Public Takeovers in Germany 2020: Overview and current issues

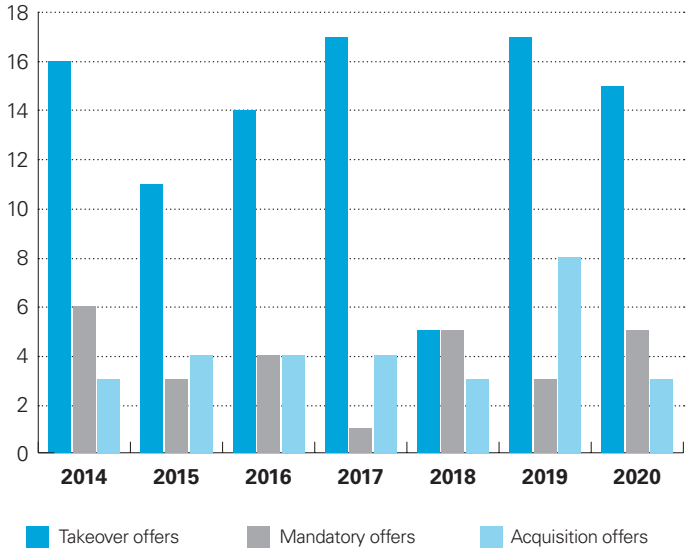
1. Overview of the German public M&A market in 2020

1.1 Key figures

While the COVID-19 pandemic also had an impact on the German takeover market in 2020 due to the mood of uncertainty that dominated stock market activity, it did not slow takeover activity down for any significant period. The concerns that dominated world affairs following the outbreak of the pandemic in Europe and North America had the stock markets in a temporary stranglehold from March onwards. After overshooting the 13,500 points mark on 21 February 2020, the DAX 30 fell to its lowest closing level in six and a half years when it slid to 8,441 points on 18 March 2020 after losing 5.6 percent in only one day. The plummeting stock markets prompted a temporary suspension of stock exchange trading in the US on the same day.

DAX 30 performance in 2020

Looking back at the year on average, the takeover market was buoyant in 2020, as it had been in 2019. Despite the sharp fall in share prices in mid-March 2020, the transactions announced shortly before the "mini crash", such as Schneider Electric/RIB, Hyundai Capital Bank/Sixt Leasing, Covivio X-Tend/Godewind Immobilien and Asklepios Kliniken/Rhön-Klinikum, were executed nevertheless. Offer documents were published in a total of 23 cases and prohibition notices were issued in three cases in 2020. This meant that, while the takeover market was weaker than in 2019, it was still significantly more buoyant than in 2018, a year that saw only 13 takeovers, despite the COVID-19 pandemic. 15 out of the 23 takeovers in 2020 were voluntary takeover offers, five were mandatory offers and three were delisting acquisition offers. Two voluntary takeover offers were combined with a delisting acquisition offer.



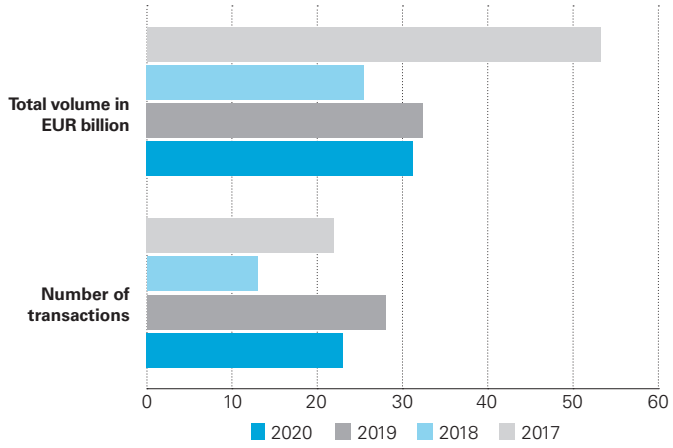
Number of procedures under the Securities Acquisition and Takeover Act (WpÜG) 2014 – 2020

White & Case advised the bidder on the combined takeover/delisting acquisition offer made by ADO Properties to the shareholders of WESTGRUND (transaction volume of just under EUR 935 million). White & Case had already advised ADO Properties on the exchange offer made to the shareholders of ADLER Real Estate published at the beginning of 2020, which accounted for a transaction volume of almost EUR 1.3 billion. Furthermore, the PE investor Battery Ventures was supported by White & Case in the takeover of EASY SOFTWARE AG (transaction volume of approx. EUR 77 million). White & Case also advised Jefferies International Ltd. on the preparation of the opinion letter for the statement of the Supervisory Board of Rhön-Klinikum AG regarding the takeover offer made by Asklepios Kliniken.

