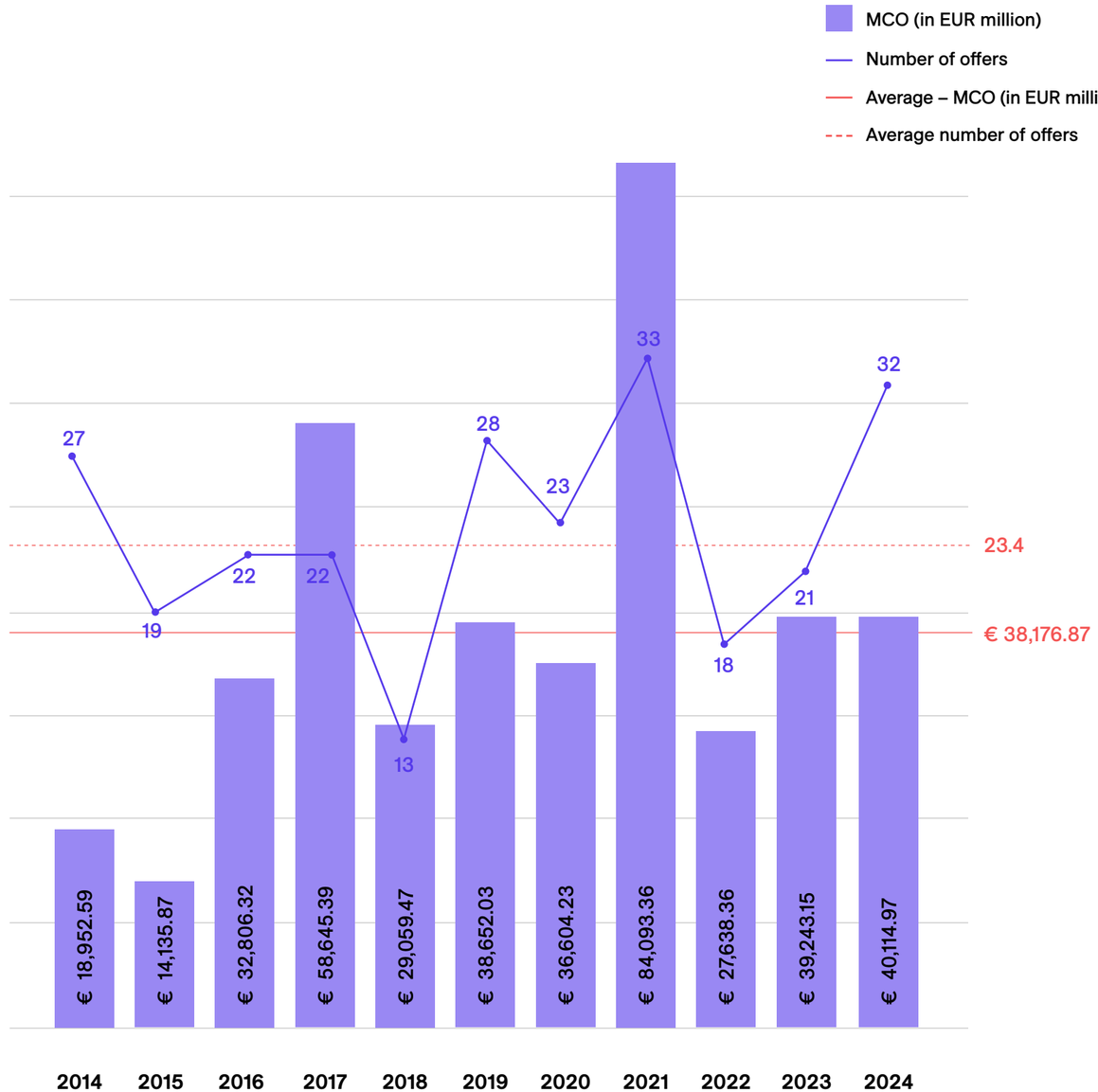


Fig. 1: Number and value of offers since 2014

Source: Noerr Research

Market overview

Number and value of offers

The number of transactions and takeover bids increased for the second year in a row, continuing the market recovery observed since 2022. The large number of delisting offers shows that a market shakeout is still taking place on the stock exchange.

In 2024, the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, **"BaFin"**) approved a total of 32 public offers in accordance with the German Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz, **"WpÜG"**). These offers concerned target companies with a total market capitalisation at the offer price (**"MCO"**) of ER 40,114.97 million. The 32 transactions consisted of 14 delisting acquisition offers, six mandatory offers and 12 takeover bids, with two mandatory offers and four takeover offers combined with a delisting offer.

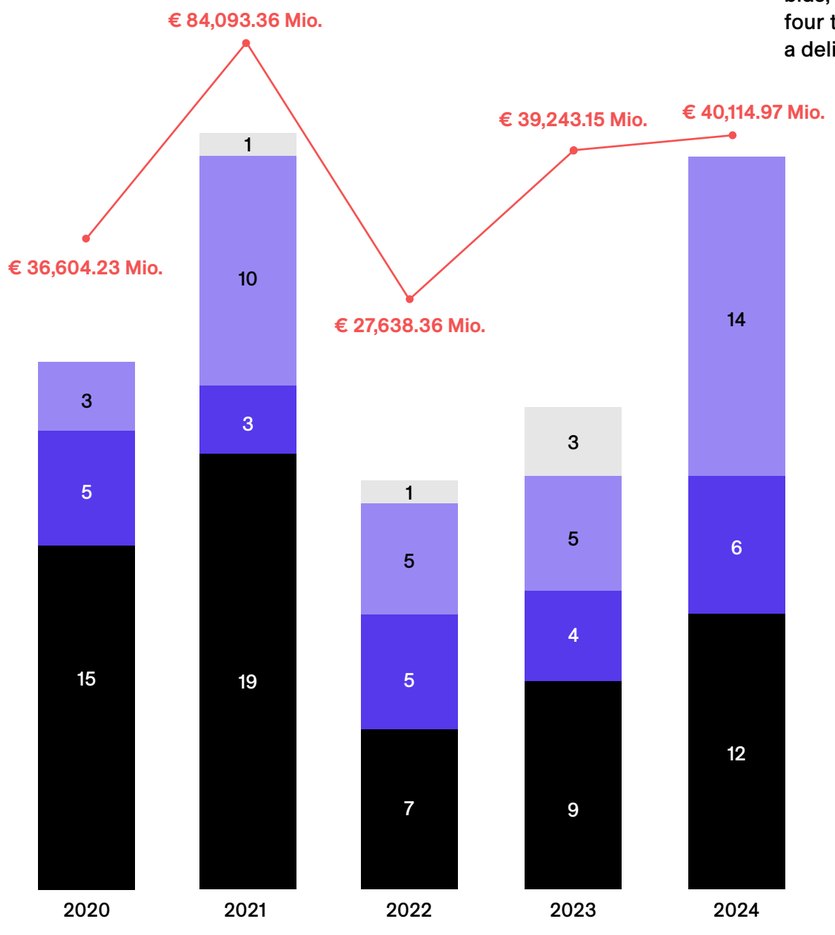


Fig. 2: Number, type and value of offers

Source: Noerr Research

The number of transactions in the German market for public takeovers increased significantly by around 52.38% in 2024, with 32 approved and published offers compared to 2023, when only 21 offers were published. In the period observed since 2014, only the record year 2021 saw more offers (33). Despite the significantly higher number of offers compared to the previous year, the total offer value (measured by MCO) increased only slightly from EUR 39.24 billion in 2023 to EUR 40.11 billion in 2024. This corresponds to a percentage increase of 2.22%. This total offer value in 2024 ranks as the third-highest since 2014. Only the exceptional years of 2017 and 2021 recorded higher values (EUR 58.65 billion and EUR 84.09 billion respectively). However, the total offer value in 2024 was approximately in line with the average of all annual values (since 2014) of EUR 38.18 billion.

The significant increase in the total number of offers compared to the previous year is primarily due to the sharp rise in the number of delisting offers, from eight (five pure and three combined) delisting offers in 2023 to 20 (14 pure and six combined) delisting offers in 2024. This represents a 150% increase in delisting offers compared to the same period in the previous year, continuing the trend towards delistings as the purpose of public offers observed since 2020. Until 2020, the proportion of offers aimed exclusively or also at delisting was always less than 20% of the total number of approved and published offers. In 2024, however, 62.50% of offers involved delisting. This marks a new high, which previously stood at 45.45% (2021) and was also not reached in 2022 (38.89%) and 2023 (38.10%).

