Noerr Public M&A Report 01/2022

The German market for public takeovers in 2021

by Volker Land and Stephan Schulz, Hamburg

Editorial

In this 01/2022 edition of the Noerr Public M&A Report we are looking back on a record year for public takeovers in Germany. 2021 saw as much as 33 bids with a total transaction volume of EUR 84.1 billion, numbers that considerably exceed the previous peaks of 28 transactions in 2019 and EUR 58.6 billion in market volume in 2017. The term "record" applies even if we take into account the fact that Vonovia SE presented the shareholders of Deutsche Wohnen SE with not just one, but two very high-volume takeover offers (both of which had the same economic objective).

The year 2021 witnessed not only a high level of activity in the German market for public takeovers, but very interesting transactions as well. Apart from the aforementioned highlight of the two Vonovia SE bids, there was the bidding contest for Munich based zooplus AG, with a total of three offers delivered by two different bidders.

Both the first offer by Vonovia SE to the shareholders to Deutsche Wohnen SE and the offer by Zorro Bidco S.à r.l. to the shareholders of zooplus AG failed to reach the minimum acceptance threshold set by the bidders, and were thus unsuccessful. It was our general impression that the failure of takeover offers caused by their failure to reach the minimum acceptance threshold has been on the increase lately. This has prompted our colleague *Juri Stremel* to contribute an article (starting on page 10), in which he pursues the question if there is empiric evidence for our aforementioned observation, and if so, which kind of takeover offers are affected and why.

Our colleague *Jens Michael Göb* has dedicated himself (starting on page 13) to "*Contractual reporting obligations in cross-border corporate groups*", a topic which is quite complex from a legal and highly relevant from a practical point of view. His contribution revolves around the question if and to what extent it is possible to establish in contractual form binding obligations of the target company to provide the parent company with information in case the statutory rights of the bidder are not sufficient for the purposes of group integration.

Our colleague *Philip M. Schmoll* has contributed the section about the reasoned statements pursuant to section 27 WpÜG published in the period this report investigates (starting on page 8).

We would like to thank the contributing authors and all other colleagues at Noerr who helped in creating and designing the Noerr Public M&A Report 01/2022. We hope we were able to present you, dear Reader, with an insightful reading experience, affording you with exciting glimpses into the goings-on in the German market for public takeovers as well as valuable background information.

Volker Land
Partner Corporate/Capital Markets

volker.land@noerr.com
T +49 40 300397 102

Stephan Schulz
Partner Corporate/Capital Markets

stephan.schulz@noerr.com
T +49 40 300397 108

Highlights

- The year 2021, with its 33 transactions and a market volume of EUR 84.1 billion, was a historic year for the German public takeover market, eclipsing not only the 23 transactions and the total volume of EUR 36.0 billion of 2020, but also the previous records of 28 transactions in 2019 and EUR 58.6 billion market volume in 2017.
- The delisting trend we saw in 2020 continued at full steam in 2021. Almost half of all offers had the sole or at least the added purpose of removing the target company from the stock exchange.
- In the large-cap segment, the number of offers rose slightly, while the average offer volume surged. The mid-cap segment saw a threefold increase in offers, while the average offer volume of the segment was lower than in 2020. In the small-cap segment, a lower number of offers contrasted with a marked increase in the average offer volume.
- Average premium volume further deteriorated to 13.01% in 2021.
- In focus: Takeover offers with minimum acceptance levels
- The current legal issue: Agreements on reporting obligations under the law of obligations in cross-border groups of shares

Market Overview

Number and volume of offers

In 2021, the German Federal Financial Supervisory Authority (Bundesanstalt für *Finanzdienstleistungsaufsicht* – „**BaFin**“) approved 33 public offers in accordance with the German Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz – „**WpÜG**“). The targeted companies comprised an aggregate market capitalisation at offer price („**MCO**“) of EUR 84.1 billion. 19 of these offers were takeover offers (of which three were combined with a delisting offer), 10 were pure delisting offers, three were obligatory offers (of which two were combined with a delisting offer) and one was an acquisition offer. One further offer was prohibited by BaFin as the shares offered for exchange were illiquid.