Due to the uncertain market environment, the market was once again dominated by smaller transactions in 2020. There were no "megadeals" running into the double-digit billions in Germany in the year under review. The largest takeover would have been that of the Dutch (and Frankfurt-listed) pharmaceuticals group QIAGEN by the US Thermo Fisher Scientific group with a transaction volume of just under EUR 10 billion. This transaction could not, however, be completed successfully, despite an increase in the consideration and a reduction of the minimum acceptance threshold. This means that in 2020 only one MDAX company - namely Metro again - was the target of a successful takeover.

As in previous years, an analysis of transaction volumes in 2020 shows only a small number of large transactions. Only 10 out of the 23 takeover transactions had a volume > EUR 1 billion; these included the Springer SE and Rocket Internet SE delisting acquisition offers. As in previous years, there were almost just as many transactions in the small cap segment (nine transactions with a volume < EUR 100 million). The fact that transaction volumes were lower overall can also be traced back to the drop in share prices in 2020. The best example of this is the renewed takeover bid made by Czech investor Daniel Křetinský for the Metro AG retail group - Metro's share price and, as a result, also the transaction volume for the 2020 takeover bid had more than halved in the space of a year compared to the takeover bid published in 2019. In addition to the unsuccessful takeover of the MDAX company QIAGEN with a transaction volume > EUR 1 billion, two CDAX companies, ADLER Real Estate and ISRA VISION, were the targets of public takeovers.

The total transaction volume of the takeover bids based on the potential acquisition of all shares amounted to EUR 31.2 billion in 2020. Taking into account the non-tender agreements concluded with shareholders in advance and secured by agreements with banks to block securities accounts, the total transaction volume is reduced to EUR 20.9 billion. This means that, despite the extraordinary circumstances in 2020, the transaction volume (without taking non-tender agreements into account) was almost on a par with the previous year (2019: EUR 32.4 billion) and outstripped the level seen in 2018 (EUR 25.5 billion).



Number/volume of WpÜG transactions 2017 – 2020

1.2 Bidders' country of origin and sector focus

In formal terms, the majority of bids in 2020 were submitted by German bidders. There were only six cases in which the bidder was a foreign company (Luxembourg (two bids by ADO Properties), the Netherlands (takeover of QIAGEN by the Dutch bid vehicle of the US Thermo Fisher Group), Malaysia (mandatory offer for Phicomm), Hong Kong (mandatory offer for S&O Beteiligungen) and one bid made by a Swiss private individual (for CENTROTEC)). In a further eight cases, however, foreign buyers were behind the bids/bid vehicles (Atlas Copco (Sweden) for ISRA VISION, Schneider Electric (France) for RIB Software, Hyundai Capital Bank (South Korea, together with Santander, Spain) for Sixt Leasing and the renewed bid made by Czech investor Daniel Křetinský for Metro), as was also the case with the private equity bidders deltus 36 (Battery Ventures)/ Easy Software (Cayman Islands), FS DE Energy (Mitsubishi) / MVV (Japan), Rebecca BidCo (Triton)/Renk (Luxembourg) and Traviata (KKR)/Springer (US). This means that more than 50 per cent of all offers were published by foreign bidders. It is interesting to note that in 2020, a year dominated by the COVID-19 pandemic and a further tightening of foreign trade law, not a single bid was initiated by a Chinese bidder.

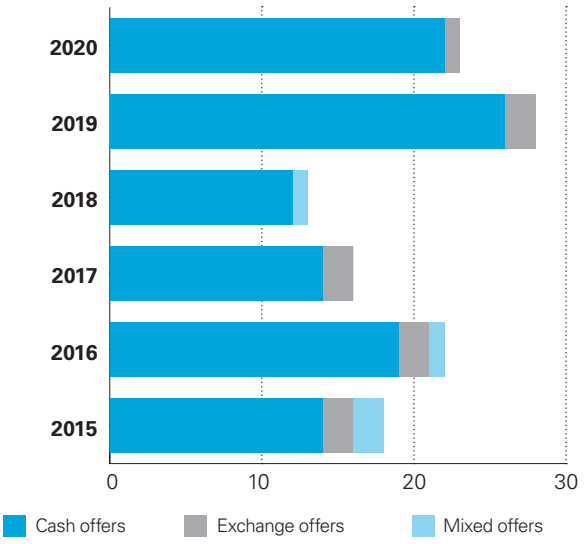
While private equity (PE) investors were also active in the takeover market in Germany last year, they did not play any dominant role. PE investors were involved in six (out of the 23) takeover procedures, including the delisting of Axel Springer SE following its takeover by KKR. Prior to the outbreak of the COVID-19 pandemic, Triton acquired a 76 per cent stake in Renk AG from VW Vermögensverwaltung and launched a takeover bid. Macquarie acquired a 45.75 per cent stake in Mannheim-based MVV Energie AG. Two of the bids in the healthcare sector (for 4basebio and Vital34) were made by PE investors. Finally, PE investor Battery Ventures successfully acquired EASY SOFTWARE AG.