For the first time since 2020, no acquisition offer was recorded in 2024 that was not also a delisting offer. The number of mandatory offers increased from four to six in 2024 compared to the previous year, but their share among all offer types remained relatively stable at 18.75% in 2024, compared to 19.05% in 2023.

The number of pure takeover bids not combined with a delisting further increased compared to the previous year. While there were still seven takeover bids in 2023 (share of the total number of offers: 33.33%), eight takeover bids were submitted in 2024, representing 25% of the total number of offers. Historically, the number of takeover bids in 2024 remained at a comparatively low level. Since 2014, the only years with fewer takeover bids were 2023 with seven and 2018 and 2022 with five. Otherwise, takeover bids were always in the higher double-digit range (at least 14 takeover bids).

The fact that the total offer value almost stagnated despite the significant increase in the total number of offers is largely due to the fact that nearly half of all offers in 2024 (43.75%) were in the small-cap segment (previous year: 19.05%). Given that the small-cap segment only accounted for a marginal 1.09% of the total offer value in 2024, the increase in the number of offers in this segment had hardly any effect on the total offer value. Consequently, the average offer value per bid was EUR 1.25 billion in 2024, down from EUR 1.86 billion in 2023.

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

The market in 2024 was characterised by many large-cap transactions with a comparatively low average offer value. There was very little activity in the mid-cap segment, while numerous transactions with average offer values were observed in the small-cap segment.

In detail, the development of the average MCO in the individual segments is as follows:

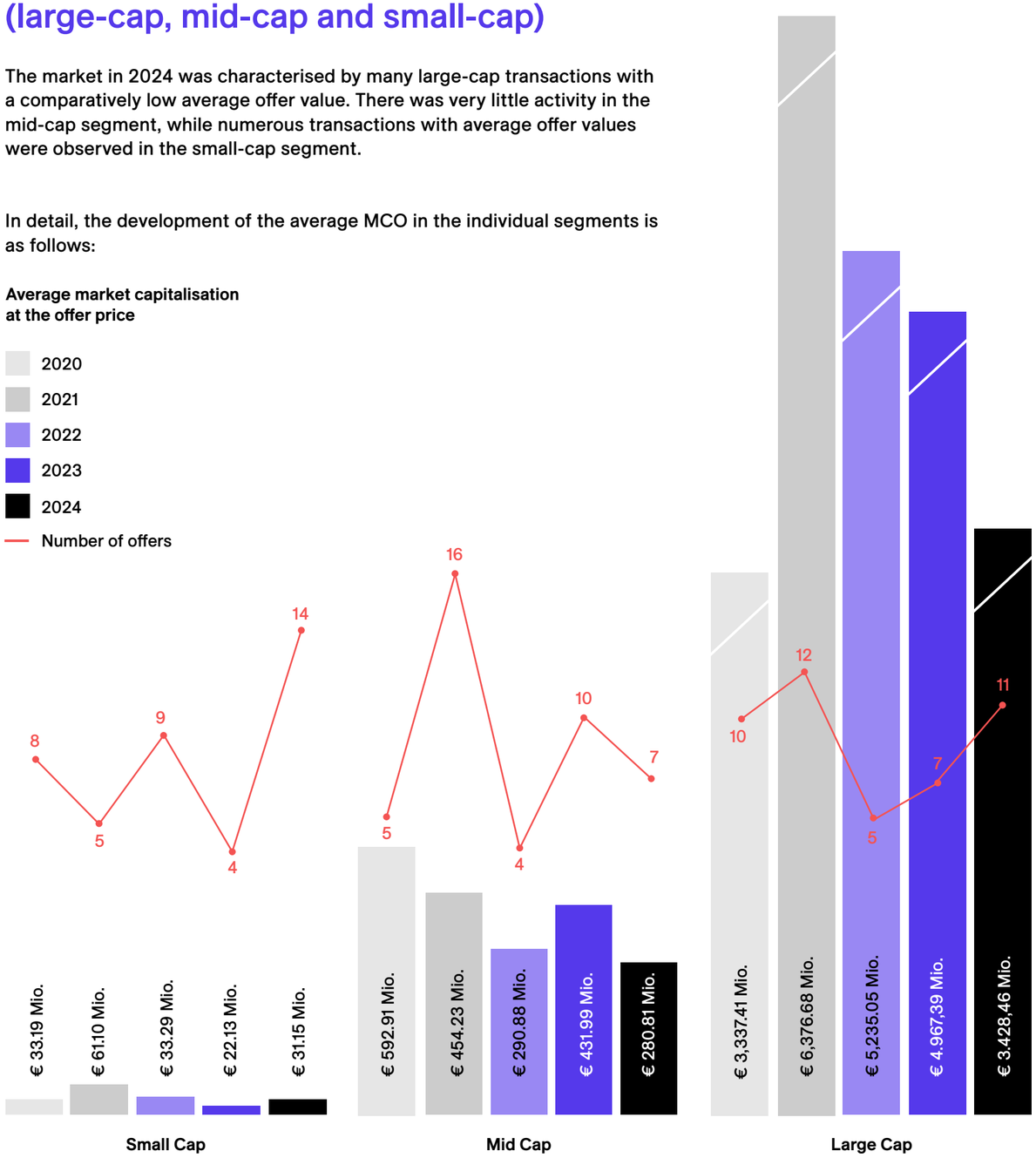


Fig. 3: Development in the segments
Source: Noerr Research

Small Cap (MCO of the target company less than EUR 100 million)
Mid Cap (MCO of the target company less than EUR 1 billion and greater than or equal to EUR 100 million)
Large Cap (MCO of the target company greater than EUR 1 billion)

Eleven public offers were to be allocated to the large-cap segment in 2024, marking a 57.14 % increase from the seven large-cap offers in 2023. This segment accounted for 34.38 % of all transactions in 2024, surpassing both the 2023 figure of 33.33 % and the average of 27.05 % from 2014 to 2023.

The average offer value in the large-cap segment amounted to EUR 3,428.46 million in 2024, a significant decrease of 30.98 % from EUR 4,967.39 million in 2023. This decline continued for the third consecutive year. In addition, the average value for 2024 was substantially lower than the annual average value since 2014 (start of our data collection) of EUR 5,851.48 million. The low average large-cap offer value in 2024 was partly due to the increased number of transactions in this segment (2024: eleven) compared to previous years (2023: seven; 2022: five). Thus, the largest transaction in terms of value in 2024, ADNOC International Germany Holding AG's public takeover bid to the shareholders of Covestro AG (EUR 11.718.00 million), did not sufficiently boost the average as much as the largest transactions in previous years, namely Oak Holdings GmbH's offers to Vantage Towers AG's shareholders (delisting offer 2023 and takeover offer 2022).

After the midcap segment had been comparatively strong in 2023 (Noerr Public M&A-Report 01/2024), both the number of transactions and the transaction value fell compared to the previous year. The number of public offers in this segment fell by 30 % from ten in the previous year to seven in 2024, while the average offer value fell by 35 % from EUR 431.99 million to EUR 280.81 million. This also led to a significant reduction in the total offer value in the mid-cap market: While it quadrupled from EUR 1,163.51 million in 2022 to EUR 4,319.93 million in 2023, it fell by 54.00 % to EUR 1,965.67 million from 2023 to 2024. The total offer value in the mid-cap segment in 2024 was therefore significantly lower than in the record year 2021 (EUR 7,267.68 million), when 16 offers were published in this segment.

In contrast to the mid-cap segment, the number of transactions in the small-cap segment more than tripled in 2024, with 14 offers compared to 2023 (four small-cap offers). This marks the highest number of small-cap offers in recent years. The average offer value in this segment also rose from EUR 22.13 million in 2023 to EUR 31.15 million in 2024 (up 40.76 %), which was roughly on a par with 2020 and 2022. The sharp increase in the number of transactions and the higher average offer value compared to 2023 was accompanied by a particularly strong rise in the total offer value in the small-cap segment, which increased almost fivefold from EUR 88.52 million in 2023 to EUR 436.04 million in 2024. Five of the seven offers in the mid-cap segment were delisting offers, which corresponds to a share of 71.43 %. This is significantly higher than the proportion of delisting offers in the small-cap segment (64.29 %) and the large-cap segment (54.55 %).

Distribution of offer value and number of transactions

With a combined offer value of EUR 37,713.02 million, the eleven large-cap offers accounted for 94.01% of the total offer value in the public takeover market in 2024 (EUR 40,114.73 million).

