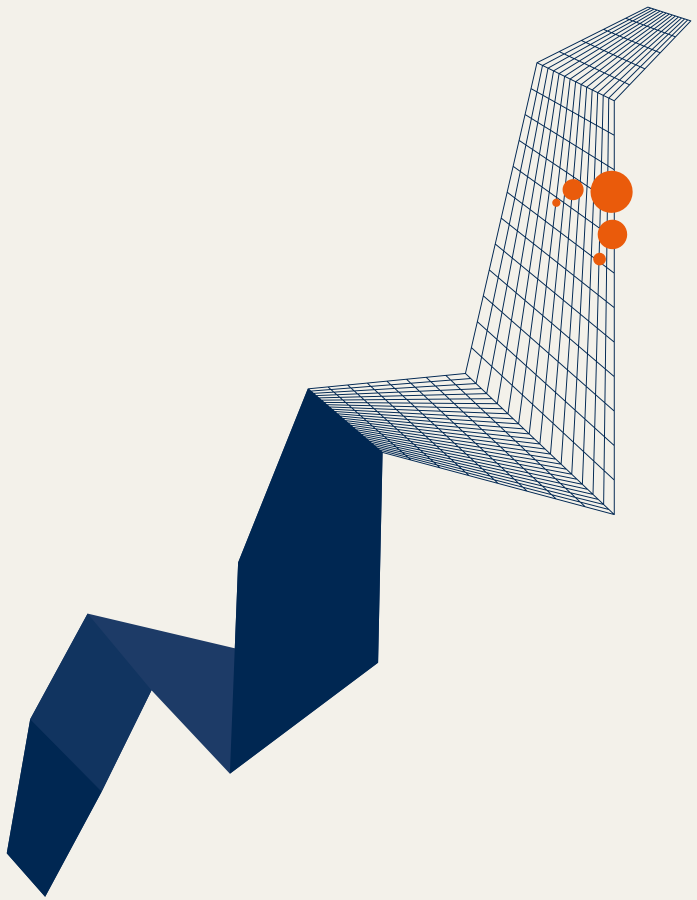

Noerr Public M&A Report 02/2022

The German market for public takeovers in the first half of 2022

by Volker Land and Stephan Schulz, Hamburg

Editorial

After a record-breaking year 2021, the first half of 2022 was a sobering experience.

This is our short description for the trend the market for public takeovers in Germany has followed during the first six months of 2022. Several key figures indicate that H1 2022 was a weak first half year, in which the market's aggregate offer volume fell to its lowest level since H1 2015. None of the transactions that did take place had an offer volume of more than EUR 2 billion. There were more mandatory offers than takeover offers.

We interpret this restraint by bidders as a reaction to the significant deterioration of the overall economic situation in the first half of this year (due to, among other things, the conflict over Ukraine, the energy crisis, supply-chain disruptions, central banks raising interest rates, fears of recession, uncertainties regarding the further development of the Covid-19 pandemic). **Considering all these factors, we expect a weak market for public corporate takeovers (as measured by transaction volume) in the full year 2022.** This assessment is supported by the low number of notifications regarding the decision to issue a takeover offer or to have acquired control of a company since May 31, 2022, as well as the low market capitalisation of the target companies concerned. Furthermore, we have observed that the impact of private equity investors in the German market for public takeovers is less important than in the private M&A sector, where private equity investors are regarded by many market observes as the main contributors to a steady deal flow – a perception that has partly lead to more optimistic forecasts with respect to the overall M&A market.

However, the law of public takeovers has by no means disappeared from the public spotlight despite the ongoing market weakness in the first half of 2022. The impetus, however, came from the US, where Elon Musk initially took a significant stake in publicly traded Twitter, Inc. that spring and later concluded a merger agreement with the target company, from which he withdrew in the meantime. After a short court battle, the deal was finally executed shortly before the expiry of a deadline set by the court on October 28. Many of the legal issues at stake are already before the courts in the US. We have asked ourselves how some publicly known aspects of the **Musk Twitter takeover** would have been assessed under German takeover law. Starting on page 11, you will find our analysis in the focus article of this issue, which we wrote together with *Jörg-Peter Kraack*.

In addition to this, as the Vonovia/Deutsche Wohnen case shows, M&A practitioners continue to be occupied by the issue of how a bidder can prevent its **offer failing because a minimum acceptance condition has not been met**. The dilemma is, on the one hand, that the bidder is only able to waive such a condition until shortly before the acceptance deadline and, on the other, that in recent years it has been difficult to forecast an acceptance rate at this stage due to the changed shareholder base of listed companies (keyword "index funds"). *Michael Brellochs* has performed an analysis of this topic and possible remedies by the lawmakers based on a regulatory proposal that has been put forward.

We would like to thank the authors and all other colleagues at Noerr who took part in preparing and designing the Noerr Public M&A Report 02/2022. This applies in particular *Juri Stremel*, the editor responsible for preparing this issue, *Michael Brellochs*, who contributed to the part concerning extensions of the possibility to waive minimum acceptance conditions, and *Philip M. Schmoll*, who wrote the part on the reasoned opinions published during the reporting period pursuant to section 27 German Securities and Acquisition Takeover Act.

We wish you an insightful reading!

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Highlights

> Collapse in offer volume

Although the number of transactions in the public takeover market increased slightly in the first half of 2022 compared to the same period of the previous year from nine to ten transactions, the total offer volume[1] in this period of EUR 5.3 billion was only slightly more than one fifth of the corresponding figure in the first half of 2021. The offer volume is thus at its lowest level since the first half of 2015.

> Few takeover bids

The number of takeover bids was at an all-time low with three transactions. Further, it was unusual that there were more mandatory bids than takeover bids during the period under review.