In 2020, as in previous years, the target companies came from a range of sectors, and takeover activity is still not clearly focused on any one particular area. The beginning of 2020 saw another process of realignment in the real estate sector. From a public takeover perspective, the year started with the takeover of ADLER Real Estate by ADO Properties by way of an exchange offer supported by White & Case, after 2019 had ended with the takeover of TLG Immobilien AG by Aroundtown. The acquisition of Godewind Immobilien AG by Covivio X-Tend was announced in February 2020. ADO completed its repositioning process by submitting a takeover bid for WESTGRUND AG – again with the help of White & Case.

Targets of public takeovers in 2020 also included, in particular, companies in the technology sector (ISRA VISION (automation solutions), Teles (communication solutions), RIB Software, Phicomm (routers, etc.), EASY SOFTWARE and Siltronic (semiconductor technology)), as well as companies in the healthcare and pharmaceuticals sector (QIAGEN, 4basebio, Vita34 and Rhön-Klinikum). Repositioning moves in the automotive supplier sector are also reflected in the takeover market (InTiCa Systems and Renk).

1.3 Consideration

Cash offers remain the rule in German public takeover procedures. Only the takeover offer made by ADO Properties for ADLER Real Estate at the beginning of 2020, which was supported by White & Case, was structured as an exchange offer. All other offers were cash-only offers.



Art der Gegenleistung

1.4 Premiums

The premiums over the three-month average share price determined by the German Federal Financial Supervisory Authority (BaFin) were once again also rather low on average in 2020; in some cases, no premiums were paid at all. GlobalWafers paid an increased offer price of EUR 145 (after initially offering EUR 125) to the shareholders of Siltronic AG following a parallel acquisition not related to the takeover offer. Thermo Fisher Scientific offered a similar increase corresponding to approximately 10 per cent of the offer price for the takeover of QIAGEN. Despite the price increase, however, this offer failed to meet the minimum acceptance threshold. Apart from these cases, premiums of = or > 30 per cent were only paid for the Atlas Copco/ ISRA VISION, Schneider/RIB Software, Covivio X-Tend/ Godewind Immobilien and deltus 36 (Battery Ventures)/ EASY SOFTWARE offers.

Premiums for voluntary takeover offers in 2020

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As far as the delisting offers are concerned, it is still the case that no premiums, or small premiums at the most, are being paid (1.43 per cent for the delisting offer made by KKR to the Axel Springer shareholders; the offer document, however, refers to an impact on share price performance as of the time at which market rumours started to emerge regarding the potential acquisition of a stake by KKR and the attractive price of the previous takeover offer). In two of the real estate transactions (Covivio X-Tend/Godewind Immobilien and ADO/ Westgrund), the takeover offer was linked to a delisting acquisition offer. In the first case, a premium was paid as part of the combined takeover/delisting offer. In the case of ADO/ WESTGRUND, the basis for determining the minimum price was a company valuation, as there was no valid three-month average share price and no relevant earlier acquisition to serve as a basis for calculating the minimum price. The same applied to the acquisition of Phicomm AG by Philocity Holdings from Malaysia as part of the mandatory offer; Phicomm AG was not operational at the time of acquisition.

1.5 Prohibitions

A total of three prohibition notices were published by BaFin in public takeover procedures in 2020.

The first prohibition concerned the takeover offer announced by Heidelberger Beteiligungsholding AG to the shareholders of Biofrontera AG, which was to be structured as an exchange offer. The prohibition notice was issued citing the illiquid shares of the bidder, in which Deutsche Balaton AG holds a 77.33 per cent stake. BaFin points out in its notice that neither the Securities Acquisition and Takeover Act (WpÜG) nor the WpÜG Offer Ordinance defines "liquidity" as a requirement. Based on the purpose of the provision and in comparison to the alternative cash consideration, however, BaFin pointed out that it is decisive for the liquidity of the consideration shares that the shareholders of the target company that accept the takeover offer can dispose of the consideration shares acquired as part of the exchange at reasonable conditions and in a timely manner in return for payment of cash consideration in euros, i.e. that they have the opportunity to divest of the shares promptly. Despite the minimum acceptance threshold set out in the offer document that was submitted and the non-tender agreements that were concluded, BaFin noted that, following the publication of the offer document, trading

in the bidder's shares on the stock markets had decreased significantly as opposed to increasing. BaFin said that a scenario in which only the designated sponsor was available to buy the consideration shares was not sufficient. As a result, the offer was prohibited on the grounds that the consideration shares were not sufficiently liquid.