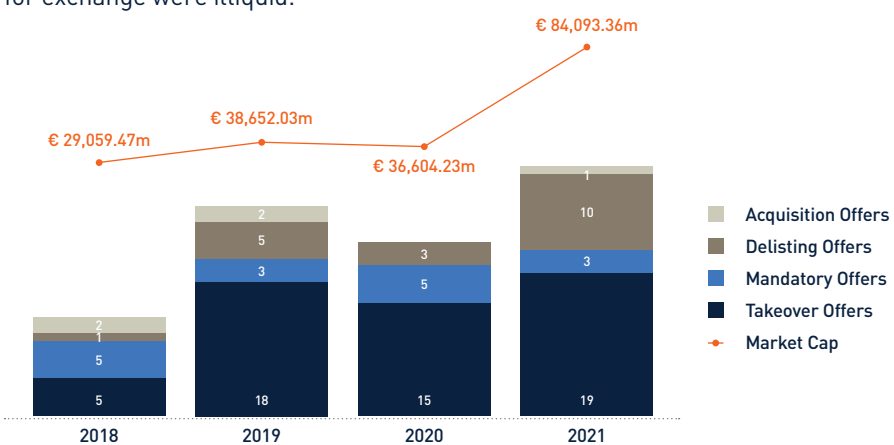


Abb. 1: Type, number, and volume of offerings
Quelle: Noerr Research

The number of transactions rose from 23 offers approved and published in 2020 to 33 in 2021, an increase of 43.5%, while at the same time, the aggregate offer volume (in terms of MCO) soared from EUR 36.0 billon to EUR 84.1 billion, an increase of as much as 133.6%. The total volume of all 2021 offers also exceeded all previous annual volumes measured since 2014, outshining even the prior record from 2017 (EUR 58.6 billion). This surge is partly owed to the two takeover offers by Vonovia SE to the shareholders of Deutsche Wohnen SE, with MCOs of EUR 18.7 billion and EUR 19.1 billion respectively, the first of which failed because the predetermined minimum acceptance threshold could not be met. However, the total offer volume of the year 2021 of EUR 65.4 billion was significantly higher than that of the year 2017 even when disregarding Vonovia's unsuccessful first bid.

It is also striking that, in contrast to previous years, the total number of offers approved and published in 2021 contained a significantly higher percentage of offers that had the sole or added purpose of delisting the target company from the stock exchange. There were 15 offers of this kind (45.5% of the total number of offers), 10 of which were pure delisting offers (30.3% of the total number of offers). In the years reviewed since 2014, this percentage had never before exceeded 20%, but only reached a maximum of 17.9% in 2019 (when all delisting offers had been pure delisting offers). Clearly, the 2020 trend of targeting companies with a public offer in order to then delist them from the stock exchange was not only unbroken but even accelerated in 2021.

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

The market can be subdivided into three segments according to the target company's MCO: small-cap (MCO of less than EUR 100 million), mid-cap (MCO equal to or greater than EUR 100 million, but less than EUR 1 billion), and large-cap (MCO equal to or greater than EUR 1 billion).

The following chart shows the development in 2021 of the average MCO of all target companies divided by segment:

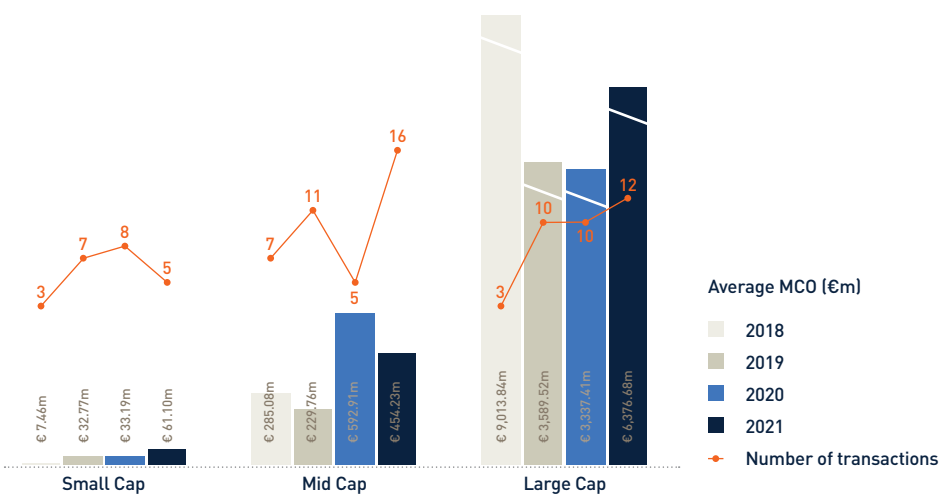


Abb. 2: Segment Development
Quelle: Noerr Research

In the large-cap segment, the average offer volume rose by 94.6% from EUR 3,337.4 million in 2020 to EUR 6,376.7 million in 2021. Unlike the years 2019 and 2020, 2021 saw two offers with an MCO of several billion euros: the two offers by Vonovia SE to the shareholders of Deutsche Wohnen SE (EUR 18.7 billion and EUR 19.1 billion respectively). Even if these two offers are not taken into account, the average 2021 volume still amounts to EUR 3,873.4 million, representing a substantial increase of 16% compared to 2020.

Twelve public offers fell into the large-cap category in 2021. Although this number represents an increase compared to the ten transactions of 2020, the large-cap segment stayed behind the mid-cap segment, losing its status as the strongest segment in terms of transaction numbers.

The mid-cap segment registered a considerable increase from five transactions in 2020 to 16 transactions in 2021. While the number of transactions more than tripled, average offer volume dropped from EUR 592.9 million in 2020 to EUR 454.2 million. This volume, however, still significantly exceeds those of 2019 (EUR 229.8 million) and 2018 (EUR 285.1 million).

The number of transactions in the small-cap segment was lower than in 2020 (eight) and 2019 (seven), but higher than in 2018 (three), while the segment's 2021 average offer volume of EUR 61.1 million clearly exceeded its 2020 counterpart of EUR 33.2 million.

Distribution of offer volume vs. number of transactions

The 12 offers in the large-cap segment accounted for EUR 76.5 billion offer volume, representing 91% of the total 2021 offer volume of EUR 84.1 billion. This ratio is similar to that of previous years. What stood out were the two bids by Vonovia SE to the shareholders of Deutsche Wohnen SE, worth EUR 18.7 million and EUR 19.1 million respectively.

In contrast to the previous year, in which such large transactions did not occur, these two mega bids represented a large chunk of the total offer volume of 2021. But even without these two extraordinary offers, the total offer volume of the large-cap segment increased substantially from EUR 32.8 billion in 2020 to EUR 38.7 billion in 2021.