> No mega deals

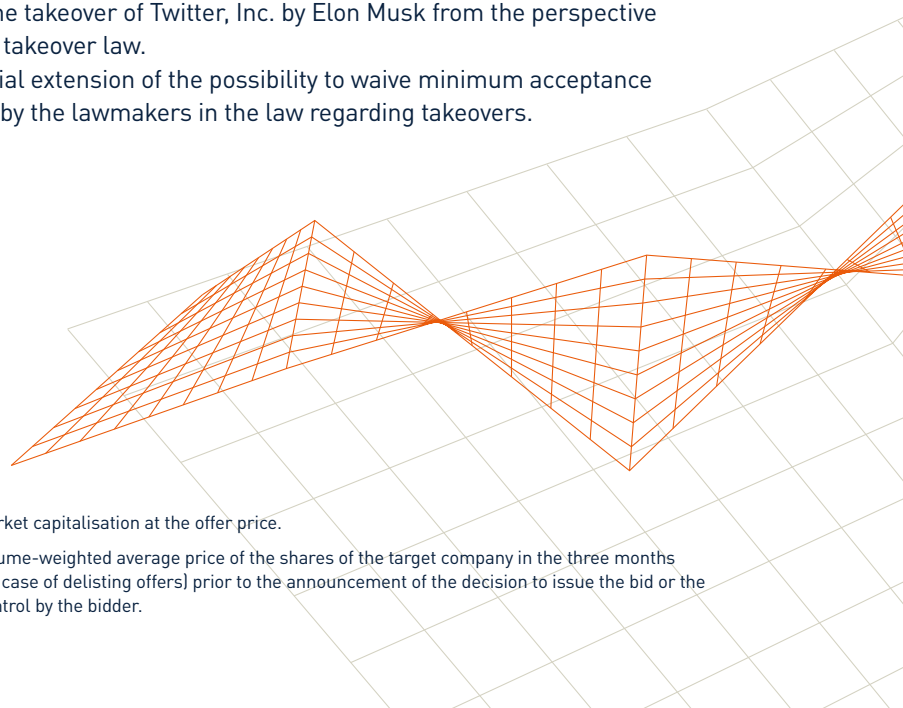
The highest single transaction volume in the first half of 2022 was EUR 1,975.29 million. No first half-year we have examined so far has shown a lower peak value. In the first half of 2021, the first takeover offer by Vonovia SE to the shareholders of Deutsche Wohnen SE alone had a volume of EUR 18,714.56 million.
At EUR 1,604.82 million, the average offer volume in the large cap segment was also lower than the lowest average value we have ever observed in the first half of 2015 (EUR 2,407.90 million).

> Premium development

The average premium paid[2] increased significantly from 10.10% in the first half of 2021 to 38.52% in the first half of 2022, which, however, was mainly due to a single offer with a very high premium. The average premium paid for takeover bids in the first half of 2022 was only 18.26. This was higher than the corresponding amount in the first half of 2021 (16.45%).

> Spotlight

- A look at the takeover of Twitter, Inc. by Elon Musk from the perspective of German takeover law.
- The potential extension of the possibility to waive minimum acceptance conditions by the lawmakers in the law regarding takeovers.



1 Expressed in market capitalisation at the offer price.

2 Based on the volume-weighted average price of the shares of the target company in the three months (or six months in case of delisting offers) prior to the announcement of the decision to issue the bid or the acquisition of control by the bidder.

Market overview

Number and volume of offers

In the first half of 2022, the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – "**BaFin**") examined eleven public offers in accordance with the German Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz – "**WpÜG**"). Ten of these offers were approved by BaFin and subsequently published by the respective bidder. These ten offers were targeted at companies with an aggregate market capitalisation at offer price ("**MCO**") in the amount of EUR 5,316.55 million and comprised three takeover offers, four mandatory offers and three delisting offers, with one of the mandatory offers being combined with a voluntary acquisition offer and one of the takeover offers being combined with a delisting offer. One offer was prohibited by BaFin due to the bidder having failed to submit an offer document in accordance with the requirements of the WpÜG.

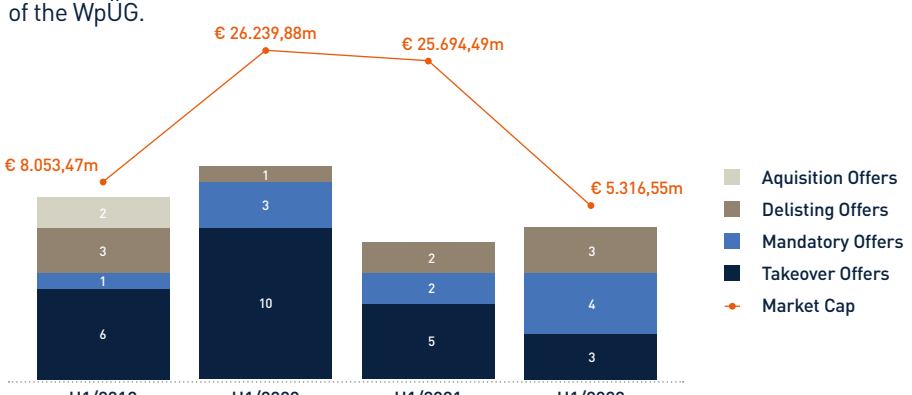


Fig. 1: Type, number, and volume of offerings
Quelle: Noerr Research

With ten offers in the first half of 2022, the number of transactions in the German market for public takeovers increased slightly compared to the prior-year period, during which BaFin approved only nine offers. Offer volume (measured by MCO) decreased significantly from EUR 25,694.49 million in the first half year of 2021 to EUR 5,316.55 in the first half year of 2022, representing a decline of 79.3%. In recent years, only the first half of 2014 and 2015 saw lower volumes, with EUR 5.2 billion and EUR 3.5 billion respectively.

This drastic decrease in total offer volume was primarily due to the fact that none of the three large-cap transactions of the first half of 2022, even when combined, came close to the largest (takeover offer by Vonovia SE to the shareholders of Deutsche Wohnen SE with an MCO of EUR 18.7 billion) or second-largest large-cap transaction (delisting offer by ams Offer GmbH to the shareholders of OSRAM Licht AG with an MCO of EUR 5.1 billion) of the first half of 2021. Furthermore, in spite of a slight increase in the number of transactions in comparison to the first half of 2021, the high number of seven large-cap transactions of the corresponding 2020 period could not be reached.

When looking at the type of offers in the first six months of 2022, the low number of takeover offers is particularly apparent. In all periods under review since 2014, this type of offer was always in first place (among others) in terms of the number of offers. We also observed again that a large share of the offers is solely or at least partly aimed at delisting the target company from the stock exchange (see also Noerr Public M&A Report 01/2022).