Consequently, the takeover battle for Biofrontera AG between the bidders Maruho and Deutsche Balaton did not enter the next round in 2020. Deutsche Balaton had already been issued a prohibition notice in 2018 regarding an acquisition offer for Biofrontera – at that time, the information on the warrants offered as consideration in the offer document did not meet the requirements that apply under prospectus law. Following the first prohibition, Deutsche Balaton had made two further takeover offers to Biofrontera's shareholders, but still only holds a stake of just under 30 per cent of Biofrontera's shares, as does the competing bidder Maruho.

The Frankfurt Higher Regional Court (*Oberlandesgericht*, OLG) confirmed the prohibition notice in its decision of 11 January 2020 (WpÜG 1/20). Surprisingly, the grounds for this decision include a reference to the MiFID Implementing Regulation and intends to take the standard for the liquidity of shares within the meaning of section 31 (2) sentence 1 WpÜG from this regulation - which is ultimately irrelevant to the decision and extends far beyond BaFin's established review criteria. This would mean that exchange offers would only be possible if the bidder has a free float of at least EUR 500 million. BaFin should be encouraged to stick to its current practice. In February 2021, a bidder with links to Deutsche Balaton was again prohibited from making an intended exchange offer – this time to the shareholders of Kromi AG – due to the shares not being sufficiently liquid.

The second prohibition notice of 2020 related to the failure of VICUS GROUP AG to make a mandatory offer to the shareholders of Travel24.com AG after acquiring control on 15 January 2020. In this case, the offer document was not submitted on time, prompting BaFin to issue the prohibition notice so as to avoid any dispute as to the claim for interest (section 38 no. 3 WpÜG) and the loss of rights (section 59 WpÜG) in particular. The VICUS GROUP finally published a mandatory offer together with three private individuals on 25 November 2020. The offer document points out that, in BaFin's opinion, the acquisition of control should have already been disclosed on 5 October 2017 at the latest due to the acquisition of control by the VICUS GROUP on 28 September 2017; a further acquisition of control took place in September 2019. The offer price takes the claim for interest pursuant to section 38 WpÜG into account.

The third prohibition published by BaFin on 21 August 2020 also related to a failure to submit an offer document on a mandatory offer in due time. Dana Middle East Technology W.L.L. (Manama Bahrain) and Mr Naif Omar A Alharti (Saudi Arabia) should have submitted the offer document following the reported acquisition of control of Fritz Nols AG within the meaning of the Securities Acquisition and Takeover Act. The bidders issued a public statement on the prohibition and justified their failure to make a mandatory offer by pointing to the tense global situation due to the COVID-19 pandemic, resulting border closures and other global disruption. Furthermore, they stated that there was no contact person available at the target company to allow for constructive communication, as the target company's Supervisory Board was not fully staffed. They said that it was also unclear whether the current CEO was still in place. In addition, they added that, as it is not common practice to deposit funds in a separate blocked account in Saudi Arabia, where one of the bidders is resident, there were delays in obtaining confirmation of financing. As at the end of February 2021, it was still the case that no mandatory offer had been published in this matter.

2. Current market practice for successful takeover procedures

After the COVID-19 pandemic emerged as the factor dominating market activity in 2020 in March at the latest, the question arises as to whether bidders acted differently than in previous years in terms of how they structured and secured the bids they made to shareholders in listed companies. As the parameters investigated below show, the pandemic has not had much of an impact on the market for public takeovers overall.

Only one voluntary takeover offer, namely the exchange offer made by ADO Properties to the shareholders of ADLER Real Estate that was published in January 2020 - i.e. prior to the outbreak of the pandemic - and supported by White & Case, did not contain any conditions. In this case, offer conditions were dispensed with because the offer was secured by concluding agreements on irrevocable undertakings prior to the transaction, and also because the antitrust authorities had approved the transaction before the offer document was published. Otherwise, as in previous years, the broad range of conditions permitted under the Securities Acquisition and Takeover Act was used.

2.1 Market-related conditions

Contrary to what one would expect during a pandemic, market-related conditions only played a role in the small number of large transactions seen in 2020. The last takeover bid published in 2020 (GlobalWafers/Siltronic), for example, contains the closing condition that no ad hoc disclosure should have been published before the expiry of the acceptance period due to an adverse change at the target company, and that a certain index (in this case the PHLX-Semiconductor-Sector Index (NASDAQ) and the MDAX) must not have fallen significantly. The "material change at the target company triggering a mandatory ad hoc disclosure" was specified as relating to EBITDA of at least EUR 100 million, with the index values also being specified. The takeovers of Metro and QIAGEN, i.e. the other takeovers with the highest transaction volumes in 2020, were also based on a certain precisely defined development in the relevant market index as a closing condition. In the case involving QIAGEN, an "independent expert" was already named in the offer document as being responsible for reviewing the materiality of any breaches; in the case of the Siltronic takeover, the "independent expert", who was not named in advance, is only to take action when asked to do so by the bidder.