The following chart shows the share of large-cap transactions in the total annual offer volume (expressed as MCO) of the years 2020 and 2021):

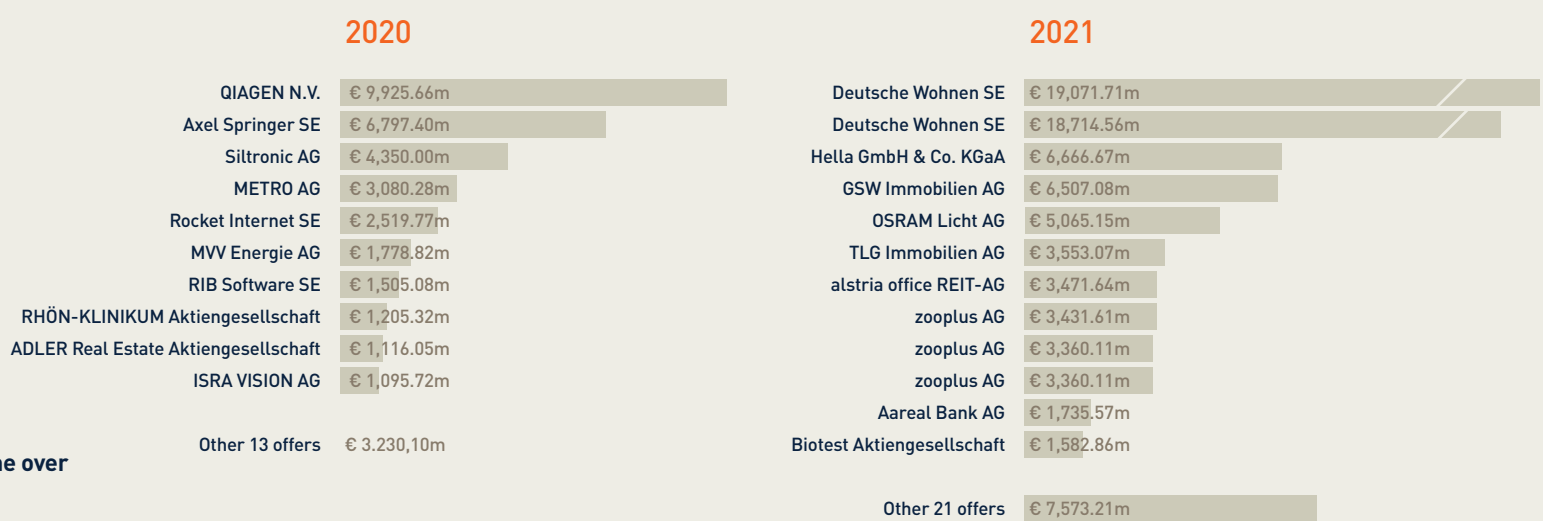


Figure 3: Distribution of offer volume over number of transactions
Quelle: Noerr Research

Premium

In 2021, bidders paid an average premium of 13.01% on the volume-weighted average price of the target company's shares measured in the three-month period preceding the announcement of the bid ("**3-month VWAP**"). The highest premium of 79.73% on the 3-month VWAP was received by the shareholders of zooplus AG in connection with the takeover offer by Zorro Bidco S.à r.l., a vehicle controlled by several funds under the guidance of private equity investor Hellman & Friedman. The high premium was du to the existence of a competing offer by Pet Bidco GmbH, behind which in turn was private equity company EQT.

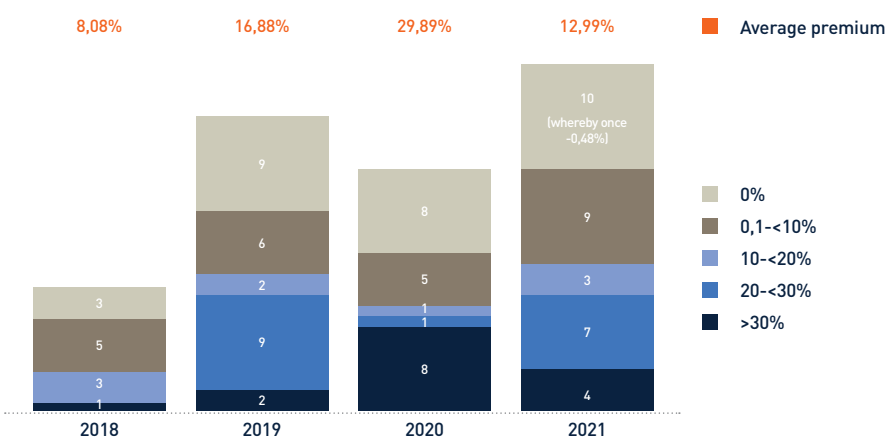


Abb. 4: Premiums offered
Quelle: Noerr Research

The following chart illustrates the premiums offered in 2021, divided into different categories, together with each category's average premium. It then contrasts these premiums with the premiums and averages of previous years:

In ten cases, the shareholders did not receive any premium. The consideration offered in the context of the voluntary purchase offer by Pierer Industrie AG to the shareholders of Leonie AG even included a discount 0.48% on the 3-month VWAP, which was possible, because the minimum price rules of sections 3 et seq of the offer ordinance of the German Securities and Takeover Act do not apply to simple purchase offers.