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 of the average MCO divided by segment:

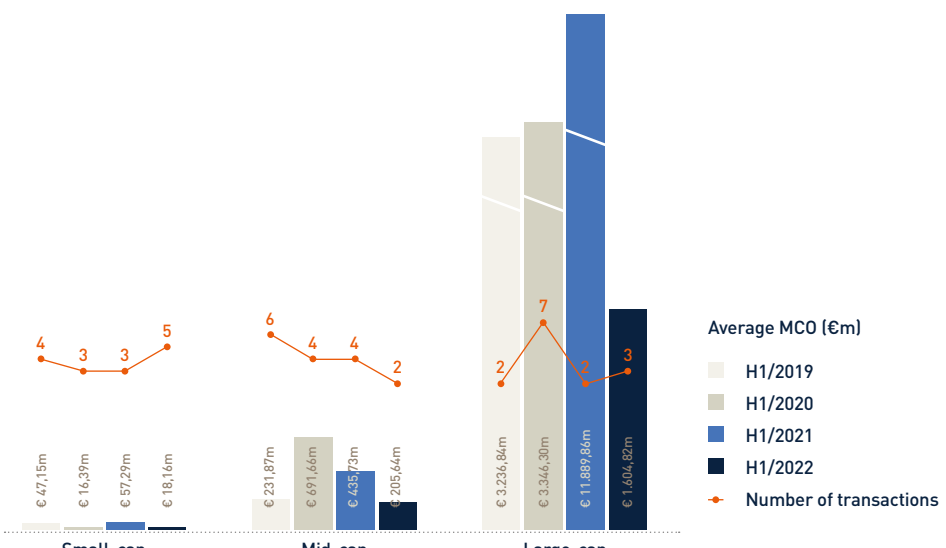
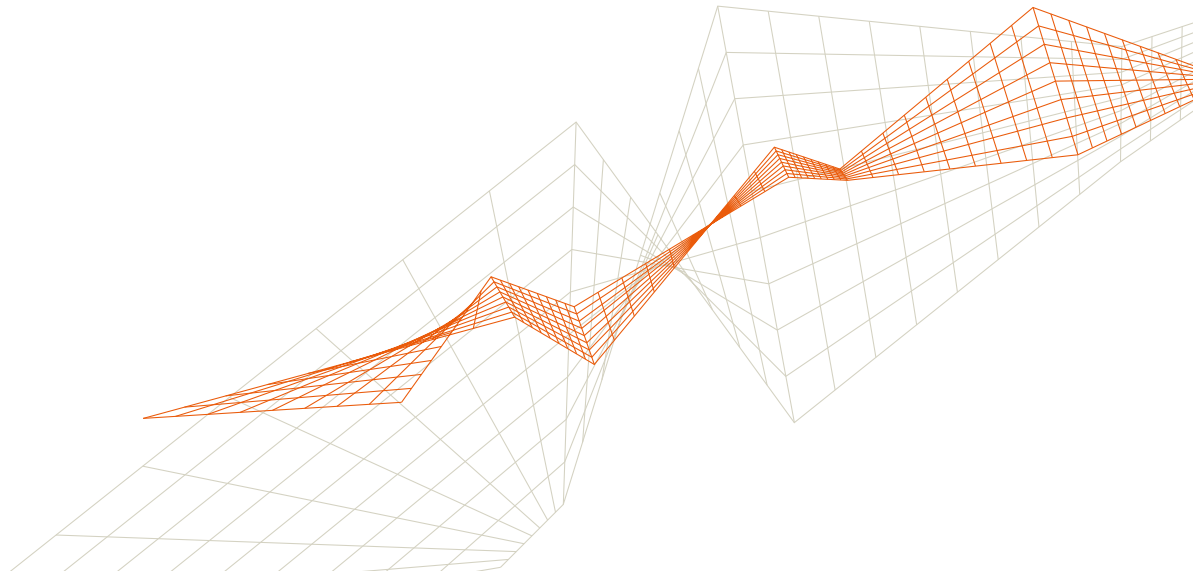


Fig. 2: Segment Development
Quelle: Noerr Research

In spite of the increase in the number of offers from two to three, the average offer volume in the large-cap segment dropped considerably from EUR 11,889.86 million in the first half of 2021 to EUR 1,604.82 million in the first half of 2022. It was also significantly lower than the large-cap offer volume of the 2020 comparison period in the amount of EUR 3,346.30 million. This half year's substantial reduction in comparison to the corresponding 2021 and 2022 periods was due to the fact that in 2022, not a single large-cap offer had an MCO of more than EUR 2 billion, whereas both large-cap offers of the first half of 2021 and two of the seven large-cap offers of the first half of 2020 had an MCO in excess of EUR 5 billion. The average offer volume of the large-cap segment in the first half of 2022 represented the lowest average MCO we have ever measured for a first half year in this segment, even lower than the previous lowest figure observed in the first half of 2015 (EUR 2,407.90 million).

The mid-cap segment saw two transactions with an average offer volume of EUR 205.64 million. The number of transactions has halved in comparison to the already low value of the first half of 2021 and was clearly in the lower range compared to the corresponding values collected since 2014. A lower or at least equally low number of mid-cap transactions could only be observed in the first halves of 2016 (one mid-cap offer) and 2014 (two mid-cap offers). Moreover, the average offering volume in the mid-cap segment has not only fallen below the relatively high comparative values of the first halves of 2021 (EUR 435.73 million) and 2020 (EUR 691.66 million), but also below the already low comparative value of the first half of 2019 (EUR 231.87 million).

In the small cap segment, however, the number of transactions in the first half of 2022 rose from three to five compared to the same period last year. The large fluctuations observed in the past years with regard to the average offering volume continued. At EUR 18.16 million, the average offering volume of this segment in the first half of 2022 was significantly below the value of the previous year's period of EUR 57.29 million, but still slightly above the value for the first half of 2020 of EUR 16.39 million.



Distribution of offer volume vs. number of transactions

Three of the ten offerings in the first six months of 2022 were in the large cap segment and accounted for a combined share of 90.56% of the total offering volume of EUR 5,316.55 million. This share thus remained at a similarly high level as in the first half of 2021 and 2020, where the corresponding figures had been 92.55% and 89.27%, respectively.

The offer with the highest MCO was the takeover bid of Atlantic BidCo GmbH, which is backed by the financial investors Advent International and Centerbridge as well as the Canadian state pension fund CPPIB, to the shareholders of Aareal Bank AG, which accounted for 37.15% of the total offer volume. This offer represented the second attempt by Atlantic BidCo GmbH to take over Aareal Bank AG. In the second half of 2021, with an acceptance rate of 41.55%, the first takeover bid failed to reach the minimum acceptance threshold, which was originally set at 70% and later lowered to 60%. The second takeover attempt in the first half of 2022 was successful despite the same high minimum acceptance threshold of 60%, for which the simultaneously increased offer price from EUR 29.00 to EUR 33.00 certainly played a significant role.

The remaining offers in the large cap segment, the delisting offer by Hornbach Holding AG & Co KG to the shareholders of Hornbach Baumarkt AG and the takeover offer by Hercules BidCo GmbH to the shareholders of Deutsche EuroShop AG, accounted for 28.42% and 24.99% of the total offer volume, respectively. Compared to the corresponding periods of the previous year, the cumulative offer volume in the large cap segment was thus distributed much more evenly among the corresponding transactions.