2.2 Minimum acceptance threshold

As in previous years, reaching a minimum acceptance threshold proved to be a particular hurdle for bidders in 2020, too. Only six out of the 15 voluntary takeover offers published included a minimum acceptance threshold. At the end of the offer period, the minimum acceptance threshold initially set in the offer document had only been reached in half of these cases. In the last procedure of 2020 (GlobalWafers/Siltronic), the minimum acceptance threshold had to be lowered from 65 per cent to 50 per cent. The 50 per cent threshold was ultimately exceeded with an acceptance rate of 56.92 per cent (at the end of the further acceptance period, the acceptance rate was as high as 70.27 per cent). The takeover of QIAGEN was a different story: in this case, the bidders held only 46.59 per cent of the share capital after the end of the acceptance period, meaning that they failed to reach the minimum acceptance threshold, which had been lowered from 75 per cent to 66.67 per cent. It would seem that QIAGEN's shareholders considered the offer price to be insufficient after QIAGEN's revenue and profits had increased significantly due to the high demand for COVID-19 tests. With its takeover bid for InTiCa Systems, PRINTad Verlags GmbH was only just able to exceed the control threshold of 30 per cent - the minimum acceptance threshold of 50 per cent + 1 share had previously been dispensed with. As far as the other bids with minimum acceptance thresholds are concerned (Hyundai/Sixt; deltus 36 (Battery Ventures)/EASY SOFTWARE; Schneider/RIB), the minimum acceptance thresholds defined were exceeded successfully in each case without any subsequent reductions.

2.3 Other trends in the structure of takeover procedures

(a) Acceptance period

The market trend is clearly towards the short statutory minimum period of four weeks, as longer acceptance periods have not increased an offer's prospects of success in the past. Professional investors, in particular, tender their shares shortly before the end of the acceptance period – regardless of how long it is. Acceptance periods of 10 weeks were only seen in the takeover of Renk by Triton and in the QIAGEN takeover procedure.

(b) Regulatory conditions

The implementation of regulatory proceedings has increased due to the gradual tightening of foreign trade regulations in Europe and the US in recent years (see below, 5.1). The Czech bidder Daniel Křetinský, for example, had to obtain investment control approval in France and Italy for the takeover of Metro and make the bid subject to the granting of such approval. The Taiwanese bidder GlobalWafers was advised by White & Case on all investment control and antitrust proceedings in connection with the takeover of Siltronic AG. The takeover of Renk by Triton was subject to a sector-specific review under section 60 of the German Foreign Trade and Payments Ordinance (AWV) and further foreign trade law review proceedings in France, Canada, the UK and the US. In the case involving the takeover of RIB Software SE by Schneider Electric Investment AG, the CIFUS application is being filed voluntarily as a precautionary measure. The acquisition of ISRA VISION by Atlas Copco was subject to a mandatory investment control review in the US, as US subsidiaries of ISRA VISION operate critical technology equipment for which CFIUS applications have to be filed as a mandatory requirement.

The takeover of Sixt Leasing SE by Hyundai Capital Bank Europe GmbH required the implementation of what is known as an ownership control procedure, i.e. approval of the transaction by BaFin. In such cases, BaFin has to either (i) prohibit the intended acquisition of a significant holding in an institution as defined in the German Banking Act (*Kreditwesengesetz*, KWG) within the period of time available to it pursuant to section 2c (1a) KWG (60 working days) or (ii) have issued a corresponding non-objection declaration regarding the intended acquisition of a significant holding in connection with the transaction within this period. The transaction was completed successfully in July 2020.

Antitrust proceedings were conducted in ten cases in 2020.

(c) Business combination agreements and other pre-transaction agreements

In takeover law practice, the conclusion of what are known as pre-transaction agreements has proven to be an effective strategy. Particularly in more significant transactions, this approach creates a framework for a successful company takeover by allowing the parties to jointly define the key parameters for the transaction and the planned subsequent integration process. The main contents of this sort of pre-transaction agreement are also summarised in the offer document. As a rule, pre-transaction agreements are not published in full; if at all, they are summarised in ad hoc disclosures or press releases.