Among the offers in the large-cap segment, the public takeover offer by ADNOC International Germany Holding AG to Covestro AG's shareholders (EUR 11,718.00 million) stood out. This offer accounted for 31.07% of the total offer value in the large-cap segment and 29.21% of the total offer value of all offers in 2024. However, its impact on the aggregate was smaller compared to the largest offers in terms of value in previous years: In 2023, the largest offer still accounted for 46.48% (share of the large-cap segment) and 41.26% (total offer value). In 2022, these figures were as high as 61.83% and 58.56% respectively. Compared to the previous year, in which the three largest transactions had a combined offer value of EUR 26.94 billion, the combined offer value for the same peer group in 2024 was only EUR 21.54 billion. Notably, 2024 had significantly more large-cap offers with values over EUR 2 billion compared to previous years (eight instead of five in 2023 and two in 2022).

It should be emphasised that there were two offers in the large-cap segment in 2024 where the same bidders and target companies were involved. Firstly, Elbe BidCo AG initially published a takeover bid on 24 April 2024 and then a delisting acquisition offer to the shareholders of ENCAVIS AG on 23 December 2024. Secondly, Novartis BidCo AG addressed the shareholders of MorphoSys AG with a takeover offer and then a delisting acquisition offer. If the statistics were adjusted for one of the offers made in each case, the share of the large-cap segment in the total value of offers in the takeover market in 2024 would fall from 94.75% to approx. 81.23%. In 2024, there were also further delisting follow-up offers for transactions from the previous year, above all the delisting acquisition offer by Telefónica Local Services GmbH to the shareholders of Telefónica Deutschland Holding AG following the ordinary acquisition offer made in 2023. In the mid-cap segment, a delisting offer by Ventrifossa BidCo AG followed the preceding takeover bid to STEMMER IMAGING AG's shareholders in 2024.

The following chart shows the shares of large-cap transactions in the total offer value for 2023 and 2024 (measured by MCO):

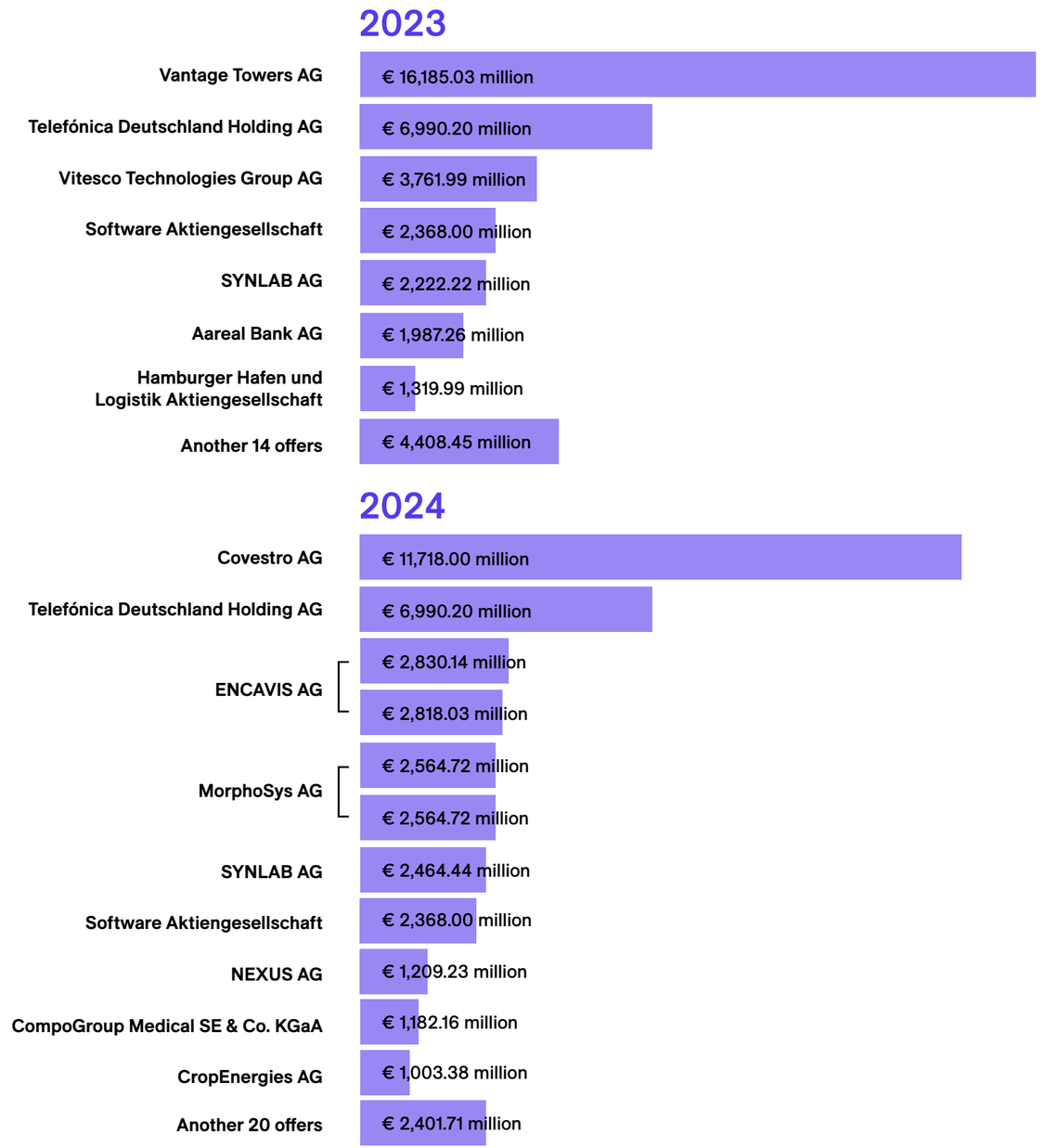


Fig. 4: Distribution of offer value and number of transactions

Source: Noerr Research

Premium amount

In 2024, there were no significant changes in the average premiums paid compared to the previous year, neither in the overall market (across all offer types) nor with regard to takeover bids. However, premium-free offers were increasingly observed, particularly for delisting offers.

In 2024, 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 announcement of the offer by the bidder (**"three-month VWAP"** or **"six-month VWAP"**) averaged 19.54%. Five offers were not taken into account because BaFin was unable to determine the three-month VWAP or six-month VWAP for these offers. This is the case where BaFin can only determine the stock exchange price for the shares affected by the offer on less than one third of the trading days in the relevant three-month or six-month period and records at least two consecutive price jumps of more than 5%. In 2024, this related to the mandatory offer by Technology Center Holding GmbH and Enapter AG to the shareholders of MARNA Beteiligungen AG, the mandatory offer by Rostra Holding Pte. to the shareholders of Decheng Technology AG, the takeover offer by Ipsos DACH Holding AG to the shareholders of infas Holding AG, the mandatory and delisting offer by Linus Holding GmbH to the shareholders of Linus Digital Finance AG and the delisting offer by the bidding consortium around CHAPTERS Group AG to the shareholders of MedNation AG. In addition, only the premiums on the three-month VWAP and six-month VWAP of the listed MorphoSys shares and not the American Depository Shares, which represent MorphoSys shares, were taken into account with regard to the takeover and subsequent delisting offer by Novartis BidCo GmbH to MorphoSys AG's shareholders.

The highest premium was offered by Novartis BidCo AG to MorphoSys AG's shareholders in the context of the takeover offer, with a premium of 136.11% on the three-month VWAP. In determining the offer price, Novartis BidCo AG took into account in particular MorphoSys' historical stock market prices and financial analysts' target price recommendations as well as negotiations with MorphoSys AG. This exceptional premium was followed by the 51.20% premium offered by SCUR-Alpha 269 GmbH (now: Caesar BidCo GmbH), a company backed by the private equity investor CVC, to CompuGroup Medical SE & Co. KGaA's shareholders.

Six offers, all of which were (combined) delisting offers, did not provide for any premiums on the volume-weighted average price. This related to offers from Acme42 GmbH to the shareholders of InVision Aktiengesellschaft, HY Beteiligungs GmbH to the shareholders of HanseYachts AG, Ephios BidCo GmbH to the shareholders of SYNLAB AG, Haron Holdings S.A. to the shareholders of DFV Deutsche Familienversicherung AG, TLG IMMOBILIEN AG to the shareholders of WCM Beteiligungs- und Grundbesitz-Aktiengesellschaft and UK Media Invest GmbH to the shareholders of Klassik Radio AG. In 2023, there was only one case where no premium at all was paid on the volume-weighted average share price.