The following chart shows the share of large-cap transactions in the first half of 2021 and 2022 on the respective total supply volume of the half-year (expressed as MCO):

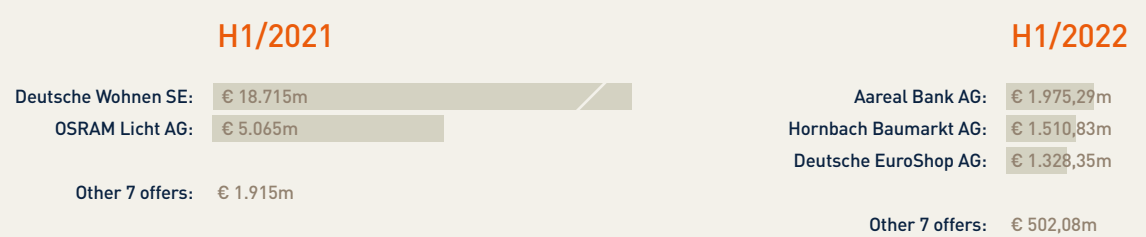


Fig. 3: Distribution of offer volume over number of transactions
Quelle: Noerr Research

Premium

In the first half of 2022, bidders paid an average premium of 38.52% on the volume-weighted average price of the target company's shares measures in the three-month period (or six months in the case of delisting offers) preceding the announcement of the bid ("**3-month VWAP**" or "**6-month VWAP**"), whereby three offers were not taken into account because BaFin was unable to determine the 3-month VWAP or 6-month VWAP for them.

At 127.11%, the highest premium was granted to the shareholders of Wild Bunch AG under the combined offer of Mr Ingmarus Johannes Maria Snijders (obligatory offer) and Voltaire Finance B.V. (voluntary acquisition offer).

The following chart illustrates the premiums offered in the transactions in the first half of 2022, broken down into different categories, as well as the associated premium average, and compares these with the premiums and averages of the respective first half years 2018 to 2021.

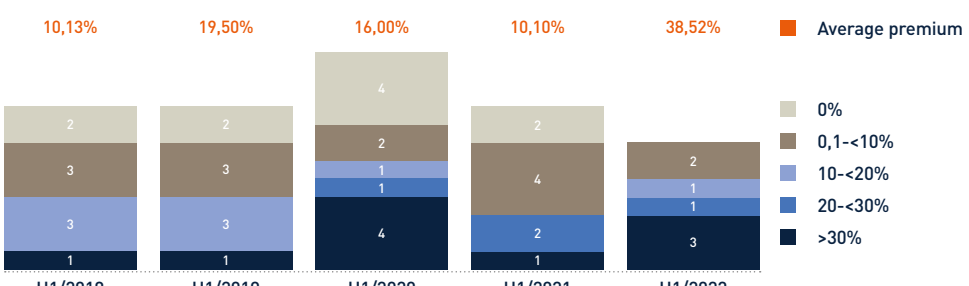


Fig. 4: Premiums offered
Exclusion of the offer to the shareholders of Biofrontera AG in H1/2018 due to unusually structured consideration.
Quelle: Noerr Research

The average premium in the first half of 2022 increased significantly from 10.10% in the first half of 2021 to 38.52% in the first half of 2022. This increase is mainly due to the high premium in the offer to the shareholders of Wild Bunch AG (127.11%); a similarly high premium of 158.33% was last offered to the shareholders of Fyber N.V. in the first half of 2019 as part of the mandatory offer of Advert Finance B.V.
In addition, the high average premium in the first half of 2022 results from the fact that, in contrast to the corresponding periods of the previous year, no premium-free offers were observed in this period.

The average premium of the three takeover bids in the first half of 2022 was 18.26% and thus higher than in the first half of 2021 (16.45% in five takeover bids).
A special consideration of the premiums granted in the context of takeover bids makes sense because the bidder in such a transaction wants to acquire control of the target company in the first place and will normally have a focus on an attractive offer price.

Reasoned statements pursuant to section 27 WpÜG

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

In the first half of 2022, the corporate bodies of target companies published a total of ten reasoned statements on the ten public offers pursuant to section 27 WpÜG. These were joint reasoned statements in each case.

Overall assessment of the offers

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

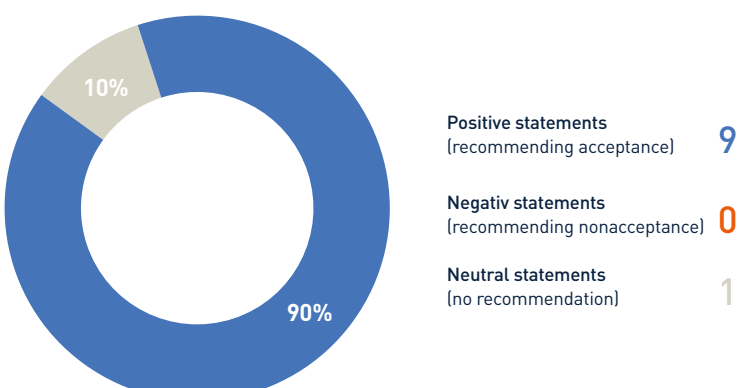


Fig. 5: Statements (number, percentage)
Quelle: Noerr Research

Fairness Opinions

Four of the 10 reasoned statements (40%) were supported by fairness opinions obtained from external advisors regarding the adequacy of the consideration offered. The management board and supervisory board of Aareal Bank AG and Deutsche EuroShop AG obtained more than one fairness opinion. The underlying takeover bids for these fairness opinions were in the large cap segment.

The timing of the reasoned statements

The reasoned statements of the first half of 2022 were issued on average 10.2 days after publication of the offer document. In the case of six of the ten reasoned statements (60%), 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.

Spotlight: Musk vs. Twitter

By Volker Land, Stephan Schulz and Jörg-Peter Kraack, Noerr Partnerschaftsgesellschaft mbB, Hamburg

Since April this year, a takeover battle was raging between Elon Musk and Twitter over the acquisition of the social media company. This was characterised by two aspects in particular: Firstly, the front lines have shifted over time, because while the question of whether and how Musk can take over Twitter initially dominated, the game has changed, and the issue was subsequently whether the investor must consummate the acquisition of Twitter. Secondly, this struggle was accompanied by intense social media communication. These particularities give reason to examine the transaction from a German legal point of view under three central aspects, namely with regard to the transaction structure, the possibility of terminating takeovers on the basis of a so-called Target MAC and the capital markets law aspects of the „Media Battle".