Business combination agreements (BCAs) were concluded in advance for the larger takeovers, in particular, such as the recent takeover of Siltronic by GlobalWafers, but also in the takeover of ISRA VISION by Atlas Copco, the takeover of RIB Software by Schneider Electric, the failed takeover of QIAGEN by Thermo Fisher and the exchange offer made by ADO Properties to the shareholders of ADLER Real Estate. Thermo Fisher and QIAGEN amended the BCA after they adjusted the offer (improving the offer price and lowering the minimum acceptance threshold); nevertheless, it was still not possible to make the offer a success. In the case of the failed QIAGEN takeover, the BCA included a break fee of US$95 million, according to media reports. Under the BCA concluded by ADO Properties and ADLER Real Estate, the bidder would have been obliged to pay ADLER Real Estate a break fee of EUR 50.0 million and ADLER Real Estate would also have been obliged to pay the target company a cooperation penalty in the same amount if the transaction had failed. Other agreements on potential break fees in BCAs have not been made public. Triton entered into an "investment agreement" when it acquired Renk.

The background to the takeover of Rhön-Kliniken by Asklepios was a joint venture agreement that the bidder had concluded with Rhön Klinikum AG's major shareholders.

Delisting agreements are also often concluded in delisting procedures. In 2020, this was the case in three out of five delisting procedures.

(d) Earlier acquisitions and irrevocable undertakings

In recent years, it has become common practice to secure the success of the takeover bid by taking appropriate accompanying measures in advance. In addition to earlier acquisitions of larger blocks of shares, the core components of these measures include, in particular, the conclusion of conditional share purchase agreements or option agreements, as well as irrevocable undertakings with shareholders of the target company.

Irrevocable undertakings, i.e. irrevocable commitments by shareholders to accept a takeover offer, remain one way of securing a transaction's success and have become common practice in German takeovers. In 2020, pre-transaction agreements like these were concluded with shareholders in connection with five takeover bids. Prior to the takeover bid for Siltronic AG, for example, GlobalWafers, concluded an irrevocable undertaking with Wacker Chemie together with the bidder, with the latter securing a block of shares worth approximately 30 per cent of the share capital. The PE bidder Battery Ventures even gained access to around 62 per cent of the share capital of EASY SOFTWARE AG via irrevocable undertakings like these. Similarly, Atlas Copco secured a block of shares worth approximately 29 per cent, while Schneider secured 9 per cent of the share capital in the target company in its bid for RIB Software. ADO Properties had also received irrevocable undertakings from ADLER shareholders in the amount of approximately 52 per cent of the share capital before the exchange offer was published.

Share purchase agreements were concluded in various forms in 14 (out of the total of 23) offers.

Especially in cases involving high-volume offers - depending on the intention pursued with the offer - safeguards like these are, however, sometimes dispensed with. For example, the most recent offer made by Czech investor Daniel Křetinský for Metro did not involve any safeguards, as the investor already held 29.99 per cent of the voting rights before the offer was made and the renewed takeover offer served merely to acquire control and avoid a mandatory offer as a result. The situation involving the attempted acquisition of QIAGEN by Thermo Fisher Scientific was different. This transaction ultimately failed because the minimum acceptance threshold was not reached, even though the bidder had offered an attractive purchase premium ultimately corresponding to 30 per cent over the three-month average share price determined by BaFin. As Thermo Fisher Scientific was unable to secure access to larger blocks of shares by taking appropriate measures, the takeover attempt failed. In the takeover of InTiCa Systems, PRINTad Verlags GmbH was only able to exceed the control threshold by dispensing with the minimum acceptance threshold of 50 per cent + 1 share. Given the lack of any other safeguards, this offer, too, would otherwise have failed based on the minimum acceptance threshold.

(e) Non-tender agreements

Agreements aimed at preventing the tendering of shares serve, in particular, to reduce the transaction volume and, as a result, also the financing volume. As a general rule, BaFin requires the bidder to ensure that funds are available to satisfy the offer in full (i.e. to acquire all shares belonging to third parties) before the offer document is published. BaFin had, however, already relaxed its long-standing practice back in 2010 and allows for qualified non-tender agreements subject to certain conditions (in particular conclusion of an agreement with the bank concerned to block securities accounts and agreement of a contractual penalty in the event that the non-tender agreement is breached) as a measure to secure financing. Occasionally, however, bidders opt not to include such non-tender agreements for the purposes of the financing confirmation that is to be submitted, most recently in the case involving Schneider Electric in its takeover bid for RIB Software in 2020. Non-tender agreements are now common market practice and were concluded in 13 cases in 2020 (out of a total of 23 procedures).

3. Statements by the target company

As in previous years, the joint submission of a reasoned statement by the management board and the supervisory board was the rule in takeover proceedings in 2020. In 2019, only the Management Board of Biofrontera had published an amended statement of its own, following the acquisition offer by Maruho Germany, in which it declared its intention to accept the offer. In 2020, separate statements by the management board and the supervisory board were only published for the takeover of Rhön-Klinikum AG by Asklepios Kliniken. This was likely due to the stakes held by various Supervisory Board members in the target company and the fact that the takeover was essentially a hostile takeover. White & Case advised the financial advisor to the Supervisory Board of Rhön-Klinikum AG in connection with the preparation of the fairness opinion.