At 19.54%, the average premium in 2024 was slightly higher than in the previous year (2023: 18.20%). Eight offers were in the highest premium category of more than 30%. This compares to six in 2023 and four in both 2022 and 2021. Looking at the total number of all offers with premiums above 20%, those offers slightly increased in 2024 compared to the previous year, with nine offers in this category (2023: seven offers with premiums above 20%). However, this increase is put into perspective when taking into account the higher total number of offers compared to previous years. The proportion of all offers with premiums over 20% in 2024 was 28.13%, significantly lower than in 2023 (36.84%). Offers without premiums or almost without premiums, i.e., those with a premium of less than 1% on the three-month VWAP or six-month VWAP, doubled to eight offers compared to the previous year, in which four such offers were observed. Consequently, in 2024, nearly no premiums were paid in a quarter of cases (2023: 19.05%).

The following chart illustrates the premiums provided for in the offers in 2024, divided into different categories, as well as the corresponding premium average and compares these with the premiums and average values of previous years:

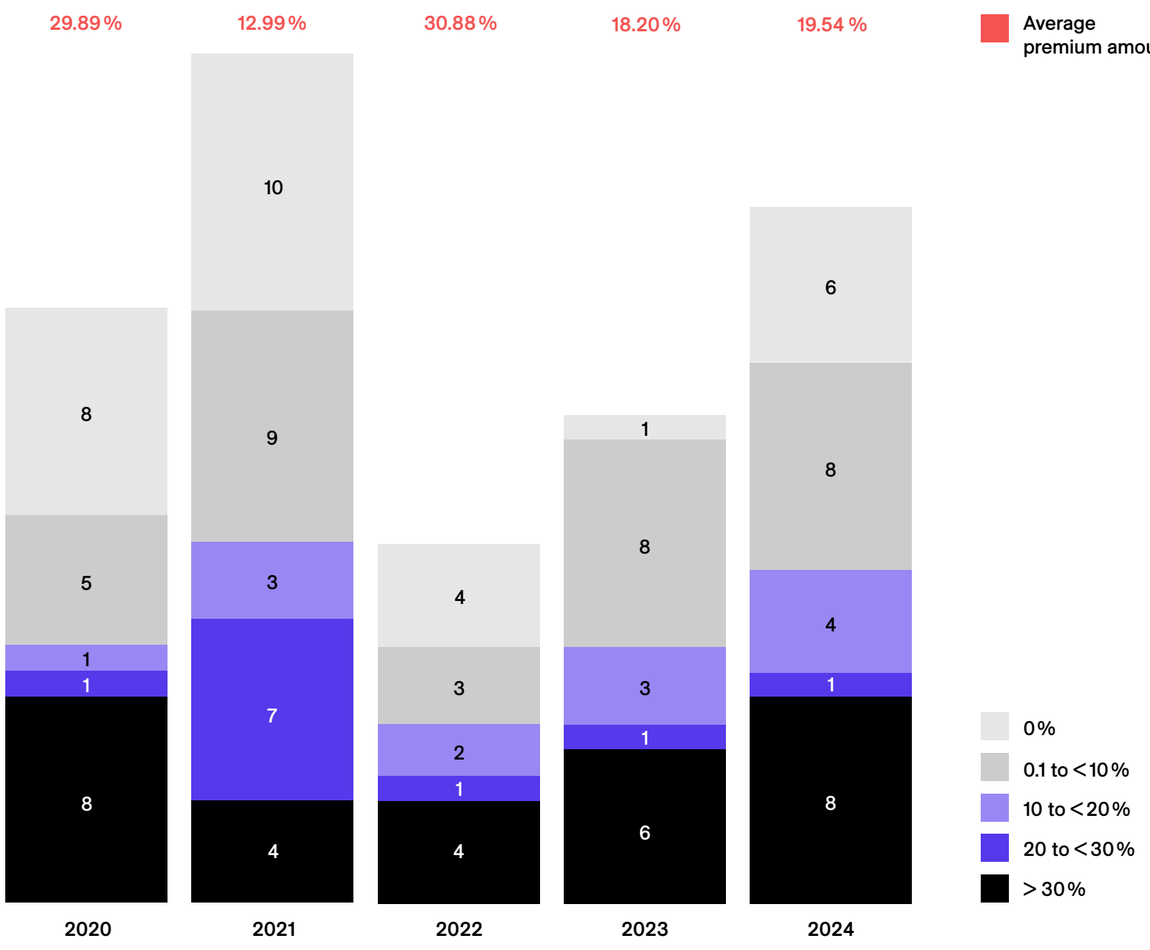


Fig. 5: Premium amount
Source: Noerr Research

The average premium for the eleven takeover bids analysed in 2024 was 31.18 %, which is 5.37 % higher than the corresponding average for the eight takeover bids considered in 2023 (29.59 %).[1] In 2022, the average premium for takeover bids was only slightly lower at 30.71 %. On average, a bidder of a takeover bid in 2024 was therefore prepared to pay roughly the same premium for initially gaining control of the target company as in the two previous years.

[1] The takeover offer by Ipsos DACH Holding AG to infas Holding AG's shareholders is not taken into account here because BaFin was unable to determine the three-month VWAP for this.

By Dr Philip M. Schmoll, Frankfurt am Main

Reasoned statements pursuant to section 27 WpÜG

In 2024, the boards of the target companies published a total of 32 reasoned statements on the 32 public offers in accordance with section 27 WpÜG.[2] These were joint reasoned statements by the boards of the respective target companies.

Overall assessment of the offer

The final assessment of the boards of the target companies of the 32 offers made in 2024 was as shown in the following chart.

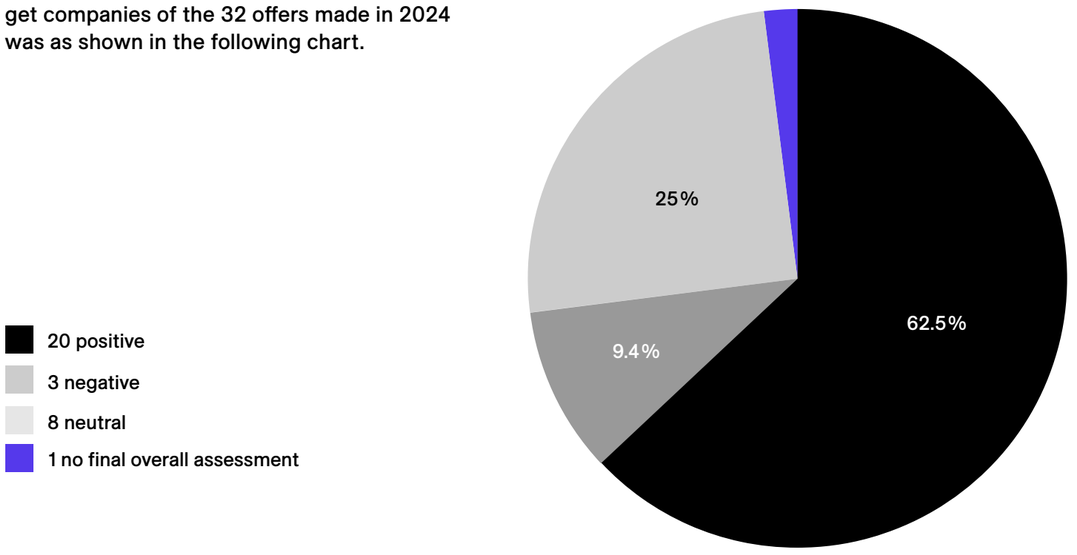
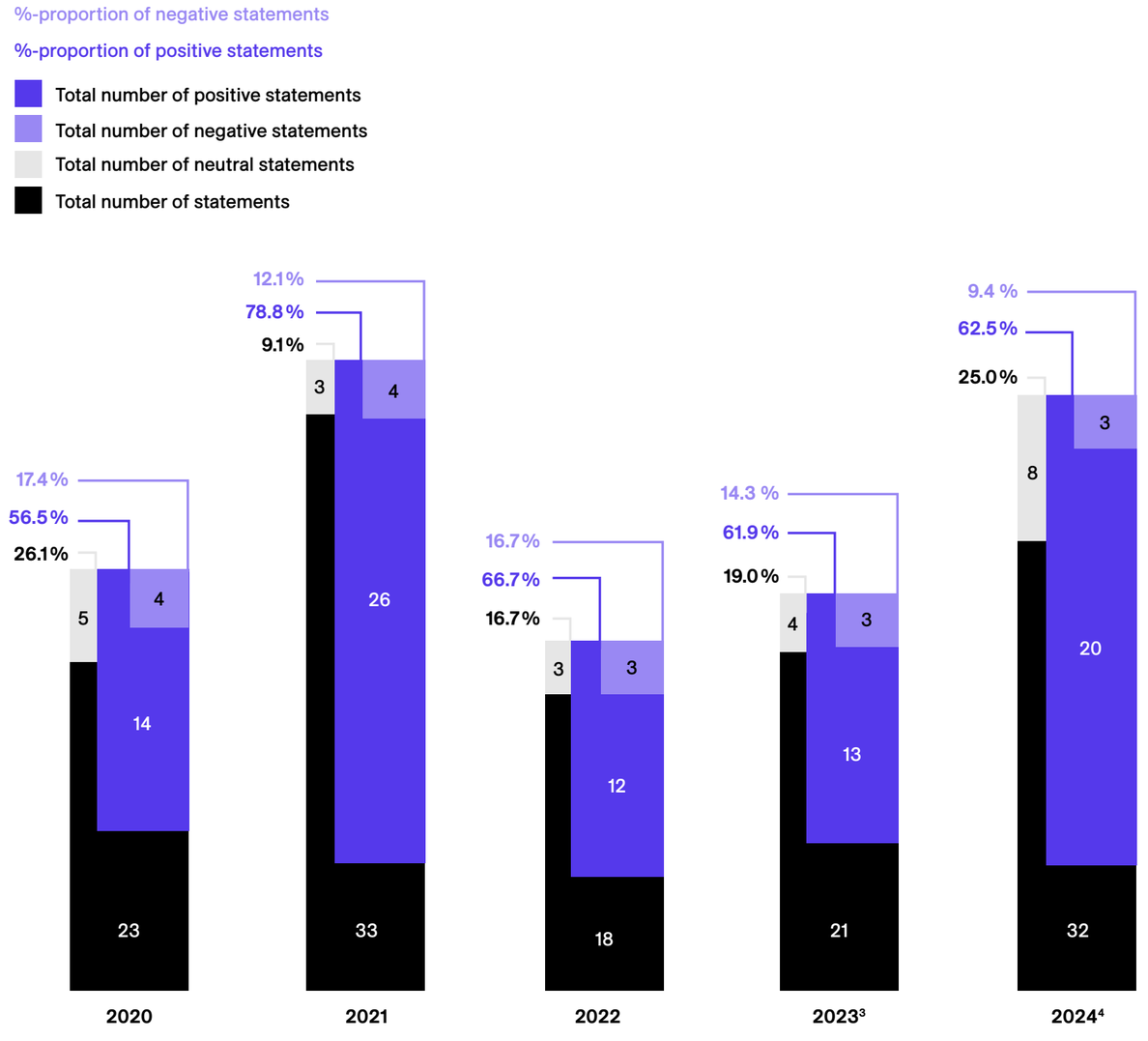