In 2021, four offers fell into the highest premium category of more than 30%, compared to eight in 2020 and two in 2019. Regarding the total number of offers with a premium of more than 20%, however, the number of offers increased from nine in 2020 to eleven in 2021, thus returning to the level of 2019. Overall average premium once again decreased in comparison to the previous years (2020: 29,89%; 2019: 16,88%).

Compared to the first half of 2021, average premium rose from 10.10% to 14.10%. The increase was mainly due to the high premium of 79.73% offered in the context of the bid by Zorro Bidco S.à r.l to the shareholders of zooplus AG in the second half of 2021. Not taking into account this outlier offer, the average premium in HY2 2021 would have been 11.24%, an increase not nearly as pronounced.

The average premium for the 19 takeover offers of 2021 amounted to 19.42%, 4.57 percentage points (or 19.05%) lower than the average premium of the 15 takeover offers of the year 2020 (23.99%). A separate analysis of the average premium for this kind of offer makes sense, as bidders will use this kind of transaction to gain control over the target.

Reasoned statements pursuant to section 27 WpÜG

By attorney Philip M. Schmoll, Noerr Partnerschaftsgesellschaft mbB, Frankfurt/M.

Overall assessment of the offers

In 2021, the corporate bodies of target companies published a total of 34 reasoned statements on the 33 transactions of the year 2021 pursuant to section 27 WpÜG, 32 of which were joint statements by the management board and the supervisory board. In the case of the voluntary public takeover offer by ABBA BidCo AG, the management board and the supervisory board of AKASOL AG each published its own reasoned statement (see Noerr Public M&A Report 02/2021). Therefore, the number of reasoned opinions exceeds the number of transactions.

The following chart summarises the final assessments of 33 offers in 2021 by the by target companies' corporate bodies.

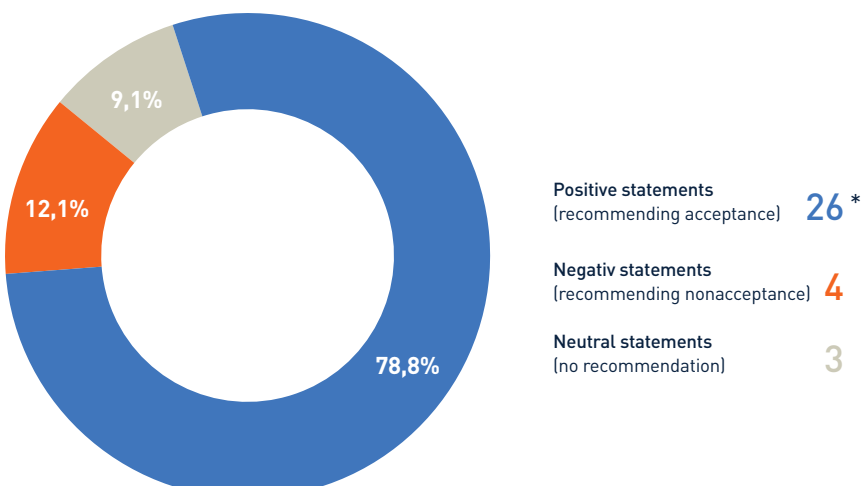


Abb. 5: Statements (number, percentage)
Quelle: Noerr Research

* Both the statement of the Management Board and the statement of the Supervisory Board of AKASOL AG were positive. They are counted as one positive statement in this presentation.

Fairness Opinions

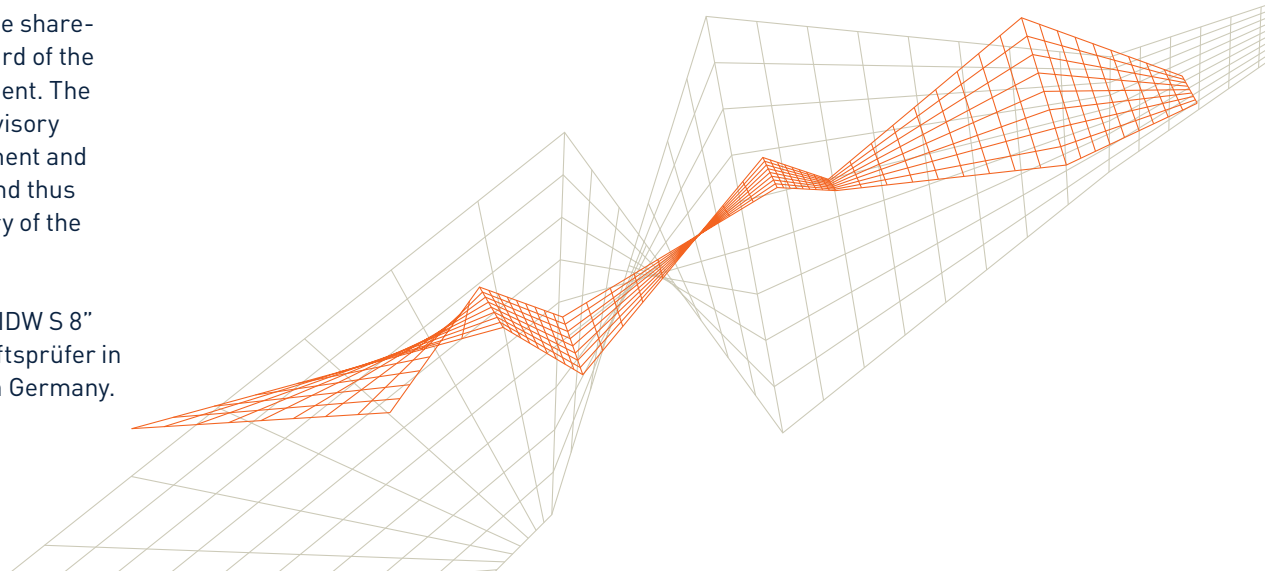
22 of the 34 reasoned statements (approx. 64.7%) were supported by fairness opinions regarding the adequacy of the consideration offered obtained from external advisors. In seven cases (approx. 20.6%), the corporate bodies of the target companies obtained more than one fairness opinion (target companies: Tele Columbus AG; AKA-SOL AG; Deutsche Wohnen SE regarding the two takeover offers by Vonovia SE; HELLA GmbH & Co. KGaA; ADVA Optical Networking SE; Aareal Bank AG). While ADVA Optical Networking SE commissioned two joint fairness opinions for management and supervisory board together, all other target companies obtained separate fairness opinions for their management board on the one hand and for their supervisory board on the other hand.