Introduction

After Elon Musk initially secretly acquired a stake of around 9 % of Twitter shares and – contrary to an agreement and at short notice after the shareholding was made public – refused to join the Twitter board as a director , he announced a non-binding proposal on 13 April 2022to acquire 100 % of Twitter shares at a price of USD 54.20 and thus at a 38% premium over the day before his investment was publicly announced. Musk had also taken up the fight against spam/fake accounts (original wording of his tweet of 21 April 2022: „If our twitter bid succeeds, we will defeat the spam bots or die trying!"). Apparently in order to increase pressure on Twitter to conclude a Merger Agreement, Musk publicly contemplated via the Twitter platform otherwise making a – then hostile – takeover bid (tender offer). A Merger Agreement was then concluded between Musk and Twitter on 25 April 2022.

Twitter, Inc. – NYSE closing prices

As the share price performance shows, the merger consideration offered was and continues to be quite attractive for Twitter shareholders:

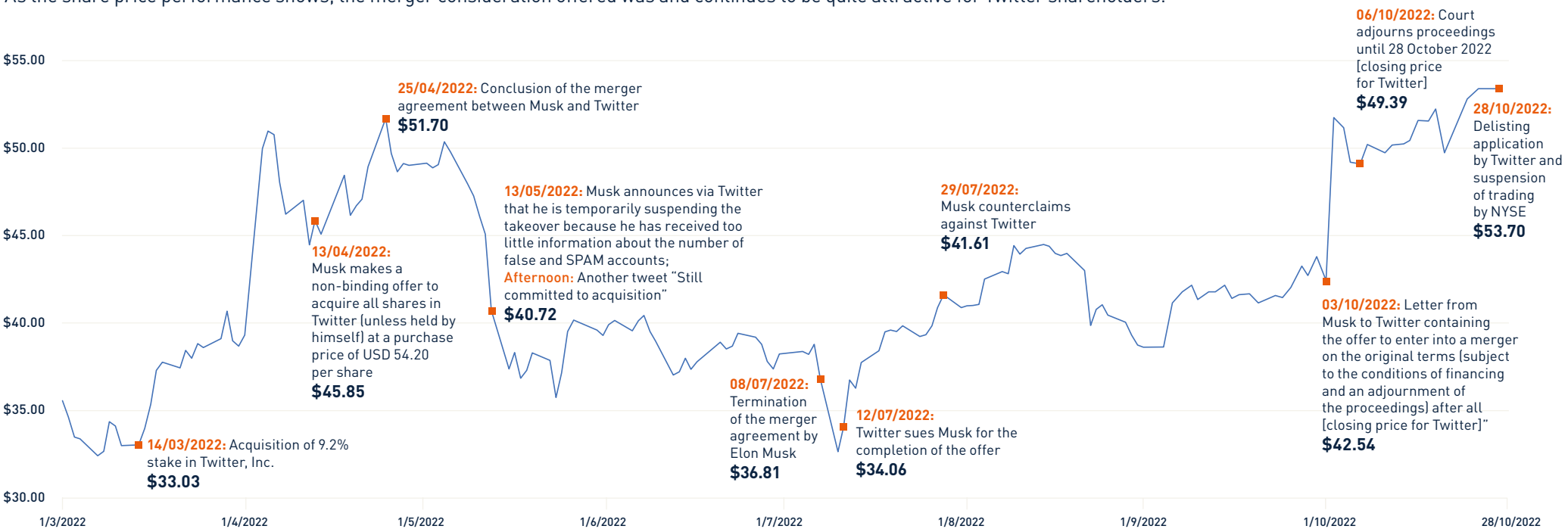


Fig. 6: Twitter, Inc. – NYSE closing prices from 1 March 2022 to 28 October 2022
Source: The Wall Street Journal Online.

While the US capital market experienced a significant downturn in the period following the signing of the Merger Agreement, Musk continued to work on the financing of the transaction, to which he also used Tesla shares also affected by the downturn. At the same time, Musk began to publicly question the accuracy of Twitter's officially announced spam/fake account rates (less than 5 %) via the Twitter platform as being far too low. In parallel, he attempted to verify the methods applied to identify the spam/fake accounts by using the information rights to which he was entitled under the Merger Agreement. As early as 13 May 2022, he tweeted that the deal was „temporarily on hold" because of alleged uncertainties about this. On 8 July 2022, he then terminated the Merger Agreement due to, among other things, alleged misrepresentations of false or spam accounts on Twitter which were reasonably likely to result in a Material Adverse Effect entitling him to a termination right.

Subsequently, the dispute moved from the Twitter platform to the courtroom. Twitter sued Musk on 12 July 2022 to enforce the transaction, and Musk responded with a counterclaim on 29 July 2022. A surprising turn of events followed on 3 October 2022: Musk told Twitter that his side is willing to close the merger on the originally agreed terms and subject to the success of the proposed debt financing if the court stays Twitter's lawsuit and adjourns the trial. Twitter refused to do so and continued to accuse Musk of reserving an unagreed way out of the transaction. The court postponed the start of the trial at Musk's request, giving the parties until 28 October 28 2022 to reach an agreement and complete the transaction – otherwise the case would have gone to trial, during which Twitter's lawyers would have been allowed to question Musk under oath about the facts of the case, as originally planned for early October. However, this did not happen: On 27 October 2022, just in time before the deadline, the parties consummated the acquisition agreed under the Merger Agreement – this, of course, with media accompaniment by Musk, who tweeted „the bird is freed" in allusion to the network's logo.

Transaction structure – US „one step merger" vs. German „multiple steps approach"

Under US law, the acquisition is not structured as a tender offer, but as a merger, namely a so-called „one step merger" in the form of a Reverse Triangular Merger. This transaction structure is frequently chosen for the acquisition of listed public companies due to its many advantages. In Germany, it is known from large cross-border „Mergers of Equals", such as the mergers of Daimler Benz and Chrysler and of Linde and Praxair. In the Musk / Twitter scenario it follows the following pattern:

Musk as the acquirer, his acquisition vehicle (Acquisition Sub) and Twitter as the target company have entered into a Merger Agreement, which Twitter's shareholders have approved with a simple majority as required by law – a first advantage of this structure. At completion, the Acquisition Sub will be merged into Twitter. In the process, all shares in the Acquisition Sub will be exchanged for Twitter shares and all Twitter shares already held (indirectly) by Musk will expire. Moreover, all remaining Twitter shares will be converted into a right to payment of Merger Consideration of USD 54.20 (rather than exchanged for shares in the Acquisition Sub) – this Triangular Merger is a second merit of the structure. Non-consenting Twitter shareholders – a third advantage of this structure - are nevertheless eliminated; although they do not receive the merger consideration, they do receive a compensation in accordance with statutory provisions. The merger of the Acquisition Sub into Twitter will cause the former to cease to exist, while the latter will

continue to exist as Musk's then wholly owned (indirect) subsidiary. Subsequently, Twitter shares are delisted from the New York Stock Exchange (NYSE). The merger took place on 27 October 2022 and the following day Twitter filed for delisting with the NYSE, which then suspended trading in Twitter shares.

