

Public M&A Report 02/2023

The German public takeover market in the first half of 2023

Editorial

Investors and lawmakers have been busy in the public takeover market ...

Dear reader

We are pleased to have the privilege of presenting to you the Noerr Public M&A Report Q2/2023 for the first half of 2023.

In line with more recent forecasts for the M&A market in general, our market report data indicate that there is cause for optimism regarding the public takeover market in Germany for the rest of the year. There were eleven BaFin-approved offers in the first six months of 2023 with a total offer value of around € 21.5 billion. Both the number and the total value of the transactions are slightly above the long-term average. However, the total offer value should not be regarded overly optimistically, as it is largely attributable to a single transaction, the delisting offer to the shareholders of Vantage Towers AG by Oak Holdings GmbH, a co-control part-

nership consisting of Vodafone GmbH and the financial investors Infrastructure Partners and KKR valued at around € 16.2 billion. This is further evidence that the main market impetus in the public takeover market continues to come from private equity companies. There were only two offers in each of the large-cap and small-cap segments during the reporting period. Thus, mid cap transactions proved to be the driver of the market in this time.

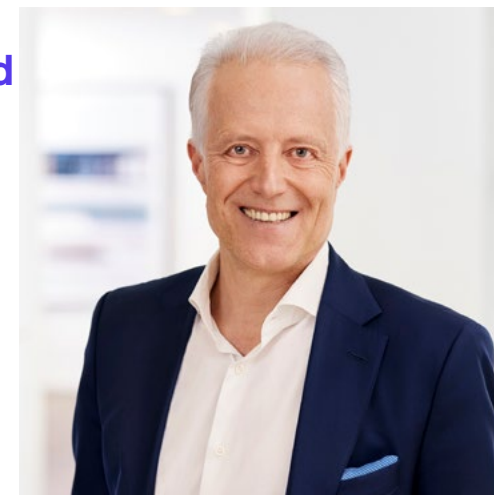
This issue of the Noerr Public M&A Report covers not only the market report on the first half of 2023 but also ongoing legislative activities in takeover law. As part of the planned German Future Financing Act (Zukunftsfinanzierungsgesetz), for which the German Federal Government approved the government draft on 16th August 2023, several provisions of the German Securities

Acquisition and Takeover Act are to be amended. Jörg-Peter Kraack analyzes these regulations in his focus article entitled "Takeover regulations in the government draft Future Financing Act".

The Noerr Public M&A Report 02/2023 is a product of the contributions of many colleagues at Noerr, to whom we are thankful. We would like to make special mention of Philipp Schmoll for the article on reasoned opinions and Juri Stremel for his editorial support.

We hope that you enjoy reading this report and that it will give you some insights into current public M&A market developments in Germany.

Volker Land



Stephan Schulz



Highlights

Offer number and value slightly above the long-term average

With eleven transactions and a total offer value (expressed in market capitalisation at the offer price – “MCO”) of around € 21.5 billion, both the number and the value of public offers in the first half of 2023 were slightly higher than the long-term average for the first half of a year (number of transactions: 10; transaction value: around € 15.7 billion). Compared to the same period last year, the offer value increased, but this is primarily attributable to one transaction, Oak Holdings GmbH’s € 16.2 billion delisting offer to the shareholders of Vantage Towers AG.

Mid-cap deals drive market development in terms of numbers

In terms of transaction numbers, the seven mid-cap transactions (valued at more than € 100 million and up to € 1,000 million MCO) are proving to be the drivers of market development in the first half of 2023. In the large-cap and small-cap segments, there were only two transactions each; compared to the long-term average (large-cap: 2.6; small-cap: 3.4), these are low numbers.

Significant decline in average premium

There was a significant period-on-period decrease (38.52 % to 16.11 %) in the average premium paid¹. This figure is below the long-term average of 25.63 %. For takeover bids, the average premium increased by 10.59 percentage points to 28.85% compared to the first half of 2022 (18.26 %).

Clustering of offers at the upper and lower ends of the premium spectrum

Premium amounts are found primarily at the upper and lower ends of the spectrum. While the three offers with the highest premiums averaged 43.60% and only one offer with a premium of 17.07% was roughly in line with the average value, the average premium of the seven remaining transactions was only 4.19%.

¹ 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 bidder’s announcement of the decision to launch the offer or acquisition of control.

In focus

Takeover regulations in the draft German Future Financing Act



Market overview

Number and value of offers

In the first half of 2023, all eleven public offers under the German Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz) reviewed by the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, "BaFin") were approved and published by the bidders. The offers were aimed at target companies with a total market capitalisation at the offer price ("MCO") of € 21,539 million. The eleven transactions consisted of five takeover offers, three mandatory offers (one of which was combined with a delisting offer) and three delisting offers.