Only in the context of the two voluntary takeover bids by Vonovia SE to the shareholders of Deutsche Wohnen SE did management board and supervisory board of the target company obtain more than two fairness opinions per reasoned statement. The management board of Deutsche Wohnen SE commissioned three, the supervisory board two fairness opinions for each of the two joint statements by management and supervisory board, i.e. five fairness opinions for each reasoned statement, and thus a total of ten fairness opinions for one deal, setting a new record in the history of the German WpÜG.

Merely four of the total of 34 fairness opinions obtained adhered to the "IDW S 8" standard of the Institute of Public Auditors in Germany (Institut der Wirtschaftsprüfer in Deutschland e.V.; „IDW"), a standard that is binding for auditing companies in Germany. The remaining 30 fairness opinions were prepared by investment banks or other consultancy firms.

The timing of the reasoned statements

The reasoned statements of the year 2021 were issued on average 9.3 days after the publication of the offer document, which was somewhat later than in 2020 (8.9 days). In 28 of the 34 cases (82.4%), the corporate bodies of the target companies were aware of the intention of the bidder to make a public offer, because the target had entered into a transaction agreement with the bidder or received from the bidder a binding instruction under a domination agreement. These 28 reasoned statements were published on average 9.1 days after the publication of the offer document and thus significantly later than in 2020, when the average delay had been 7.5 days.



In focus: Takeover offers with minimum acceptance thresholds

by Juri Stremel, Noerr Partnerschaftsgesellschaft mbB, Hamburg

In order to ensure that a takeover offer will only have to be settled if it results in the bidder acquiring control over the target company, such offers may be subject to a minimum acceptance threshold as a closing condition. In recent years, there has been an increasing number of reports of takeover offers that have failed or were in risk of failing because the minimum acceptance threshold was not reached. Against this background, we analysed all 90 public takeover offers approved and published by BaFin during the years from 2016 to 2021 with regard to whether the recently perceived increased risk of failure for takeover offers with minimum acceptance thresholds can also be empirically substantiated and which type of takeover offers are affected by this risk.

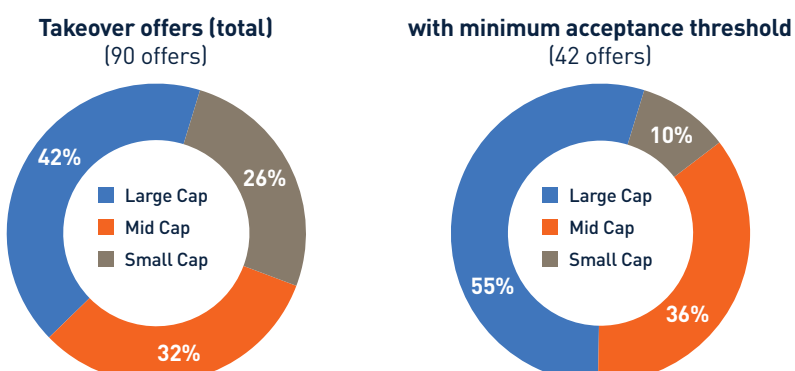


Abb. 6: Distribution of takeover offers with a minimum acceptance threshold
Quelle: Noerr Research

42 of the 90 takeover offers in the years from 2016 to 2021 (46.7%) provided for minimum acceptance thresholds. 23 of them were attributable to the large-cap segment (54.8%), 15 to the mid-cap segment (35.7%) and only four to the small-cap segment (9.5%). As the respective shares of these three segments in all takeover offers in the period under investigation amounted to 42.2% (large-cap), 32.2% (mid-cap) and 25.6% (small-cap), it was found that minimum acceptance thresholds were used relatively more often in the large-cap and mid-cap segments than in the small-cap segment.

Twelve of the 42 takeover offers with a minimum acceptance threshold (28.6%) failed due to not reaching the threshold. As much as ten of these failed transactions belonged to the large-cap segment (corresponds to 83.3% of all failed transactions), so that ultimately 43.5% of all 23 large-cap takeover offers with minimum acceptance thresholds failed in the investigation period. The remaining two failed takeover offers concerned mid-cap transactions, resulting in a significantly lower failure rate of only 13,3% of the transactions for this segment. Statistically, large-cap transactions fail more often at the minimum acceptance threshold than other public M&A transactions.