Compared to this structure, the path to acquiring 100 % of the shares of a listed public company in Germany is a „multiple steps approach" and is known to be much more cumbersome, risky and expensive: A takeover offer with a minimum offer threshold or the delisting offer would have to be followed by further group-integrating measures in the form of a domination and profit and loss transfer agreement and a squeeze-out. These steps are associated with actual uncertainties (e.g. assumption threshold-relevant behaviour of ETFs, back-end speculation of hedge funds) as well as legal and financial risks (risks of contestation by shareholders, top-up payments after arbitration proceedings).

Termination of the Merger Agreement by invoking Target MAC

In support of its termination of the Merger Agreement, Musk alleges misrepresentations with respect to the spam/fake account disclosures, which allegedly resulted in a Material Adverse Effect, i.e. a material deterioration of Twitter's business, financial condition or results of operations, entitling Musk to terminate the Merger Agreement.

Such so-called Target MAC clauses are also seen more frequently in public takeovers in Germany in current times of crisis due to their unpredictable effects on target companies. However, they are subject to much stricter legal requirements: A termination right of the Bidder would be inadmissible due to the discretionary element in the determination of the Target MAC (cf. Sec. 18 German Securities Acquisition and Takeover Act – WpÜG). Only objective conditions are permissible where the underlying circumstances for determining the deterioration of the target company's conditions are clearly ascertainable. According to BaFin (German Federal Financial Services Supervisory Authority) practice, these must also be material changes that would have to be reported by the target company on an ad hoc basis pursuant to Art. 17 German Market Abuse Regulation – MAR. Due to these strict requirements, the right of termination in the Merger Agreement concluded between Musk and Twitter, which is linked to a Target MAC, would be inadmissible in a takeover offer under German takeover law and would therefore also not be agreed in an accompanying Business Combination Agreement. This strictness of German takeover law in the first step of the „multiple steps approach" makes it very difficult for a bidder to refrain from a transaction by relying on findings from a subsequent due diligence at the target company. An approach similar to Musk's with regard to spam/fake accounts would hardly have any chance of success under German law and is also not common practice. The legal situation would only be different if the parties had agreed from the outset that the bidder would have a right of termination if the determined quota of spam/fake accounts deviated from the quota communicated so far to such an extent that this would have a significant impact on the price of the shares of the target company. However, such an explicit provision would be very unusual.

Musk's „Media Battle" from the Perspective of European Market Abuse Law

In every phase of the takeover battle and until the end, Musk flanks his position with intensive social media communication. Such a strategy would have narrow limits in this country.

Phase one

Looking at the first phase of the battle, one gets the impression that Musk is trying to persuade Twitter to conclude a Merger Agreement in the near future by publicly hinting – significantly via the Twitter platform – at a possible uncoordinated tender offer.

Under German takeover law, a bidder is only obliged to publish an intention to make a takeover bid pursuant to Sec. 10 WpÜG if it is in any case unconditionally certain that a takeover will take place. An actor who, like Musk, is only publicly considering a takeover in order to exert pressure would therefore not have been obliged to publish such an announcement. The WpÜG does not provide the BaFin with a legal remedy against a bidder who only publicly contemplates a possible intention to make an offer - unlike, for example, British law.

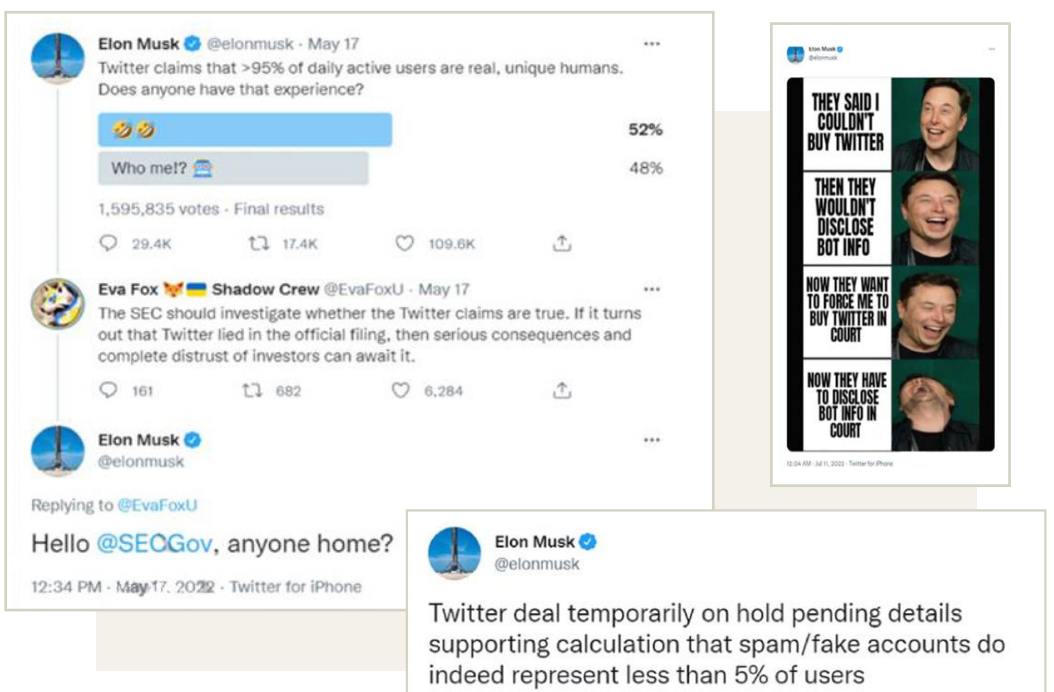
However, the Market Abuse Regulation (MAR) sets stricter limits to such a strategy: If the self-initiated or fuelled rumours about a possible takeover intention are true, they should typically qualify as inside information at an early stage in such a stretched circumstance. Either the submission of a takeover bid would be predominantly probable or, according to the so-called probability/magnitude approach, a lower degree of probability would also be sufficient due to the consequences for the target company. In this case, a communication via social media à la Musk would violate the prohibition of unauthorised disclosure of inside information according to Art. 10 para. 1, 14 lit. c) MAR, because – unlike in the US – publications via social media do not establish the publicity due to which information would lose its quality as inside information.