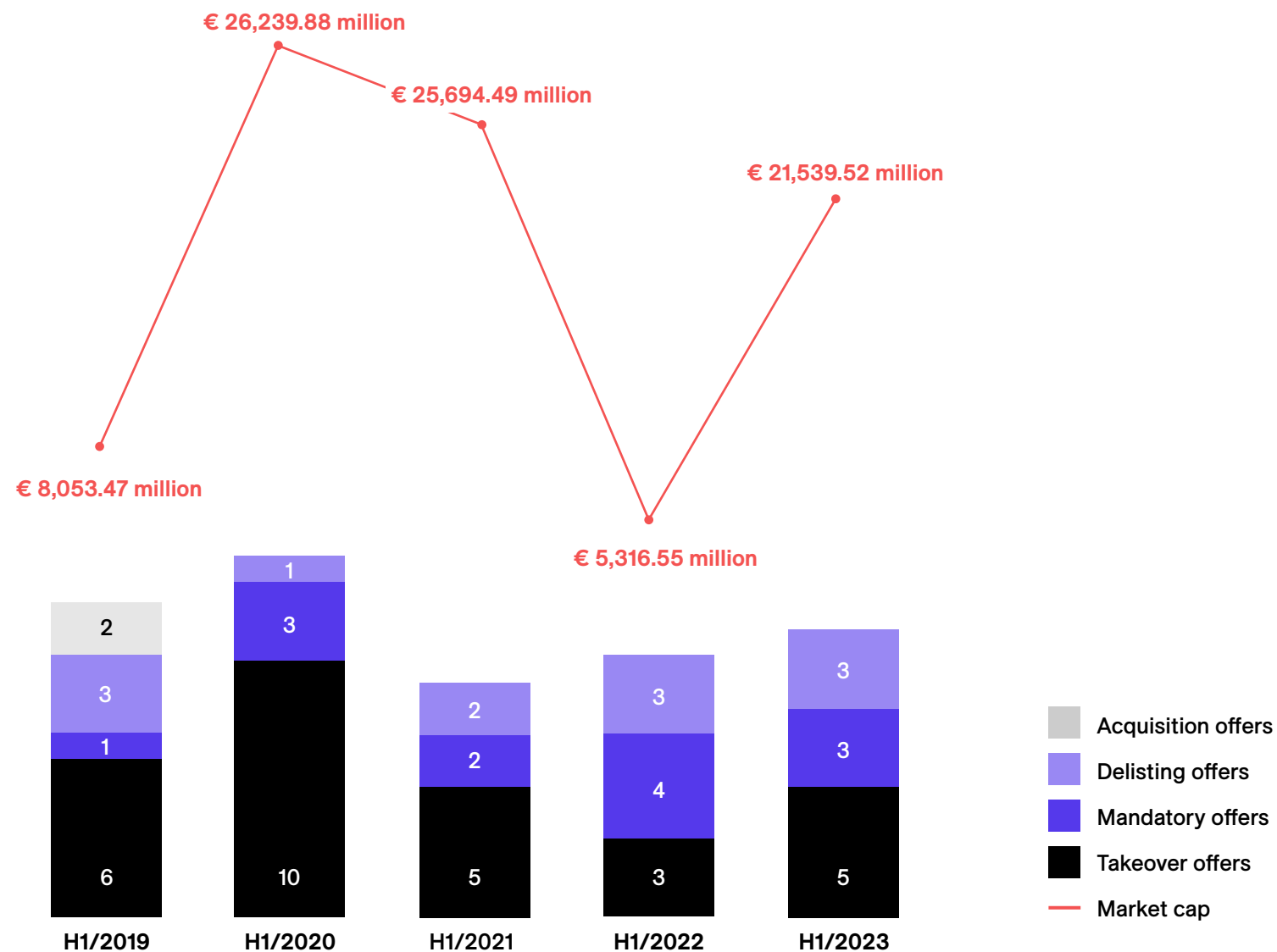


Fig. 1: Number, type and value of offers

Source: Noerr Research

This number of offers and total offer value brought the market for public takeovers in the first half of 2023 almost back to the level of the first half of 2021 (nine offers, total offer value € 25,694 million). This means that the situation has improved significantly from the weak period of last year (ten offers but a total offer value of only € 5,317 million). The number of transactions and the total offer value were also above the long-term average since the beginning of 2014 (ten transactions and a total offering value of €15,185 million).