The minimum acceptance thresholds ranged from 18.5% to 90% in the period under investigation. A clear majority of the offers (36 offers or 85.7%) set the threshold at 50% or higher. 21 takeover offers had a threshold of more than 51%. This implies that half of the takeover offers (representing 50%) in the period under investigation did not only have the objective of obtaining control over the target company. Rather, the intention was apparently also to fundamentally restructure the target companies (e.g. to conclude a domination and/or profit transfer agreement or a squeeze-out), which requires the approval of a qualified majority of the shareholders at the general meeting of the target company.

When analysing the amounts of the minimum acceptance thresholds of the takeover offers that failed during the period from 2016 to 2021, it also became apparent that for nine of the twelve failed transactions (seven large-cap and two mid-cap transactions), the threshold had been 67.5% or higher. Consequently, most of the transactions that failed in the period under investigation seem to have been aimed not only at obtaining control over the target company but also at fundamentally restructuring it.

Level of the minimum acceptance threshold amounts
(42 offers)

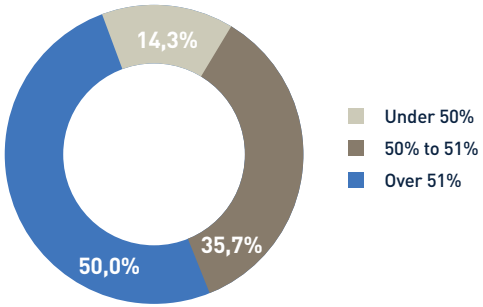


Abb. 7: Distribution of minimum acceptance threshold amounts
Quelle: Noerr Research

Reasons for (imminent) failure to reach the minimum acceptance threshold

Of 42 takeover bids that provided for a minimum acceptance threshold, the minimum acceptance threshold was missed in 23 takeover bids or the bid was amended due to a threatened miss. With regard to these offers, we have tried to determine the reasons leading to this (imminent) failure. In doing so, we relied on the media coverage of takeover bids that regularity accompanies these transactions. For 16 of the 23 takeover offers in question (14 of which were large-cap and two of which mid-cap offers), the reporting went into more detail on the reasons for the failure or the amendment of the offer. Sometimes several reasons are given for a transaction.

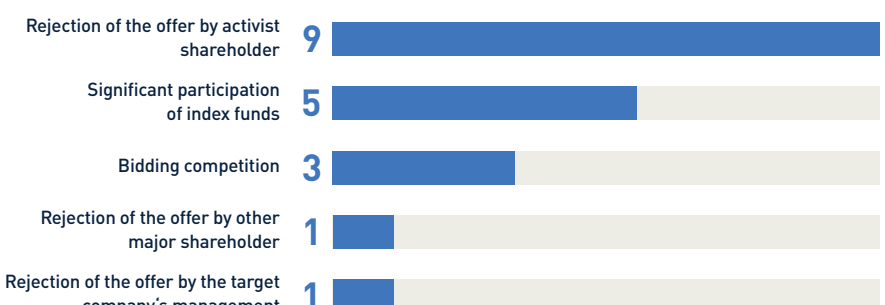


Abb. 8: Reasons for (impending) failure to meet the minimum acceptance threshold
Quelle: Noerr Research; Multiple answers possible.

Our analysis of these media reports showed that for nine of the 16 takeover offers (56.3%) for which the media had provided more detailed coverage, the (imminent) failure was attributed to activist shareholders of the target company having publicly rejected the respective offers in advance (have played a role statt was attributed, also the participation of index funds in the target company was made responsible for the offers' failure). In five cases (31.3%), the (imminent) failure was associated with the participation of index funds in the target company (three of which were the aforementioned cases, in which the negative stance of the participating activist shareholders was made responsible for the respective transaction's failure). A significant participation of index funds can be a major hurdle for reaching the minimum acceptance threshold because such funds are often structured in a way that they may only tender their shares in context of a takeover offer if the offer's success is already certain. In three cases (18.8%) the (imminent) failure of the takeover offer was due to bidding competitions, two of which occurred in 2021 between Zorro Bidco. S.à r.l. and Pet Bidco GmbH with respect to zooplus AG (see above) and the third of which in 2019 with respect to OSRAM Licht AG, with Bain Capital and The Carlyle Group on one side and Austrian ams AG on the other. Finally, there were two cases (each corresponding to 6.3%) in which the failure to reach the minimum acceptance threshold was attributed to the rejecting stance of another major shareholder or the management of the target company, respectively.

Contractual reporting obligations in cross-border corporate groups

By Jens Michael Göb, Noerr Partnerschaftsgesellschaft mbB, Frankfurt/M.

Flow of information essential for a group to function

After successfully acquiring a target company, a bidder may be faced with a variety of legal questions in connection with integrating the target company into the group. Establishing a functioning flow of information within the group is typically a key problem. For economic reasons, ensuring that the group's top management receives sufficient information is vital to efficient group management. At the same time, it is a fundamental prerequisite of management's ability to live up to its group-wide responsibility for compliance and risk management. If the parent company is required to prepare consolidated financial statements, the need for reliable information channels becomes clear at the latest in the context of group reporting. However, this can be a challenge, especially for foreign parent companies that have successfully completed a public takeover of a listed German target company.