Fig. 6: Reasoned statements pursuant to section 27 WpÜG

Source: Noerr Research

Multi-year comparison 2020 to 2024

A multi-year comparison shows that the number of neutral statements published in 2024 was exceptionally high. At around two-thirds of the total number, positive statements account for a large proportion of the reasoned statements – similar to previous years.



[2] A detailed evaluation of the reasoned statements can be found in the article by Schmoll/Dreinhöfer in WM 2025, p. 285 et seq., or on request from our contact persons.

[3] In addition, one differentiating statement was published (4.8%).

[4] In addition, in one case, no statement was published.

Special votes

In the course of the joint reasoned statement by the general partner and the supervisory board of CompuGroup Medical SE & Co. KGaA on the voluntary public takeover bid by Caesar BidCo GmbH, the Chairman of the Administrative Board and a Managing Director published a joint special vote, as they did not participate in the resolution on the statement due to potential conflicts of interest. However, ultimately, they shared the assessment and the recommendation for acceptance published in the statement.

Fairness Opinions

To support twelve of the 32 reasoned statements (37.5%; previous year: 57.1%), fairness opinions were obtained from external advisors on the adequacy of the offered consideration. These included all statements on the eight takeover bids in 2024. In eight of the twelve cases, the management bodies jointly commissioned a fairness opinion. The management bodies of CompuGroup Medical SE & Co. KGaA and Nexus AG each jointly commissioned two fairness opinions from different advisors. The management board and supervisory board of ENCAVIS AG each obtained their own fairness opinion from different advisors. The management board and supervisory board of Covestro AG each obtained two separate fairness opinions from different advisors. On the basis of the offer price, all target companies whose boards jointly or individually obtained more than one fairness opinion were valued at over EUR 1 billion.

The reasoned statements that were not supported by fairness opinions were primarily those related to mandatory and/or delisting offers. In these cases, fairness opinions are increasingly not obtained, mainly for cost reasons.

Date of submission of the reasoned statements

In 2024, the reasoned statements were submitted on average 8.8 days after publication of the offer document (previous year: 9.4 days). In 26 of the 32 reasoned statements (81.3%), the boards of the target companies were aware that the respective bidder would make a public offer due to the conclusion of a transaction agreement with the bidder prior to the announcement of the offer pursuant to section 10 WpÜG (so-called “section 10 announcement”). These reasoned statements were published on average 8.5 days after publication of the offer document (previous year: 9.0 days).

by Dr Philip M. Schmoll, Frankfurt am Main

Takeovers of issuers listed in the open market

A large number of listed companies in the small-cap and mid-cap segment are currently considered to be undervalued on the stock exchange and are therefore attracting the attention of both private equity investors and strategic buyers. If the shares of such companies are listed exclusively on the open market (section 48 Stock Exchange Act (Börsengesetz, **“BörsG”**)), the takeover procedure regulated in the Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz, **“WpÜG”**) does not apply in the event of a takeover. This gives acquirers more flexibility in structuring the transaction. However, from the target company’s perspective, the provisions of stock corporation law become more important, which – unlike for issuers in the regulated market – are not superceded by the WpÜG. The following article provides an overview of legal aspects that are worth considering on the part of the acquirer and the target company in the event of a takeover.

Acquirer

Transaction preparation:

– **No shareholding transparency:** The success of a takeover generally depends on the acquirer succeeding in acquiring share packages from the target company's major shareholders. To achieve this, the prospective buyer must first be aware of the composition of the shareholder base. As major shareholders of issuers in the open market are not required to submit voting rights notifications under sections 33 et seq. Securities Trading Act (Wertpapierhandelsgesetz, **“WpHG”**) and a notification obligation under stock corporation law only applies for shareholdings exceeding 25% or 50%, prospective buyers only have limited public visibility into the target company’s shareholder base (often referred to as “shareholding transparency”). Some open market issuers voluntarily disclose their shareholder structure on their investor relations website, based on information provided by their major shareholders in the case of bearer shares or from their share register in the case of registered shares. In individual cases, prospective buyers may therefore rely on the target company’s assistance to obtain information about the shareholder structure. In addition, issuers in the open market have no right to information from intermediaries regarding the identity of their shareholders (“know your shareholder”) in accordance with section 67d(1) Stock Corporation Act (Aktiengesetz, **“AktG”**) (also known as “shareholder/share ID”)

– **Greater flexibility with stakebuilding:** In certain situations, it might be beneficial for prospective bidders to acquire a stake in the target company in advance of a takeover (“stakebuilding”). For target companies listed on the regulated market, it is only possible to acquire (i) shares in the amount of 2.99% of the voting rights and instruments as defined in section 38 WpHG in the amount of 1.99% of the voting rights or (ii) instruments in the amount of up to 4.99% of the voting rights without triggering a notification obligation. Due to the inapplicability of the WpHG, such restrictions on stakebuilding do not apply to target companies listed in the open market. A notification obligation under stock corporation law only arises if the acquirer holds more than 25% of the company’s shares.

– **Transaction communication:** When it comes to transaction communication, acquirers need to be aware that the target company must generally disclose inside information in connection with the takeover without delay. Delaying such disclosure of inside information is permissible only if, among other things, immediate disclosure would likely prejudice the legitimate interests of the target company. To prevent premature disclosure of the takeover, either (i) the target company must be involved to pass a corresponding resolution to delay the immediate disclosure, or (ii) the target company must be completely isolated from receiving any information about the takeover. Particular caution is required in situations where members of the management board or supervisory board are also involved on the buyer or seller side.