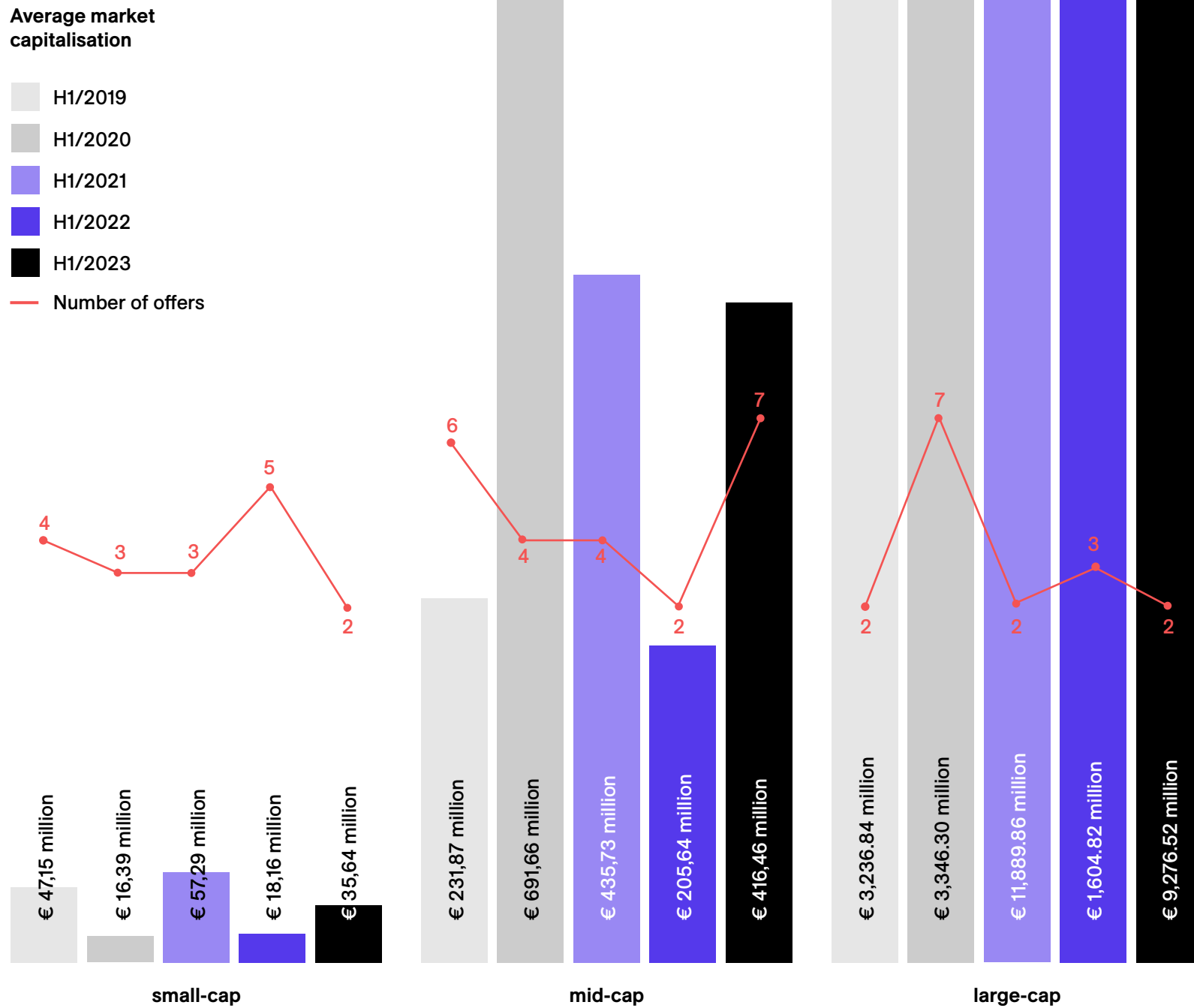
However, Oak Holdings GmbH's delisting and acquisition offer to the shareholders of Vantage Towers AG valued at € 16,180 million accounted for a considerable share of the total offer value. There was only one other transaction in the large-cap sector with a value of € 2,360 million (Silver Lake Group's takeover offer to the shareholders of Software Aktiengesellschaft). With seven transactions, the mid-cap segment saw the most activity on the public M&A market in the first half of the year.



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

Based on MCO, the transactions can be divided into three segments: small-cap (MCO of the target company < €100 million), mid-cap (MCO of the target company ≥ €100 million and < €1,000 million) and large-cap (MCO of the target company ≥ € 1,000 million).

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



Due to Oak Holding GmbH's delisting offer, the average offering value of the two transactions in the large-cap segment is almost at the same level as in the first half of 2021 (€9,272 million), which is also significantly higher than the annual average since 1st April 2014 (when we started collecting data), which is €5,692.761 million.

The number of transactions in the mid-cap segment has again increased significantly to seven offers with an average value of € 416.46 million. Thus, compared to only two transactions of this size in the first half of 2022, the first half of 2023 has returned to around the same level as the same period in 2021 (five offers in the mid-cap segment with an average offer value of € 441.35 million).

In the small-cap segment, there were only two transactions with a total offer value of € 35.64 million in the first half of the year. This figure is significantly below the long-term average of 3.4 small-cap transactions in the first half of a year.



Fig. 2: Development in the segments



Distribution of offer value and number of transactions

The two offers in the large-cap segment in the first half of the year accounted for 86.13 % of the total offer value in the public takeover market. This number of offers was slightly below the long-term average of 2.6 large-cap transactions in the first half of a year.

The highest offer value was the acquisition and delisting offer by Oak Holdings GmbH. With an MCO of € 16,185 million, it accounted for approximately 75 % of the total value of the market in the first half of the year.