If, on the other hand, these rumours are not true, it may again be market manipulative if the bidder publishes this information for strategic purposes of exerting pressure via social media channels. This is because information-based market manipulation pursuant to Art. 12 para. 1 lit. c) MAR also extends to dissemination via the media, including the Internet, and explicitly includes rumours if the person acting knew or should have known that they were false or misleading so that they were likely to cause false or misleading signals regarding the supply or demand or the price of the shares of the target company or likely to cause an abnormal or artificial price level. Furthermore, it may also constitute market manipulation if the interested party then fails to correct these rumours. According to the – not undisputed – opinion of the BaFin, information-based market manipulation can also be committed by omission in the event of prior conduct in breach of duty.

Irrespective of all this, a bidder who is himself an issuer and whose takeover plans have not yet reached the stage of an intention pursuant to Sec. 10 WpÜG, but have certainly reached the stage of insider relevance, would be obliged, in the case of sufficiently precise rumours, to end any postponement of publication by means of a so-called „leak" ad hoc notification, irrespective of whether he himself initiated these rumours or was the cause of them (cf. Art. 17 para. 7 MAR).

Phase two

In the second phase of the takeover battle, too, narrow limits are placed on a communication strategy by the prohibition of market manipulation. Now that the tide has turned for him, Musk seems to want to publicly stir up sentiment against Twitter in order to give weight to his claim regarding the misrepresentation of the spam/fake accounts and possibly contribute to the occurrence of a Target MAC event in any case due to the public or capital market reaction.



Again, should this strategy use deliberate exaggerations or misinformation regarding the spam/fake accounts, this is likely to send false or misleading signals regarding the supply/demand or price of the target company's shares, or is likely to create an abnormal or artificial price level. After all, this information concerns a topic that is particularly relevant for Twitter as a social media platform and, moreover, it seems to be decisive for the question, which is in any case relevant for the share price, whether the transaction can be terminated by virtue of the Target MAC's intervention.

Conclusion

Looking at the Musk/Twitter case from the perspective of German takeover and capital markets law makes the structural differences to American law evident. This is particularly so in the fact that German law does not have a transaction structure comparable to the „one step merger". Nor would it be possible to refrain from a transaction by invoking a generally formulated Target MAC clause under German law. An open-hearted communication behaviour of the Offeree in relation to a pending or ongoing takeover procedure outside the official announcements and documents is exposed to the risk of violations of the Market Abuse Regulation.

Extension of the option to waive the minimum acceptance condition under German takeover law

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German takeover law (unlike some other jurisdictions) does not provide for a statutory minimum acceptance threshold, but rather allows the bidder to decide on whether or not to launch the bid under a minimum acceptance threshold. If the bidder decides to make the takeover offer subject to a minimum acceptance condition, the bidder may – under German law – only waive this condition up to at least one working day prior to the expiry of the acceptance period (section 21(1) German Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz – WpÜG)). In practice it happens frequently that the bidder does not know the acceptance rate yet at that point in time since professional investors tend to decide on whether or not to tender their shares only on the very last day of the acceptance period, and it is hard to anticipate whether or not hedge funds will accept the offer. Where the acceptance level (even if just by a small margin) falls short of the minimum acceptance threshold, the bidder has no other choice than to make a new takeover offer if the bidder is still interested. Most recently, this could be observed in the Vonovia/Deutsche Wohnen case. This regulatory regime is facing increasing criticism. A preferable approach would be for the German legislator to extend the option to waive the minimum acceptance condition. A proposal for a regulatory change that has its origin in comparative law considerations is already on the table.

1. Acceptance rate is increasingly unpredictable

Predicting the acceptance rate for a takeover bid has become more difficult in Germany over the last years. This is due to the changes in the shareholder structures of listed companies, especially when it comes to takeover situations. Index funds hold ever larger parts of listed companies' shares.[3] Due to their aim to reflect a certain index as precisely as possible, they usually accept a takeover bid only when it is certain that the bid will be successful, i.e. when the bidder has reached the minimum acceptance threshold (details depend on the terms and conditions of the relevant index provider). In addition, specialised hedge funds invest in the target once a bidder has announced a takeover intention under section 10(1) German Securities Acquisition and Takeover Act. However, they do not accept the bid for those shares, and instead speculate on a higher compensation payment in connection with the corporate integration measures (such as a domination and profit and loss transfer agreement or a squeeze-out) following a takeover. Generally, the compensation rules under German law in corporate integration and reorganization measures depend on the target's intrinsic value. This even applies where a previous takeover offer was successful, i.e. the target's shareholders considered the valuation and the price offered attractive. Because of this incentive structure, hedge funds in Germany tend to accept a takeover bid only with respect to the minimum number of shares that is required to help the bid succeed, but retain the remainder for the subsequent corporate integration measures (so called back-end speculation). If hedge funds err in their assessment, assuming that the bid will be successful even without them tendering all their shares, the bid may fail.

Taking index funds and hedge funds together, the group of shareholders that a bidder can reach with a takeover offer has become much smaller. The result is that even bids that offer a premium on the market price and are supported by the target and other shareholders may actually fail.

[3] For DAX shares see for example Brellochs, ZHR 185 (2021) 319, 327 with further references; see also *Klöhn*, ZHR 185 (2021) 182, 221 et. seq.

2. Reactions in practice

In German takeover practice, various methods have been developed to deal with this situation. Firstly, the offer document sometimes expressly notes that no domination and profit and loss transfer agreement will be entered into for a certain period of time following a successful takeover bid to indicate that it is not worthwhile speculating on the back-end. Secondly, minimum acceptance thresholds have become lower in Germany. While until a few years ago minimum acceptance thresholds of 75% (or more in individual cases) were quite common to enable the bidder to immediately implement structural actions at the target after the takeover, bidders tend to set minimum acceptance thresholds now more around 50%.[4] Furthermore, analysing the target's shareholder structure and specifically reaching out and communicating with block shareholders (including hedge funds) is becoming more and more important to increase the likelihood of all relevant shareholders tendering their shares.

Still, takeover bids sometimes fail to pass the minimum acceptance threshold if (as in the Vonovia/Deutsche Wohnen case) the bidder fails to anticipate the acceptance rate and to waive the minimum acceptance threshold in time when things are getting tight. Under current German law, the bidder may waive an acceptance condition (e.g. a minimum acceptance threshold) up to one day before the end of the acceptance period (section 21(1), first sentence, no. 4 German Securities Acquisition and Takeover Act). At this point in time, however, the bidder often does not know the acceptance rate yet, because institutional investors usually only tender their shares at the very last minute. This means that when deciding on the waiver the bidder has to predict the acceptance rate and, in particular, anticipate the actions of hedge funds, which can be difficult for the reasons pointed out above. Even if the bid just fails to reach the minimum acceptance threshold by a small margin, a second bid is permissible only after the expiry of one year, unless both the German Federal Financial Supervisory Authority (BaFin) and the target agree to the submission of an earlier second bid (section 26(5) German Securities Acquisition and Takeover Act).