Public takeover bids

As mentioned at the beginning, the WpÜG does not apply to takeovers of issuers in the open market. Nevertheless, it may be beneficial for the acquirer to publish a voluntary public takeover offer to the target company's shareholders. In principle, the acquirer has the flexibility to structure such offers as desired. In cases where takeovers are pre-arranged between the acquirer and the target company, the parties to the transaction typically follow a takeover procedure similar to that outlined in the WpÜG.

This involves the bidder publishing an offer and other announcements regarding the offer (e.g., acceptance and results notifications), while the target company's boards submit a reasoned statement on the offer. Aligning with the WpÜG's takeover procedure provides the offer with a structured framework familiar to market participants, distinguishing it from unprofessional takeover attempts. Recent examples include the acquisition offer by Pineapple German Bidco GmbH (Thoma Bravo) to the shareholders of EQS Group AG in 2023 and the acquisition offer by Zentiva AG to the shareholders of Apontis Pharma AG in 2024. Compared to the regulated WpÜG takeover procedure, structuring the offer offers the following flexibility:

Profile of the public offer to the shareholders of EQS Group AG

Bidder:	Pineapple German Bidco GmbH (Thoma Bravo)
Listing of the target company:	Scale segment on the Frankfurt Stock Exchange
Offer value:	EUR 401 million
Premium:	61 % on the three-month VWAP
Offer announcement:	16/11/2023
Offer period:	4/12/2023 – 12/01/2024 (approx. six weeks)
Submission of the reasoned statement:	13/12/2023
Completion of the offer:	2/2/2024
Delisting:	6/5/2024
Bidder's stake at the start of the offer:	9 %
Transaction protection:	approx. 60 % through irrevocable tender agreements prior to offer announcement
Acceptance rate:	74.55 %
Participation of the bidder after completion of the offer:	97.51 %
Special features:	– Offer in English/non-binding German translation of the offer – Re-investment of the founder Achim Weick in the bidder group

Time flexibility:

– **No obligation to announce the offer:** Bidders have no obligation to announce their decision to make a public offer to the target company's shareholders. It is therefore possible to publish a public offer directly without announcing this decision in advance. However, announcing before initiating the offer is common practice as it allows the capital market and the public to assess the offer before the acceptance period begins.

– **No official approval needed:** Due to the lack of regulation of the takeover procedure, BaFin has no authority to approve the offer, which in particular means that the ten-day review of the offer documents by the authority is not required. The offer document can therefore be published immediately after its finalisation and thus also immediately or shortly after any voluntary offer announcement.

– **No minimum acceptance period:** Bidders are free to decide on the length of the acceptance period without any obligation to grant a minimum acceptance period. Although not required, a four-week acceptance period, common in regulated market takeovers, is often used in practice.

Profile of the public offer to the shareholders of APONTIS PHARMA AG

Bidder:	Zentiva AG
Listing of the target company:	Scale segment of the Frankfurt Stock Exchange
Offer value:	EUR 85 million
Premium:	38.3 % on the three-month VWAP
Offer announcement:	16/10/2024
Offer period:	24/10/2024 – 21/11/2024 (four weeks)
Submission of the reasoned statement:	30/10/2024
Completion of the offer:	6/12/2024
Delisting:	Announced
Bidder's stake at the start of the offer:	0 %
Transaction protection:	approx. 38.26 % through share purchase and transfer agreement prior to the announcement of the offer
Acceptance rate:	46.08 %
Participation of the bidder after completion of the offer:	85.27 %
Special features:	Waiver of minimum acceptance threshold on 19/11/2024

– **No additional acceptance period:** Bidders are not obliged to offer shareholders an additional acceptance period after the regular acceptance period expires. In practice, offer addressees are not regularly granted a further acceptance period voluntarily. Shareholders must therefore decide to accept or reject the offer within the set acceptance period and cannot wait to see whether any minimum acceptance threshold has been reached by the end of the regular acceptance period.

Flexibility in the type and amount of consideration:

– **No constraints on type of consideration:** Bidders are free to decide on the type of consideration offered. For example, offering shares as consideration only to certain shareholders without triggering any further legal consequences is possible. This facilitates a "roll-over" of a target company shareholder's stake into a stake in the acquirer (group). In addition, there are no requirements regarding the liquidity or stock exchange listing of the offered shares.

– **Different amounts of consideration:** Bidders may offer sellers of larger share blocks a higher price than to the other shareholders. In contrast to the regulations of the WpÜG, block premiums, typically demanded by sellers of larger share blocks, do not have an effect on the offer price of the public offer to the other shareholders.

– **No obligation to perform a company valuation if the shares of the target company are illiquid:** Shares of issuers on the open market can often be illiquid. In this case, however, bidders do not have to carry out a company valuation to determine the offer price, as required for issuers on the regulated market pursuant to section 5(4) Regulation on Offers under the Securities Acquisition and Takeover Act Offer Regulation (WpÜG-Angebotsverordnung).

– **Flexibility in amending the offer:** In WpÜG-regulated takeover bids, bidders are only allowed to amend their offer up to one working day before the end of the acceptance period. At that point in time, however, it is challenging to accurately predict how many shareholders will accept the offer since institutional investors in particular often decide on the acceptance on the last day of the acceptance period and acceptance behaviour is generally difficult to forecast. For takeover bids with a minimum acceptance threshold, this means that the bidder must decide on reducing or waiving a minimum acceptance threshold without full clarity on the final acceptance rate (see Verse/Brellochs, ZHR 2022, 339). In contrast, for takeovers of open market issuers, bidders may amend the offer up to the expiry of the acceptance period. In contrast to WpÜG-regulated takeover bids, amending the offer does not extend the acceptance period or grant shareholders who have already accepted the offer the right to withdraw.

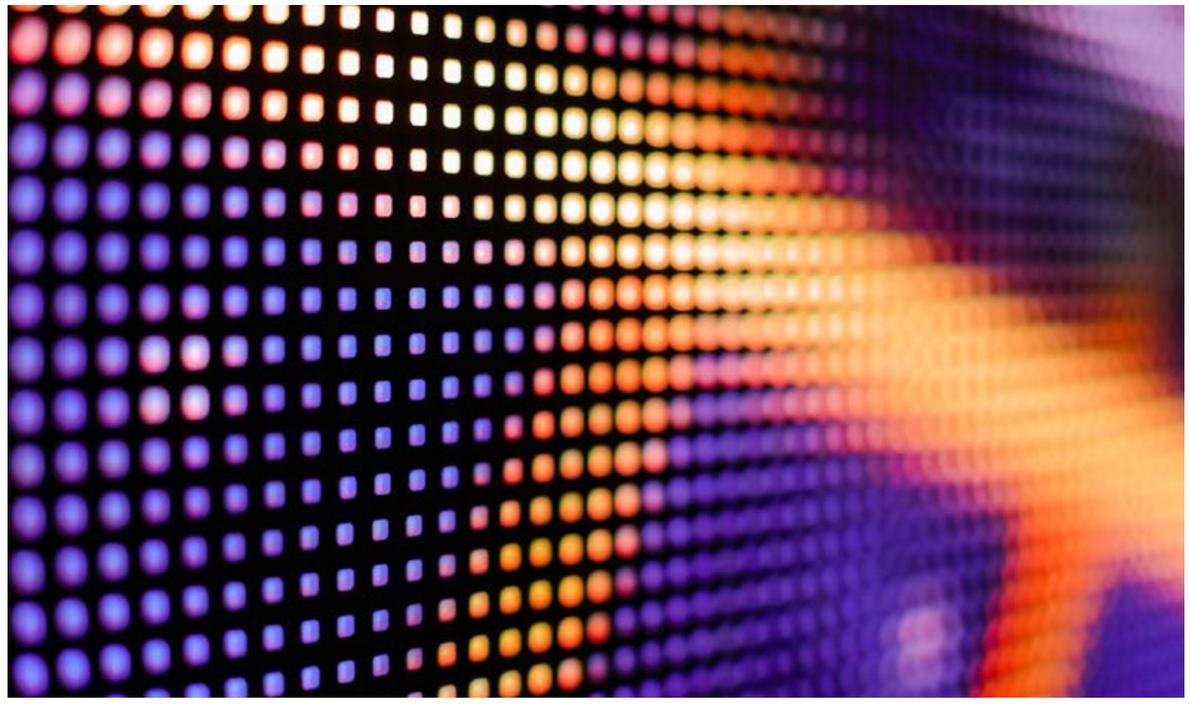
– **Linguistic flexibility:** Under the WpÜG, offers must be published in German, although a non-binding English translation is commonly prepared in transactions in the mid- and large-cap segments. For public offers in the open market, on the other hand, offers may only be published in English or designate the English version as binding, such as the offer document for the acquisition offer of Pineapple German Bidco GmbH (Thoma Bravo) to the shareholders of EQS Group AG.