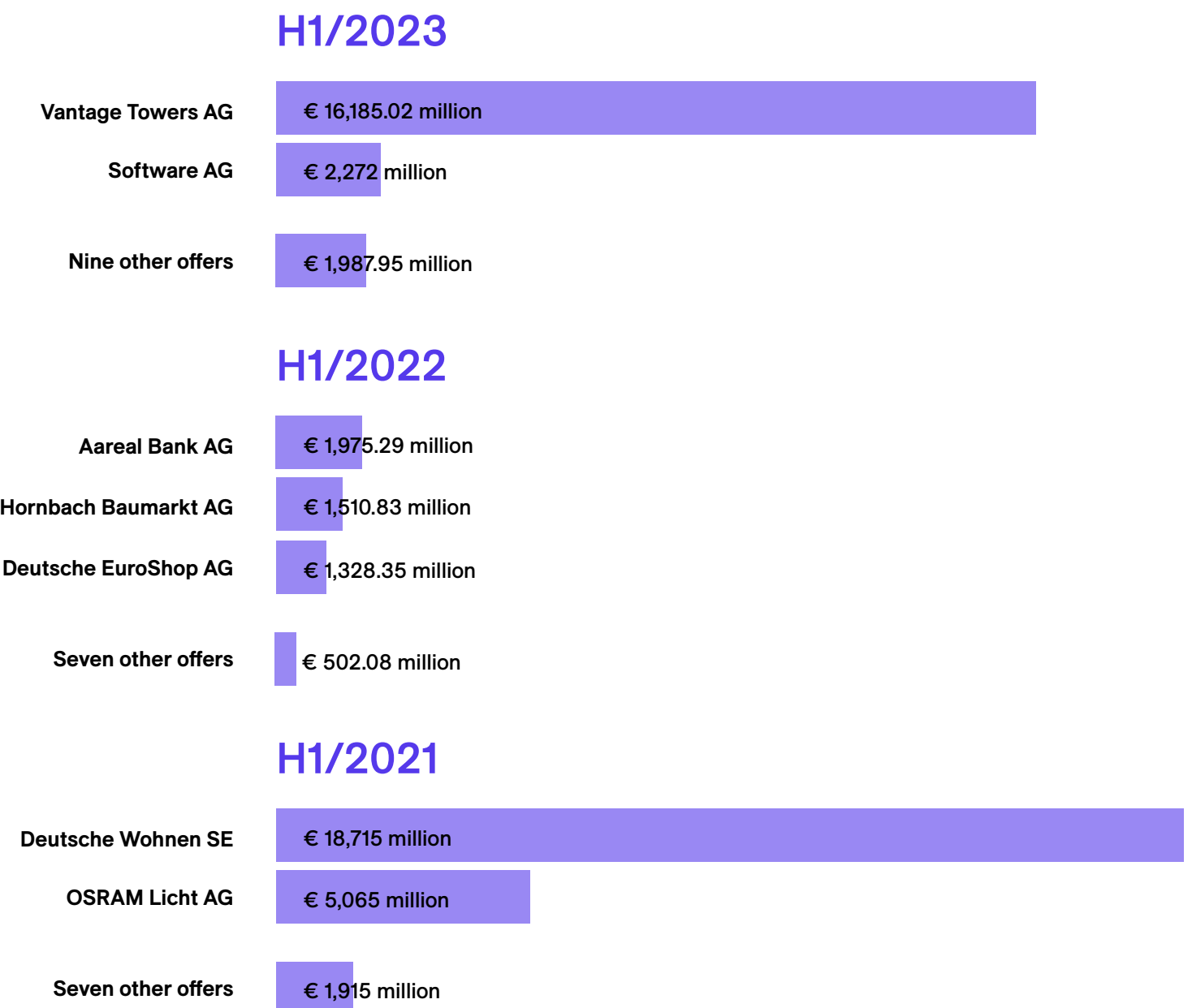


Fig. 3: Distribution of supply value and number of transactions

Source: Noerr Research

Premiums

The average premium on the volume-weighted average price of the shares 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 16.11% in the first half of 2023, significantly below both the figure for the same period last year (38.52%) and the long-term average since the beginning of 2014 (25.63%).



Silver Lake Group paid the highest premium (a 57.48% premium on the Three-Month VWAP) to Software Aktiengesellschaft’s shareholders as part of a takeover bid.

The following chart presents the premiums and premium averages as offered in transactions in the first half of 2023 broken

down into different amounts and compared to the premiums and averages offered in the first half of the years 2018 through 2022.