3. Proposal for a regulatory reform

This regulatory regime has been repeatedly criticised in the past, most recently after the Vonovia/Deutsche Wohnen takeover which failed in the first attempt. From a comparative law perspective, it would be reasonable to structure the bidder's statutory option to waive the minimum acceptance threshold in such a way that the bidder knows the acceptance rate at the time of deciding on a potential waiver. This would require the German legislator to change the German Securities Acquisition and Takeover Act such that the bidder is granted the possibility to decide on the waiver of the minimum acceptance threshold within a short period of time following the expiry of the acceptance period once the final acceptance rate is known.[5] This possibility also exists in other jurisdictions, with the details varying.[6]

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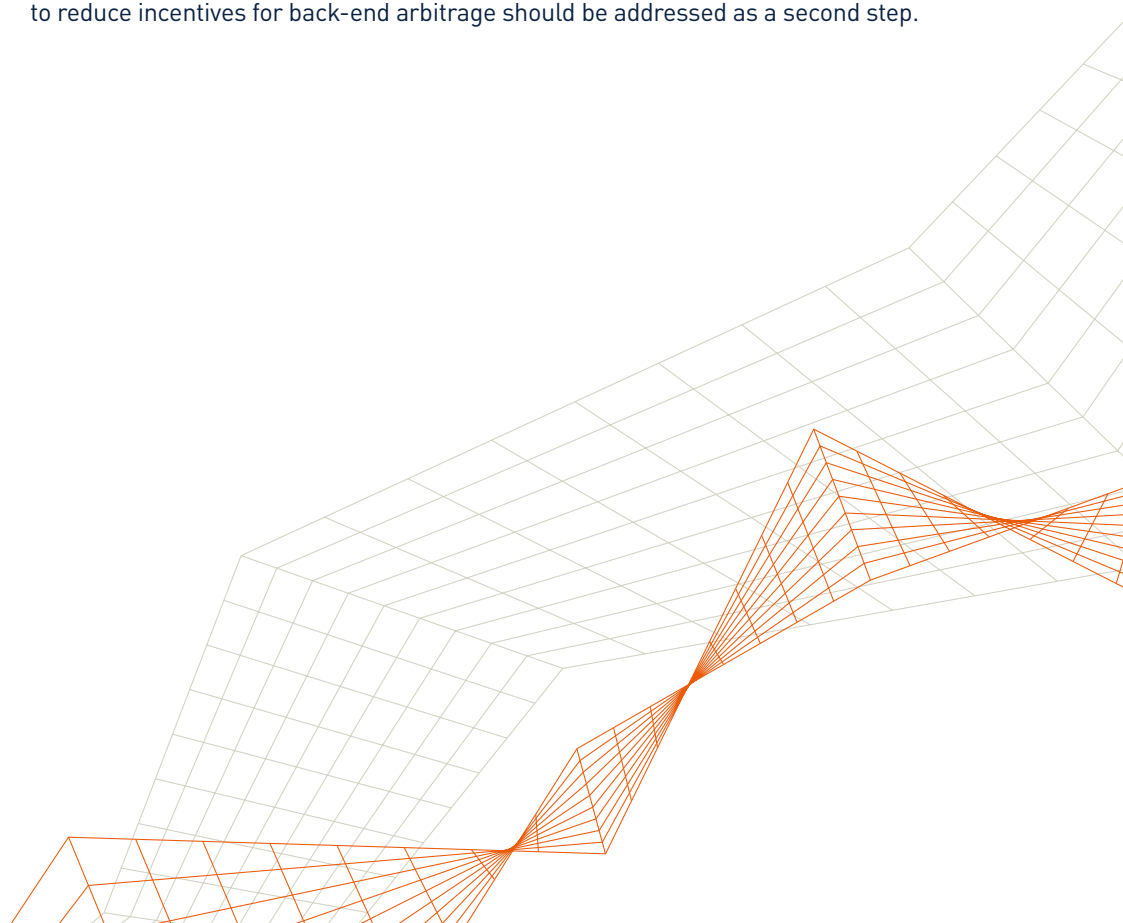
[4] In 2021, for example, only three out of ten takeover bids subject to a minimum acceptance condition provided for a threshold of more than 50% plus one share, and in one of those three cases it had already been ensured by irrevocable tender commitments that the higher threshold would be reached; for references see *Verse/Brellochs*, ZHR 186 (2022), 339, 342.

[5] For a proposal of a regulatory change see *Verse/Brellochs*, ZHR 186 (2022), 339, 370; on the discussion also see *Hasselbach/Pirnay*, NZG 2021, 1636; *Döding*, ZGR 2021, 956; *Schiessl*, FS Seibert, 2019, p. 733; *Cascante/Tyrolt*, AG 2012, 97; *Klemm/Reinhardt*, NZG 2007, 281.

[6] On the foreign jurisdictions see *Verse/Brellochs*, ZHR 186 (2022), 339, 349 et. seq.

Target shareholder protection could be maintained under such a new regulatory regime if it is properly structured. For example, the new extended waiver option could provide that the bidder has to include a reservation in the offer document that the minimum acceptance threshold may also be subsequently waived. Furthermore, permitting the bidder to subsequently waive the minimum acceptance threshold could only be permissible if the threshold was reached e.g. by two thirds. This would prevent bidders from setting a high threshold merely for tactical reasons despite being ready f rom the outset to follow through with the offer even with a much lower acceptance rate. Besides this, the provisions of German takeover law aiming at protecting the target's shareholders (transparency in the offer document, equal treatment and mandatory minimum price rules) would not be affected. Should a shareholder decide to make acceptance of the offer dependent on whether or not the bidder waives the minimum acceptance threshold, the shareholder can wait until the acceptance period has expired. Since the bidder would be required to announce the bidder's decision on the subsequent waiver within a few days of expiry of the acceptance period, shareholders could still tender their shares in the additional two-week acceptance period which is mandatory after a takeover offer (section 16(2) German Securities Acquisition and Takeover Act).

It remains to be seen whether the German legislator will be prompted by the proposed regulatory reform recently put forward to extend the option to waive the minimum acceptance condition. From a practical point of view, this would certainly be desirable. Regardless of this regulatory reform, the more fundamental question under German law – which has been discussed for years – is how to limit incentives to speculate on a higher compensation payment in connection with corporate integration measures after a successful takeover. Compared with this more fundamental question, extending the option to waive the minimum acceptance condition is a first step that seems rather easy to implement and probably less controversial, and it could bring German takeover law closer to international standards in this respect. Afterwards, how to reduce incentives for back-end arbitrage should be addressed as a second step.



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