In thirteen out of 23 cases, the management and supervisory boards welcomed the offer of the respective bidders; there were only four cases in which the management and supervisory boards decided against the offer. Metro's management once again defended itself against the repeated takeover bid launched by Czech investor Daniel Křetinský after the latter's ultimately unsuccessful takeover bid had already been rejected by the management team back in 2019.

The management and supervisory boards of Vita34 and InTiCa Systems justified their recommendations not to accept the offers with the low share price. The Executive Board and Supervisory Board of MVV Energie AG, on the other hand, used different arguments in their statement rejecting the offer, referring to a wish to keep the free float at the current level (prior to the execution of the takeover bid) in the interests of the Group.

Even though, at around 26 per cent (6 out of 23 statements evaluated), the proportion of neutral statements was down on the previous year, a reluctance among target company management teams to issue a clear positive or negative statement has become established practice in the market. This means that the legal practice accepted by BaFin contradicts the theory, with the relevant literature calling for neutral statements to be limited to a small number of exceptional cases. Within this context, the question arises as to whether this sort of neutral stance taken by the management is consistent with the purpose of the statement as defined in section 27 WpÜG. For practical purposes, neutral statements should be based on a comprehensive overall consideration of the specific case. If the overall picture does not allow for a recommendation either way, then a neutral (justified) statement can be made.

One special case among the neutral statements was the transaction involving Rocket Internet SE. This public delisting buyback offer involved Rocket Internet as both the bidder and the target company. A specific recommendation for action by the Management Board and Supervisory Board – i.e. anything other than a neutral statement – would therefore have been a recommendation for or against the company's own offer.

In 2020, there were only four cases in which works councils/ employee representatives exercised their right to publish their own statement in addition to the management board and supervisory board statements after being informed of the offer pursuant to section 10 para. 5 WpÜG, compared with six cases in the previous year. In the case of Metro, the works council referred to the statement it had already submitted in 2019, according to which the main aim was to avoid any job cuts by concluding an investor agreement.

Obtaining fairness opinions by management bodies is now considered standard practice. In 2020, fairness opinions were obtained for 15 out of the 23 bids. Metro's Management Board and Supervisory Board went as far as to obtain three valuation reports (BofA Securities, Goldman Sachs and Rothschild), which served as the basis for their negative opinion.

4. Court decisions relating to takeover law in 2020

Takeover law disputes in 2020 once again related to the adequacy of the consideration – in one case due to agreements concluded after the takeover bid and in the other due to agreements concluded prior to the takeover bid. Once again, the takeover of Stada by private equity investors Bain and Cinven back in 2017 and the subsequent integration measures, as well as the 2010 takeover of Deutsche Postbank by Deutsche Bank came under scrutiny.

In its judgment of 7 July 2020 (5 U 71/19), the Frankfurt Higher Regional Court has now confirmed the decision made by the first instance court in the Stada case in a final and non-appealable judgment. The proceedings were based on an agreement between the bidder/its sister company and Elliott one day before the end of the additional acceptance period on an irrevocable commitment under which Elliott undertook to agree to a control and profit and loss transfer agreement with a minimum compensation offer of EUR 74.40 at the Annual General Meeting. The plaintiff had accepted the takeover offer in the amount of EUR 66.25 within the acceptance period. Elliott had sold its entire block of shares to the Stada owners on the basis of the irrevocable commitment at the significantly higher price of EUR 74.40 per share agreed therein.

The Higher Regional Court confirmed that a claim for subsequent payment pursuant to section 31 para. 5 sentence 1 WpÜG is precluded by the exception in scope set out in section 31 para. 5 sentence 2 WpÜG. In the opinion of the Frankfurt Higher Regional Court, the compensation claim arising from a control and profit and loss transfer agreement (section 305 para. 1 of the German Stock Corporation Act (AktG)) is a case involving a statutory obligation to pay compensation to shareholders. The same applies to a possible claim under section 31 para. 6 sentence 1 WpÜG. With regard to a claim for damages due to the publication of an incorrect offer document pursuant to section 12 para. 1 WpÜG, the Higher Regional Court clarifies that the requirements of this provision are not fulfilled simply because the potential opportunity to conclude this sort of agreement or a "mental reservation" to that effect is not explicitly mentioned in the offer document. As a result, failure to update an originally correct/complete offer document does not fulfil the liability requirements set out in section 12 para. 1 WpÜG either.