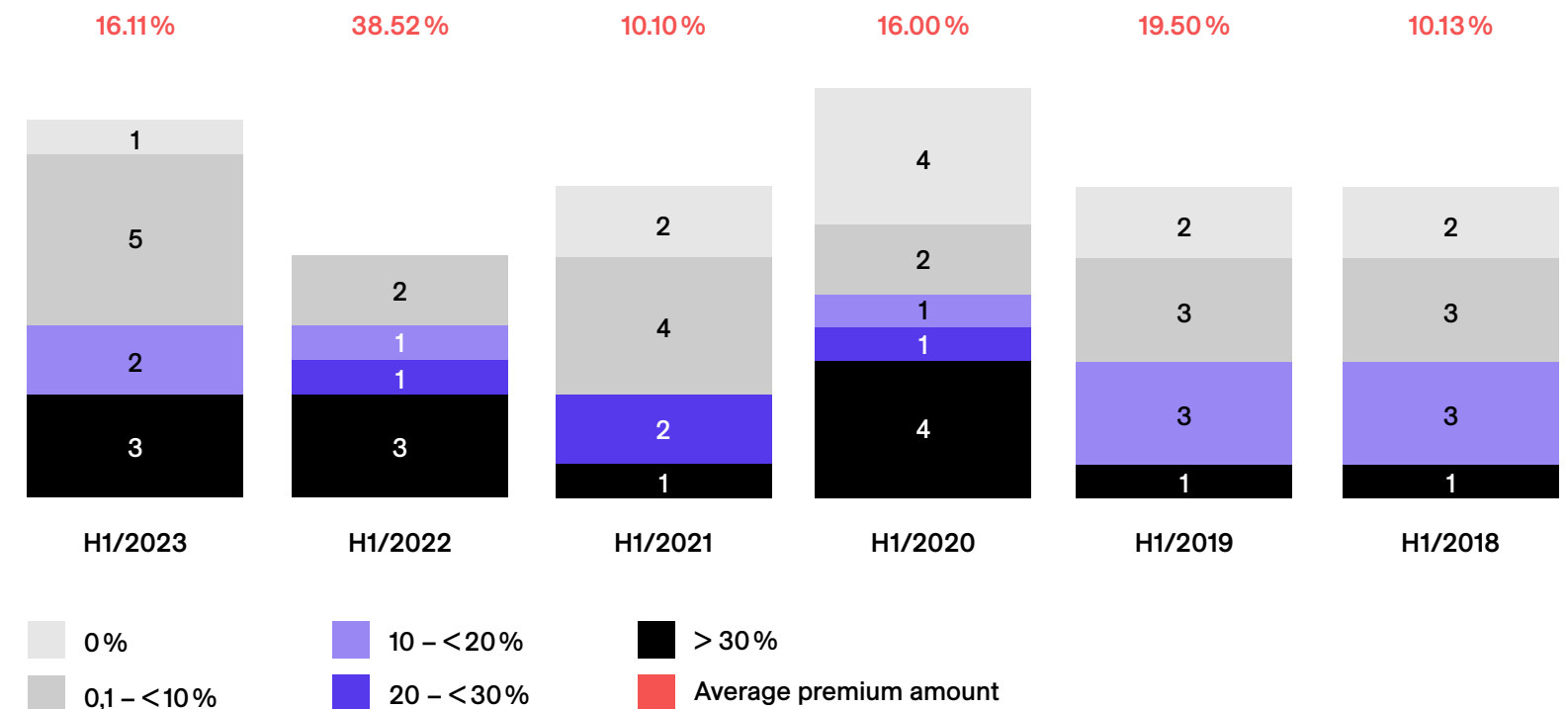


Fig. 4: Premium amount

Offer to Biofrontera AG shareholders in H1/2018 excluded due to unusually structured consideration.

Source: Noerr Research

The decrease in the average premium level in the first half of 2023 compared to the same period last year (38.52% to 16.11%) corresponds to just over 58%. However, the premiums paid by bidders in the first half of the year are still well above the level for the same period in 2021 (10.10%). The drop compared to last year is primarily due to the fact that the average value in the first half of

2022 was largely attributable to the high premium paid in the offer to the shareholders of Wild Bunch AG (127.11%). Only one premium-free offer was made in the first half of 2023. However, six offers had premiums of less than 10%. The average premium of these offers was 2.74%. The premiums in the five takeover bids averaged 28.85% in the first half of 2023, significantly higher than

in the first half of 2022 (18.26% in three takeover bids). Premiums paid in the context of voluntary takeover bids deserve separate consideration because bidders in such transactions are attempting to convince shareholders to voluntarily give them control of the target company and therefore normally propose attractive offer prices.

Reasoned statements

pursuant to section 27 WpÜG

In the first half of the year 2023, the corporate bodies of target companies published a total of eleven reasoned statements on the eleven public offers pursuant to section 27 of the Securities Acquisition and Takeover Act. These were all joint (and not separate) reasoned opinions by each target company’s management and supervisory boards.

Overall evaluation of the offer

The final assessments of the boards of the target companies on the eleven bids in the first half of 2023 were as shown in the following chart.

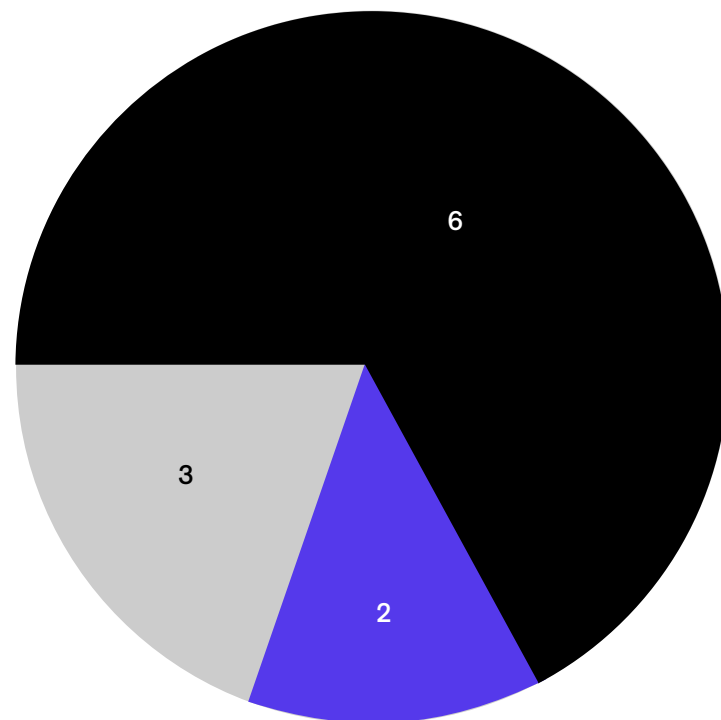
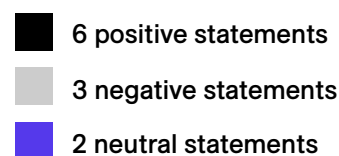