Statutory rights to information for group accounting purposes

In principle, a parent company has various ways available to obtain information from the a subsidiary. Of course, this is largely unproblematic where the parent company has successfully worked towards establishing a contractual group and can base the right to information on a right to issue instructions under section 308 of the German Stock Corporation Act (*Aktiengesetz* – AktG). On the other hand, if it remains a purely de facto group, the parent company must initially rely on general instruments for obtaining information.

Against this background, the law helps parent companies by providing for information rights in relation to subsidiaries under section 294(3) of the German Commercial Code (*Handelsgesetzbuch* – HGB). This is intended to enable parent companies to prepare consolidated financial statements, a group management report and a special non-financial group report. However, it is problematic that the German Commercial Code only imposes the obligation to prepare consolidated financial statements and a group management report on domestic parent companies (section 290(1) first sentence of the German Commercial Code), with the result that the applicability of section 294(3) of the German Commercial Code to group parent companies domiciled abroad is questionable. Consequently, foreign parent companies with German subsidiaries that are required by accounting regulations of their domestic legal system to provide comprehensive group reporting ("global consolidation principle") may look for ways to establish the flow of information in the de facto group, including channels other than those provided for by law, i.e. on a contractual basis.

However, even parent companies that fall under the direct scope of section 294(3) German Commercial Code may deem this necessary, considering the fact that the right to information is limited to the purposes of group accounting. It is true that section 294(3) German Commercial Code provides for relatively far-reaching claims to information, given that obtaining information can also serve to ensure complete and correct accounting by the parent company. However, it does not convey a general right to information. In addition, is also often advisable to place the flow of information in the de facto group on a contractual footing with a view to the compensation for disadvantages pursuant to section 311 of the German Stock Corporation Act, despite section 294(3) of the German Commercial Code being applicable.

Practical solution: contractual reporting obligations

In order to regularly and reliably obtain the information required for group reporting, it may therefore be advisable for the parent company to have the corresponding information rights granted to it by entering into a contract with the subsidiary.

In practice, such agreements can be components of contractual arrangements that have recently become the subject of increasing interest among experts under the terms "relationship agreements" or "group coordination agreements". These are coordination agreements that regulate cooperation within the de facto group in even more detail and may provide for adopting uniform group guidelines and establishing group functions (e.g. for internal audit, compliance and risk management) and/or functional reporting lines. It is important that "relationship agreements" (and even more so agreements that only govern reporting for accounting purposes) are not structured as inter-company agreements pursuant to section 291 onwards German Stock Corporation Act. This ensures that they do not require the approval of the general meeting pursuant to section 293(1) German Stock Corporation Act. Instead, they are purely contractual agreements with the purpose of regulating the necessary cooperation within the group in a legally watertight manner and without resulting in a control agreement (Beherrschungsvertrag) with the corresponding obligations.

Legal barriers and legally compliant drafting of the agreement

If a parent company and a subsidiary wish to establish binding obligations to provide the parent company with information in contractual form, compliance with the restrictions arising directly from section 311 of the German Stock Corporation Act is of paramount importance. According to this provision, the controlling company in a de facto group is prohibited from using its influence to induce a dependent joint stock company to enter into a legal transaction that is detrimental to it or to take or refrain from measures resulting in a disadvantage, unless the disadvantages are compensated.

First of all, it is advisable to set out the reporting obligations and related modalities as precisely as possible in the agreement. This applies first and foremost to the matters to be covered by the reporting. Here it is advisable to include provisions that are graduated according to the relevant reporting periods, which also have to be defined. As a result, the scope and depth of information in annual or quarterly reports can be defined differently from monthly reporting obligations, if any. Furthermore, rules can be defined for any additional evidence or queries that may be required and for the applicable deadlines.

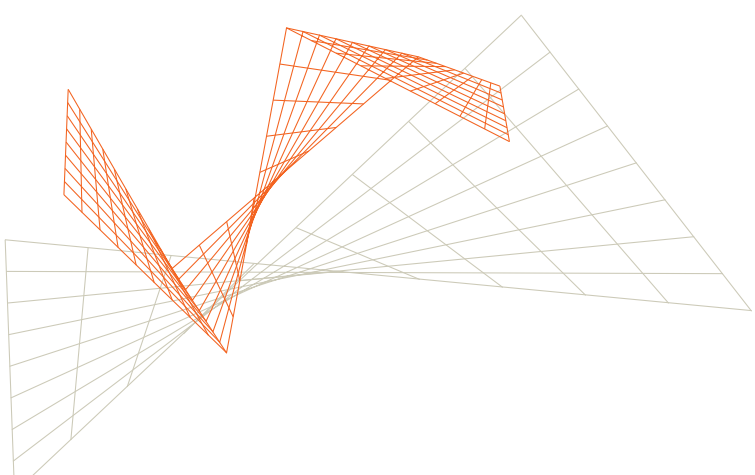
On this basis, binding stipulations are then to be agreed with regard to section 311 German Stock Corporation Act and compensation for disadvantages. For example, provisions on compensation for the costs incurred by the reporting subsidiary should be included directly in the agreement, the amount and due dates of compensation payments. However, this compensation designed to justify any adverse influence has its limits where the disadvantages are not quantifiable. But this is very likely to apply where confidential information from the sphere of the subsidiary is disclosed: it is difficult to imagine quantifiable financial compensation for disadvantages that (may) result from

the disclosure of confidential information. In practice, the problem is solved by excluding any disadvantage for the subsidiary by ensuring that the parent company uses the information exclusively for the purposes of internal group control and management. To ensure this, the contract should limit the use of information by the parent company to certain purposes which rule out any use to the disadvantage of the subsidiary. Apart from this, the contract should have additional provisions intended to maintain confidentiality.