No obligation to make a mandatory offer

In certain cases, acquirers can gain control of an open market issuer without making a public offer to shareholders, e.g., if the majority of the shareholders are a small group. Unlike regulated market issuers, no mandatory offer is required in this case, allowing the acquirer to purchase one or more share blocks without a public offer via a share purchase agreement and implement structural measures immediately afterwards, such as concluding a domination and/or profit and loss transfer agreement or squeezing out minority shareholders.

No delisting offer required for delisting

Typically, delisting from the open market only requires the issuer to cancel its listing with the stock exchange. There is no need for a delisting offer in accordance with section 39 BörsG. However, stock exchange terms and conditions usually provide for a certain period of time from receipt of the cancellation notice until delisting, allowing shareholders to sell their shares via the stock exchange before the delisting (e.g., the three-month period in the case of inclusion of shares in the open market of the Frankfurt Stock Exchange).[5]



[5] However, the government draft of the Future Financing Act II proposes that delisting from an SME growth market (in Germany only the Scale segment of the Frankfurt Stock Exchange), which is considered a Qualified Regulated Unofficial Market, will require a prior delisting offer. If the new Federal Government will take this issue further remains to be seen.

Target company

Since stock corporation law is not subordinated to the WpÜG for open market issuers, it plays a prominent role for the target company. Thus, the rights and duties of the target company's boards are primarily governed by sections 76(1) and 93 AktG (duties of care) and section 53a AktG (equal treatment).

- **Commitment to company interests:** The management board and supervisory board must prioritise the company's interests in all measures taken during the takeover process. This applies in particular to decisions regarding a due diligence by one or more prospective acquirers, supporting public offers and facilitating possible subsequent structural measures such as a delisting. If members of the management board and supervisory board face (potential) conflicts of interest (e.g., due to dual roles at the acquirer, seller or target company), it must be examined whether and to what extent these members may or should participate in relevant decisions.

- **Duty of neutrality of the management board?** The question of whether a prohibition on the management board from influencing the composition of shareholders or a general duty of neutrality under stock corporation law can be derived from the general provisions of stock corporation law is a matter of legal debate. There are strong arguments against such a duty of neutrality. However, in the absence of Federal Court of Justice rulings, particular caution is required when implementing defence measures. In any case, the management board must prioritise the interests of the company as well as adhere to the general restrictions under stock corporation law, such as subscription rights in the case of a capital increase (section 186 AktG), the acquisition or sale of treasury shares (section 71 AktG) and the principle of equal treatment (section 53a AktG).

- **Statement on a public offer:** The question of whether the management board and supervisory board are obliged to issue a statement on a public offer to the target company's shareholders is also legally controversial. There are strong arguments for an obligation of the management board based on the management board's general duties under stock corporation law. In pre-agreed public offers, the business combination/investment agreement typically includes a duty of the target company's boards to publish a reasoned statement on the offer. In any case, the target company's boards have the right to publish a statement on the offer.

by Dr Jörg-Peter Kraack, Hamburg

Is the attribution of voting rights under the “acting in concert” rule contrary to European law?

Recent referral by the German Federal Court of Justice to the ECJ for a preliminary ruling of 22 October 2024 – II ZR 193/22 has considerable implications

Introduction

The question of whether attributing voting rights for acting in concert is contrary to European law is a highly contentious issue in capital market law, especially regarding the publicity of shareholdings. The Federal Court of Justice recently had a rare opportunity to deal with this attribution under sec-tion 34(2) Securities Trading Act (Wertpapierhandelsgesetz, **“WpHG”**). The central question was whether attributing voting rights due to a common policy adopted “otherwise than by agreement” pursuant to sentence 1, second alternative (i.e., without an agreement) is in conformity with European law. Due to doubts in this regard, the Federal Court of Justice referred an interpretation question regarding the Transparency Directive to the ECJ for a preliminary ruling (Federal Court of Justice, referral dated 22 October 2024 – II ZR 193/22).

This decision has considerable implications for the practice of disclosing shareholdings and, due to its function as a preliminary condition, also affects takeovers.

Facts of the case

The legal dispute concerns an action to avoid (Anfechtungsklage) and action for annulment (Nichtigkeitsklage) brought by three shareholders in 2018 against resolutions of the annual general meeting of the defendant, a listed stock corporation (Aktiengesellschaft, “AG”), regarding discharges granted to board members and elections to the supervisory board.

The actions were dismissed at first instance and the appeal was also unsuccessful. In the appellate court’s opinion, the plaintiffs were not entitled to challenge the actions due to their breach of notification obligations pursuant to sections 33, 34 WpHG since 2017, resulting in a loss of rights pursuant to section 44(1) WpHG. The court argued that the voting rights of the plaintiffs and another shareholder were mutually attributable pursuant to section 34(2) WpHG due to their acting in concert from 2017 to 2019, as they had in any case coordinated their behaviour “otherwise than by agreement”.

The plaintiffs were therefore initially obliged to report that their voting rights exceeded the 10% threshold before the 2017 annual general meeting because they and another shareholder together held more than 10% of the voting rights. Subsequently, they were obliged to report falling below the 10% threshold before the 2018 annual general meeting as their combined holdings were less than 10% at that time. The legal consequence of this loss of rights included not only the right to vote at the 2018 annual general meeting, but also the right to challenge resolutions passed at the meeting.

Decision and reasons

The Federal Court of Justice stayed the proceedings and referred a question on the interpretation of the Transparency Directive to the ECJ for a preliminary ruling under Art. 267 Treaty on the Functioning of the European Union (TFEU). The legal dispute raised the question of the compatibility of acting in concert on the basis of adopting a common policy “otherwise than by agreement” pursuant to section 34(2), sent. 1, second alternative WpHG with the requirements of Article 10(a) of the Transparency Directive (Directive 2004/109/EC).

The conformity of this attribution requirement with the directive is disputed in the legal literature and essentially concerns the question of whether the excessive national provision on acting in concert is permissible despite the general full harmonisation of the Transparency Directive in accordance with the exemption in Article 3(1a)(iii) of the Transparency Directive Amending Directive (Directive 2013/50/EU). According to this directive, stricter national provisions are permissible if they are adopted “in relation to takeover bids, merger transactions and other transactions affecting the ownership or control of companies, supervised by the authorities appointed by Member States pursuant to Article 4 of the Takeover Directive (Directive 2004/25/EC)”. The Federal Court of Justice therefore referred the question to the ECJ as to whether this exemption provision should be interpreted as precluding attribution on the basis of adopting a common policy “otherwise than by agreement” pursuant to section 34(2), sentence 1, second alternative WpHG.

Implications at a glance

- The Federal Court of Justice's referral on acting in concert "otherwise than by agreement" ("in sonstiger Weise") has considerable implications for shareholding practice and, by extension, takeovers.
- In the short term, investors and issuers will have to deal with this legal uncertainty, which has now been recognised by the Federal Court of Justice. Currently, this uncertainty mainly concerns the trend towards actual behavioural coordination among investors in the form of collaborative engagement or ESG activism as well as questions of admission to the annual general meeting in the upcoming season (keyword: loss of rights).
- In the long term, the ECJ's preliminary ruling is likely to clarify how shareholding publicity exceeding the Transparency Directive requirements can be justified, not only in cases of acting in concert, but also in many other areas because it is "in relation to takeover bids".
- Ultimately, the intended parallel interpretations of the securities trading law regime (section 34 "WpHG") and the takeover law regime concerning the control threshold (section 30 Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz, **WpÜG**) is at stake, along with the function of shareholding publicity as a preliminary condition under takeover law.

In the Federal Court of Justice's opinion, the referred question is also relevant for the decision of the legal dispute. If EU law precluded acting in concert by adopting a common policy "otherwise than by agreement", the Federal Court of Justice would have to set aside the appellate judgment and remand the case for further findings on the adoption of a common policy. Conversely, if EU law did not preclude such coordination, the appeal would have to be dismissed because the plaintiffs would have suffered a loss of rights due to their breach of their notification obligations pursuant to section 44(1), sent. 1 WpHG, rendering them ineligible to challenge the resolutions of the annual general meeting.

The Federal Court of Justice clarifies that – contrary to a few opinions – such a loss of rights (and thus the relevance of the referred question for a decision on the attribution of voting rights) does not automatically cease if the required notification of voting rights for exceeding or falling below a threshold is not made and the threshold crossing is subsequently actually reversed. Instead, the loss of rights is only rectified by fulfilling at least the last notification obligation.