Fig. 5: Reasoned statements pursuant to section 27 WpÜG

Source: Noerr Research

In the joint reasoned opinion of the management and supervisory boards of GK Software SE on the voluntary public takeover offer by Fujitsu ND Solutions AG, the chairman of the management board published a special addendum in which he disclosed that he was abstaining from voting on the resolution regarding the joint reasoned opinion due to an irrevocable undertaking that he had entered into with the bidder. Nevertheless, he also stated that he shared the assessments and the recommendation for acceptance published in the joint reasoned opinion.

The primary justification for all negative opinions (e.g., the joint reasoned opinion of the general partner and supervisory board of exceet Group SCA (despite the Business Combination Agreement) as well as the joint reasoned opinions of the management and supervisory boards of Voltabox AG and Klöckner & Co. SE) was the inadequacy of the consideration offered. In particular, the consideration was said to fail to reflect the intrinsic/fundamental value of the share of the target company. The management and supervisory boards of Voltabox AG also criticised that the background of the mandatory offer of Triathlon Holding GmbH was unclear and did not conform to any strategic or economic considerations.

It was stated in the neutral reasoned opinion of the management and supervisory boards of MS Industrie AG that the consideration was appropriate and the intentions of the bidder positive. Nevertheless, due to the similar level of consideration and recent stock exchange prices of the share, the corporate bodies did not see themselves in a position to make a clear recommendation to accept the takeover and delisting offer. The neutral reasoned opinion of the administrative board and managing directors of SNP Schneider-Neureither & Partner SE was based on a different valuation of the consideration for short- or long-term investors and the fact that the administrative board and managing directors saw neither long-term burdens from integration measures nor synergy potential between the bidder and the target company.

Fairness opinions

To support six of the eleven reasoned opinions (around 55%), “fairness opinions” on the appropriateness of the consideration offered were obtained from external advisors. The management and supervisory boards of Klöckner & Co. SE and Software Aktiengesellschaft obtained more than one fairness opinion, with each board in both cases commissioning its own advisors. In both cases, the underlying takeover bids in these reasoned opinions were in or just below the large-cap segment. In addition, individual board members of the target companies were in league with the bidder in both cases.

Date of submission of the reasoned opinions

The reasoned opinions in the first half of 2023 were submitted on average 9.5 days after publication of the offer (first half of 2022: 10.2 days). In seven of the eleven reasoned opinions (approximately 73%), the corporate bodies of the target companies were aware that the bidder intended to 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 of the Securities Acquisition and Takeover Act (“section 10 announcement”). These reasoned opinions were published on average 9.8 days after publication of the offer document.

Overview

Takeover regulations in the government draft on the German Future Financing Act

On 16th August 2023, the German government has resolved on a government draft of a law on the financing of future-proof investments (Future Financing Act – Zukunftsförderungsgesetz).

The core objective of the Future Financing Act is to strengthen Germany's position as an internationally attractive capital market. Shares are to become a more attractive capital investment by adding incentives on the demand side and strengthening the supply side by increasing the number of listed companies. The intention is to make it easier to access to capital markets and raise equity capital, particularly for start-ups, high-growth companies and small- and medium-sized enterprises ("SMEs"), which are considered drivers of innovation.

For these purposes, electronic shares are to be introduced by amending the Act on Electronic Securities (Gesetz

über elektronische Wertpapiere), and stock exchange law is to undergo substantial simplifications for IPOs and in particular for SPACs.

However, the Future Financing Act also proposes amendments that have formal, procedural and substantive implications for public takeovers under the Securities Acquisition and Takeover Act. These proposed amendments in the government

draft, which have changed only in minor aspects compared to the ministerial draft dated 12th April 2023, are presented below with comments.

The takeover-related amendments of the Future Financing Act are expected to come into force at the beginning of 2024. Therefore, the time frame for further amendments in the course of the parliamentary process is fairly short.

The takeover regulations of the Future Financing Act at a glance:

- facilitating the offer procedure by removing the obligation to notify BaFin in advance of the bidder's decision to submit an offer,
- increasing transaction security and avoiding de facto shortening of deadlines by changing the deadline regime to "working days" (excluding Saturdays) instead of "business days",
- avoiding legal uncertainty as to whether the deemed approval will occur if BaFin announces a prohibition of the offer via a formal, automatic extension of the deadline,
- facilitating the administrative procedure under takeover law via digitalisation: mandatory use of BaFin's reporting and publication platform for applications and notifications makes signing and document logistics obsolete.
- Numerous unanswered questions remain regarding the treatment under takeover law of the re-admitted multiple-voting shares.