It is not only in the context of section 311 German Stock Corporation Act that the prevailing opinion sees room for a group-friendly interpretation that permits information channels to be established. If we look at other provisions that can be considered as barriers, it is also evident that leeway in favour of effective management of the group is generally recognised. In the context of section 131(4) first and second sentences German Stock Corporation Act and section 48(1) no. 1 German Securities Trading Act (Wertpapierhandelsgesetz – WpHG), which (also) aim at achieving equal treatment of shareholders in terms of information, it can also be assumed that the group situation may constitute a justification for different treatment. The prevailing interpretation of section 131(4) first sentence German Stock Corporation Act assumes that the information is not provided to the controlling company (only) in its "capacity as a shareholder" if it serves the purpose of managing the group. The law implicitly recognises this idea for necessary information provided to a parent company for the purpose of including the company in the parent company's consolidated financial statements in section 294(4) third sentence German Stock Corporation Act – albeit primarily against the background of the parent company's statutory reporting obligations. In the context of section 48(1) no. 1 German Securities Trading Act, which constitutes a manifestation of the principle of equal treatment in securities law, an objective reason for different treatment, which is likely to exist in the pursuit of legitimate group interests, is likewise generally sufficient.

Furthermore, for publicly listed companies, the rules on insider trading deserve special attention. If the subsidiary's management obtain inside information, its dissemination within the group is also subject to the provisions of the Market Abuse Regulation. This means that if such information is the subject of reporting, special caution is required. However, only the "unlawful" disclosure of inside information is prohibited (see Article 10(1) no. 1 and Article 14(c) Market Abuse Regulation). In this case (as for the question of equal treatment of shareholders) it is appropriate to consider the group situation.

It is sometimes claimed that group interests and management of the group essentially follow the interests of the parent company and thus cannot justify the "upward" disclosure of inside information. However, there is at least general agreement that disclosure in order to allow the parent company to meet its legal obligations, including group reporting, is permissible.



As with section 311 German Stock Corporation Act, however, it must be ensured that the use of the information is consistent with the justification for its disclosure within the group. If disclosing inside information is only justified against the background of the group-internal (statutory) performance of duties, it must be contractually ensured that it is only used for these purposes, and in particular not for the parent company's own economic advantage. Furthermore, the legality of the disclosure of inside information depends on whether it is proportionate. In this situation provision of a two-stage process is possible in which the subsidiary first fulfils its reporting obligations to a reduced extent, i.e. by omitting the inside information in question. Then, if the parent company believes that this is not sufficient for reporting purposes, a consensual decision must be made on careful and legally compliant disclosure of the inside information.

Conclusion

Since the flow of information within a group is indisputably essential to the functioning of the group, practical ways must be found to enable the group to be managed – including and especially across national borders. In this context, it is apparent that the current law does not place insurmountable obstacles in the way of contractual reporting obligations within the group, but it does erect barriers in various respects that must be observed when drafting such agreements. The interest of the parent company in managing the group effectively and in a legally compliant manner, which is generally recognised as legitimate, is the key factor.

Our contacts

Hamburg

Volker Land
Partner, Noerr

volker.land@noerr.com
T +49 40 300397 102

Stephan Schulz
Partner, Noerr

stephan.schulz@noerr.com
T +49 40 300397 108

Düsseldorf

Natalie K. Daghles
Partner Corporate/M&A

natalie.daghles@noerr.com
T +49 211 49986157

Frankfurt/Main

Holger Alfes
Partner, Noerr

holger.alfes@noerr.com
T +49 69 971477 231

Julian Schulze De la Cruz
Partner, Noerr

julian.schulzedelacruz@noerr.com
T +49 69 971477 231

Laurenz Wieneke
Partner, Noerr

laurenz.wieneke@noerr.com
T +49 69 971477 231

Munich

Gerald Reger
Partner, Noerr

gerald.reger@noerr.com
T +49 89 28628 155

Michael Brellochs
Partner, Noerr

michael.brellochs@noerr.com
T +49 89 28628 468

Ralph Schilha
Partner, Noerr

ralph.schilha@noerr.com
T +49 89 28628 167

Alicante

Berlin

Bratislava

Brussels

Bucharest

Budapest

Dresden

Düsseldorf

Frankfurt/M.

Hamburg

London

Munich

New York

Prague

Warsaw

noerr.com

About Noerr

Noerr stands for excellence and an entrepreneurial approach. With highly experienced teams of strong characters, Noerr devises and implements solutions for the most complex and sophisticated legal challenges. United by a set of shared values, the firm's 500+ professionals are driven by one goal: our client's success.

Listed groups and multinational companies, large and medium-sized family businesses as well as financial institutions and international investors all call on the firm.

As one of the leading European law firms, Noerr is also internationally renowned with offices in eleven countries and a global network of top-ranked "best friends" law firms. In addition, Noerr is the exclusive member firm in Germany for Lex Mundi, the world's leading network of independent law firms with in-depth experience in 100+ countries worldwide.