Scope

The decision of the Federal Court of Justice to refer a central question on the attribution of voting rights for acting in concert pursuant to section 34(2) WpHG for a preliminary ruling has short-term and long-term implications:

Short-term legal uncertainty

In the short term, investors and issuers will have to deal with the legal uncertainty now recognised by the Federal Court of Justice regarding the attribution of voting rights in the case of acting in concert "otherwise than by agreement". This currently primarily affects the trend towards actual behavioural coordination among investors in collaborative engagement or ESG activism as well as questions of admission to the annual general meeting in the upcoming season. Experience shows that a clarification of the interpretation by the ECJ is first likely to occur within about a year from now.

For **investors**, there is legal uncertainty regarding attribution only within the scope of acting in concert under shareholding publicity. Acting in concert "otherwise than by agreement" under takeover law in accordance with section 30(2) WpÜG will undoubtedly continue to have an attribution effect.

Investors who consider not disclosing voting rights in these cases will continue to face the risk of being penalised by BaFin and suffering a loss of rights in the event that the attribution provision subsequently proves to be compliant with European law. The hurdles for claiming an unavoidable legal error against issuers and BaFin are extremely high in view of the legal uncertainty.

Investors who, as a precautionary measure, continue to assume that acting in concert "otherwise than by agreement" justifies attribution do not risk anything by submitting a voting rights notification.

Issuers run a high risk if they refuse to allow investors to participate in the annual general meeting even where the investors have not submitted voting rights notifications and where there is evidence of acting in concert "otherwise than by agreement". The legally required "reasonable certainty" of a loss of rights cannot be assumed with sufficient (legal) certainty due to the legal uncertainty confirmed by the Federal Court of Justice.

Legal uncertainty remains regarding the question (not clarified by the Federal Court of Justice) as to whether, in the event of repeated breaches of notification obligations, fulfilment of not only the last, but all notification obligations is required for the loss of rights to cease.

Long-term legal certainty following the ECJ's preliminary ruling

The Federal Court of Justice's referral to the ECJ focusses on acting in concert "otherwise than by agreement", but it also prompts a decision on whether stricter shareholding disclosure rules are permissible under the Transparency Directive Amendment Directive, specifically when these are "in relation to takeover bids". The ECJ's preliminary ruling is therefore likely to be relevant for understanding all provisions regarding shareholding publicity that go beyond the requirements of the Transparency Directive and whose permissibility is based on this takeover-related exception from full harmonisation.

If, following the ECJ's preliminary ruling, it is clear that an attribution for **acting in concert "otherwise than by agreement" does not comply with European law**, the following will apply:

- The provision on the attribution of voting rights in the case of acting in concert "otherwise than by agreement" pursuant to section 34(2), sent. 1, second alternative WpHG is no longer to be applied by German courts. BaFin will have to change its supervisory practice.

- If the attribution in the case of acting in concert "otherwise than by agreement" cannot be justified because it is not "in relation to takeover bids", it is likely that many other attribution provisions under section 34 WpHG are incompatible with European law. This applies, on the one hand, to the other excessive provisions for acting in concert pursuant to section 34(2) WpHG (e.g., regarding the subject of coordination and mutual attribution even for pool members without influence) and, even more so, to the excessive attribution provisions of section 34(1) WpHG.

- The basis for the parallel interpretations of the attribution regime under section 34 WpHG and the takeover law regime of section 30 WpÜG, as assumed by the legislature and BaFin, is removed.

- The legislature must adjust the attribution provisions of section 34 WpHG to comply with European law. This creates an unfortunate legal policy and doctrinal situation where the same circumstances can trigger a mandatory takeover bid under section 30 WpÜG due to control thresholds, yet not require notification under section 34 WpHG.

If, according to the ECJ's preliminary ruling, it is clear that an attribution for acting in concert "otherwise than by agreement" is compliant with European law, the following applies:

- The excessive attribution of voting rights for acting in concert is generally justified, i.e., not only with regard to coordination "otherwise than by agreement", but also with regard to other excessive attribution provisions (see above).

- In this respect, the parallel interpretation assumed by the legislature and BaFin between acting in concert under securities trading law pursuant to section 34 WpHG and acting in concert under takeover law pursuant to section 30 WpÜG is also justified.

- However, the attribution provisions of section 34(1) WpHG that go beyond the requirements of the Transparency Directive are not automatically justified. They are not necessarily also "in relation to takeover bids" since otherwise the full harmonisation of shareholding publicity would be completely undermined ("gold plating").

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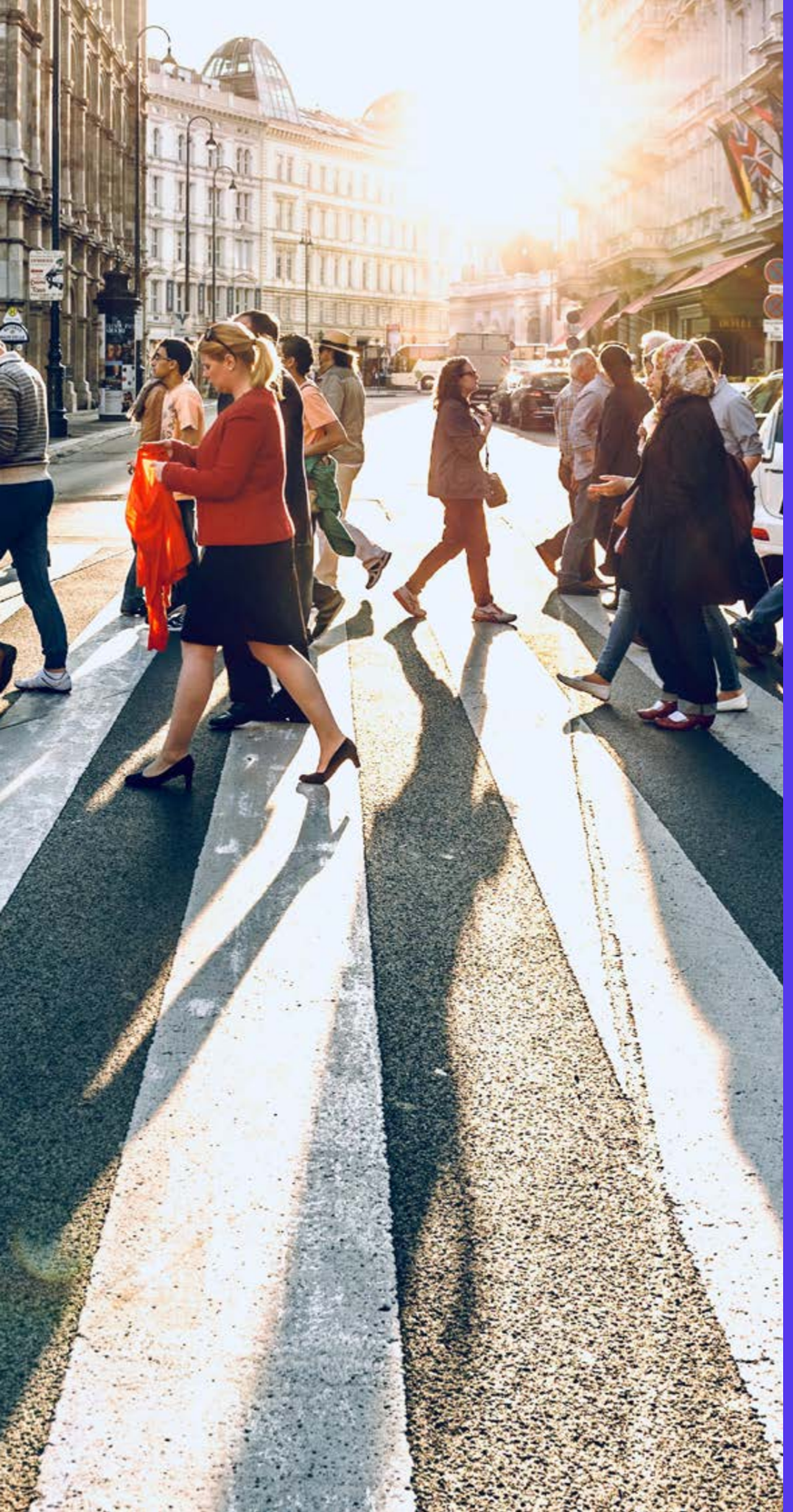

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