BaFin no longer to be given prior notification of the offer

The takeover procedure will immediately be relieved of the burden of a superfluous formality. In the future, bidders will no longer have to notify BaFin in advance of their decision to submit an offer before publishing it. Section 10(2), no. 3 of the Securities Acquisition and Takeover Act is to be repealed.

Although bidders have been leaving this notification to service providers anyway, the abolition is to be welcomed without reservation, as this notification has no relevance from a supervisory point of view for monitoring compliance with the requirements of the bidding procedure.

In contrast, the requirement to provide stock exchanges with prior notification remains unaffected. In addition, bidders must continue to notify BaFin (and the stock exchanges) of the decision to make a takeover bid immediately after its publication.

Changeover of the calculation of cut-off periods to "working days" – no de facto shortening of deadlines

The Future Financing Act provides for a further procedural simplification for calculating takeover deadlines. This will be changed and based on the newly introduced term "working days".

It is general knowledge that significant cut-off periods under takeover law are currently measured in terms of "business days". By referring to section 3(2) of the German Federal Leave Act (Bundesurlaubsgesetz), BaFin also includes Saturdays as "business days" since the term is not defined by law in the Securities Acquisition and Takeover Act. This has led to practical problems and de facto shortened deadlines in the formalised takeover procedure.

Due to this practice, the general ten-day period for BaFin to review the offer pursuant to section 14(2), first sentence of the Securities Acquisition and Takeover Act may in fact be shortened because BaFin, as an authority, does not work on the Saturdays in the period. This is advantageous for the bidder, but possibly challenging for BaFin.

Similarly, the period during which bidders can amend their offers pursuant to section 21(1) of the Securities

Acquisition and Takeover Act may effectively be shortened. Up to now, an amendment has been possible up to one business day prior to the expiry of the (original) acceptance period. This has sometimes led to problems for bidders. Depending on the acceptance rate, bidders generally only wish to amend their offer shortly before the deadline expires (e.g. by increasing the consideration or reducing the minimum acceptance threshold), but would have to ensure timely publication even on a Saturday. It is therefore not uncommon for bidders to publish their offers on the previous Friday as a precautionary measure.

Comparable uncertainty existed, if less relevant in practice, if bidders made their offers subject to the condition of an approving resolution of their shareholders' meetings, which had to be procured without undue delay pursuant to section 25 of the Securities Acquisition and Takeover Act, but no later than the fifth business day prior to the expiry of the acceptance period. Counting Saturdays shifted the beginning of this period, which is to be calculated backwards, further forward. It is to be welcomed that the Future Financing Act aims to remedy this problem. The term "working days" is to

apply uniformly to deadline calculations and is to replace the term "business days" in the future. Pursuant to the legal definition in section 2(9) of the draft Securities Acquisition and Takeover Act, "working days" are calendar days with the exception of Saturdays, Sundays and public holidays. This should eliminate the abovementioned problems in transaction planning with regard to Saturdays. However, the government draft still fails to clarify the question, which has already been as controversial as it is relevant in practice, of whether "public holidays" should consist of only national holidays. A restriction to national holidays would be appropriate and should be clarified.

Changing the time limit regime to working days also leads to a modification of the notification period for mandatory offers. Accordingly, it will continue to be mandatory to publish an announcement of acquisition of control pursuant to section 35(1), first sentence of the government draft Securities Acquisition and Takeover Act "without undue delay", but at the latest within seven working days and no longer seven calendar days.

Avoidance of the deemed approval in the case of bid prohibitions

A change in the time limit for BaFin's prohibitions of offers is intended to increase procedural legal certainty. An offer is deemed to be permitted by BaFin if the authority has not issued a prohibition during the review period of ten business days (in the future: working days). If BaFin comes to the conclusion towards the end of this period that the offer is to be prohibited pursuant to section 15 of the Securities Acquisition and Takeover Act, it is possible that the prohibition order will not take effect until the end of the ten-day examination period, as it is in any case not yet deemed to have been announced or served, and the offer is then deemed to be permitted by virtue of statutory regulation.

Section 14(2a) third sentence of the government draft Securities Acquisition and Takeover Act now provides for an automatic extension of the ten-day period by further five working days after BaFin has made the prohibition available electronically pursuant to section 4f or 4g of the Financial Services Supervision Act (Finanzdienstleistungsaufsichtsgesetz) for retrieval via its reporting and publication system "RPS", publicly announced it or submitted to be sent by mail.

Digitalisation of the administrative procedure under takeover law

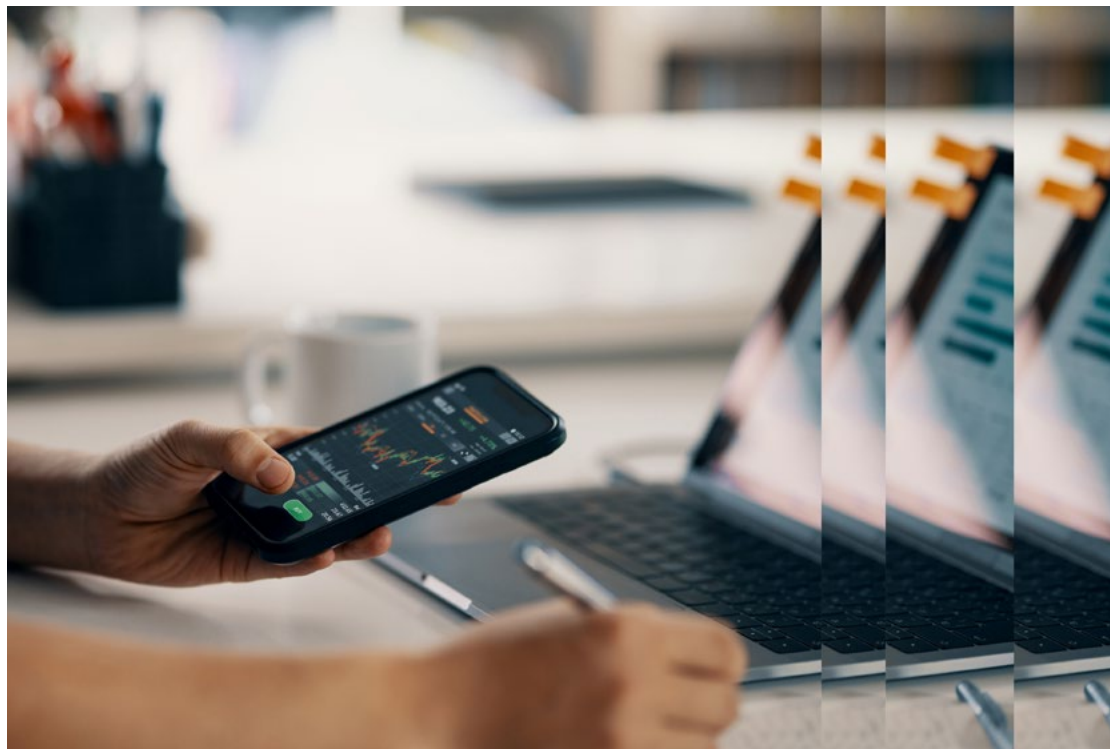
The most welcome core issue addressed by the Future Financing Act is digitalising the administrative procedure under takeover law. To this end, the amended section 45 of the government draft Securities Acquisition and Takeover Act stipulates that applications as well as legally required notifications, declarations, information or transmissions will have to be submitted to BaFin exclusively electronically via BaFin's reporting and publication system.

The exclusivity of this rule is to be emphasised and welcomed. Signed original documents will no longer be required. This means that bidders and the target company no longer have to deal with the cumbersome logistics of signatures and physical documents that have to be sent to BaFin. It certainly raises a smile to read in the explanatory memorandum of the government draft that prior registration on the RPS is a "reasonable" expectation to be placed on

bidders, especially in comparison to sending documents by mail or buying a fax machine to send them.

The digitalisation project will have a fundamental impact on the takeover procedure. In particular, offer

documents will no longer have to be signed in writing; after publication, they will have to be transmitted to BaFin via the RPS together with the notification thereof. The same will apply to the reasoned opinion of the target company's corporate bodies.



In practice, this will mean that bidders and advisors must register on the RPS in good time and ensure that BaFin activates their RPS account before a takeover procedure officially begins. This is because the "section 10 notification" – as the first formal transaction notification – will have to be sent to BaFin via the RPS immediately after its publication. Even though the RPS is supposed to be activated within one working day, it will be advisable to initiate the registration process a few days in advance.

Finally, BaFin's investigative powers are also being adapted to the digital age. According to section 40(1), second sentence of the government draft Securities Acquisition and Takeover Act, BaFin's authority to issue orders regarding requests for information and submission is to extend not only to the "whether" and "what", but also to the "how", i.e., a form to be determined by BaFin, such as requests for information on securities transactions in a machine-analysable electronic format.

Readmitting multiple-voting shares – unclear effects on public takeovers

- In addition to formal changes in takeover law, the Future Financing Act proposes readmitting multiple-voting shares. These are primarily intended to alleviate the concerns of shareholders of start-ups and SMEs about the loss of influence and control over the strategic direction of the company that might be associated with financing from the regulated capital market.
- Readmitting multiple-voting shares represents a paradigm shift. They were abolished in 1998 and the "one share/one vote" principle was strictly implemented in order to strengthen the market for corporate control. This is because multiple voting rights have a prohibitive effect on public takeovers due to their function of securing influence. The legislator is now showing preference to this function of securing influence and breaking away from the previous rationale governing legal policy.
- However, the government draft does not contain a consistent regulation of the effects of multiple voting rights in takeover law and on the disclosure obligations of major shareholders, giving rise to fundamental systematic questions. How is the acquisition of control to be determined in the case of multiple voting rights, especially since, according to the concept of the government draft, they are to expire upon "transfer" of the shares listed in the regular market or the open market? How are attribution and circumvention issues to be dealt with here? Is it appropriate to require concerned shareholders to apply for a discretionary exemption by BaFin from a mandatory bid in cases of passive acquisition of control, which occur when the multiple voting rights expire? How can minimum acceptance thresholds be handled in a legally watertight manner?

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