Regarding the question as to the extent to which pre-transaction agreements lead to an acquisition of control by the bidder, meaning that the takeover bid was executed too late, the Higher Regional Court of Cologne made a statement in two largely parallel judgments on 16 December 2020 (13 U 166/11; 13 U 231/17) in the Deutsche Bank//Postbank case. These judgments were based on the claims filed by several former Postbank shareholders who had accepted the takeover offer at a price of EUR 25.00 in 2010 in the context of the takeover by Deutsche Bank. Referring to agreements already concluded with Postbank in 2008, shareholders of Deutsche Bank claimed that, due to the control obtained as a result of the agreements, a mandatory offer should already have been made before 2010 at a significantly higher offer price and asserted claims for the payment of the difference.

The proceedings started with the action filed by Effecten-Spiegel with the Regional Court of Cologne in 2011 (82 O 28/11). Later on in the proceedings, the German Federal Court of Justice referred the case back to the Higher Regional Court of Cologne (II ZR 353/12). Several small shareholders then also filed a lawsuit with the Regional Court of Cologne (13 U 231/17), which essentially ruled in their favour in 2017. With the two most recent rulings of 16 December 2020, the Cologne Higher Regional Court upheld Deutsche Bank's appeal.

In its final and non-appealable decisions, the OLG clarifies that neither the original agreement between Deutsche Bank and Deutsche Postbank dating back to September 2008, nor any subsequent actions led to an acquisition of control by Deutsche Bank before October 2010. In particular, Deutsche Bank did not exceed the control threshold of 30 per cent of the voting rights of Deutsche Postbank, which is decisive for the submission of a mandatory offer, at an earlier point in time due to agreements such as a share pledge agreement or a mandatory convertible bond. There was also no attribution of voting rights due to acting in concert. The decisive factor, according to the court, was the agreed interest protection clause, under which the bidder had undertaken to exercise the rights to which it was entitled under stock corporation law only taking the interests of the target company into account until the execution of the mandatory convertible bonds.

A staggered transfer of shares was also not to be seen as a reason for attribution. In the absence of any influence over the target company, the conclusion of standstill or non-delivery agreements also cannot, in the court's opinion, constitute acting in concert.

Ultimately, while the court division confirmed that the case did not constitute acting in concert, it explicitly permitted an appeal on points of law based on legal questions in connection with the interpretation of the requirements for attribution set out in section 30 para. 2 WpÜG. At least in the case of Effecten-Spiegel, one shareholder has already made use of this right and had lodged an appeal on points of law against the ruling of the Cologne Higher Regional Court.

5. Adjustments to the overall legal conditions for public takeovers in Germany

5.1 Renewed changes in basic foreign trade law conditions

Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (EU FDI Screening Regulation) was announced in the Official Journal of the European Union on 21 March 2019 and entered into force in October 2020. With the amendment to the German Foreign Trade and Payments Act, which entered into force on 17 July 2020, the German legislator made changes to the legal basis for German investment screening law to reflect the requirements set out in the EU FDI Screening Regulation. The legislator has also implemented the cooperation mechanism provided for in the EU FDI Screening Regulation and has reacted to developments related to the COVID-19 pandemic by making two further amendments to the German Foreign Trade and Payments Ordinance (AWV).

In particular, the screening standards were tightened up as part of the amendment to the Foreign Trade and Payments Act: the decisive factor is now whether the acquisition by a non-EU/EFTA investor leads to a "probable impairment" of public order or security (instead of an "actual threat", which was the wording used previously). In cases involving critical company acquisitions, the "probable impairment" screening standard represents an extension of the discretionary powers of the Federal Ministry for Economic Affairs and Energy (BMWi), which is responsible for the procedures, meaning that it is a more stringent standard than its predecessor.

The 16th Ordinance amending the German Foreign Trade and Payments Ordinance, which came into force on 29 October 2020, implements the European screening mechanism in particular. This means that the investment screening programme now also includes probable impairments of public order or security of other EU member states as well as with regard to certain projects and programmes that are in the EU's interest. In January 2021, the Federal Ministry for Economic Affairs and Energy (BMWi) submitted a further amendment to the German Foreign Trade and Payments Ordinance for consultation. Based on the requirements of the EU FDI Screening Regulation, the amendment is designed to designate further critical technologies as particularly relevant to security in the future, meaning that transactions involving the acquisition of even only 10 percent of the shares will be subject to screening and reporting requirements. The consultation process on the announced further amendment to the German Foreign Trade and Payments Ordinance was completed on 26 February 2021.

The 15th Ordinance amending the German Foreign Trade and Payments Ordinance had already come into force on 2 June 2020, focusing on an extended screening obligation for the acquisition of companies in the healthcare sector – in light of the COVID-19 pandemic.

It is not only the introduction of the European cooperation mechanism that has made the regulatory procedures more complex, especially for cross-border transactions. The extension of the transaction duration associated with the initiation of investment control screening proceedings and the need for coordination with other screening procedures (in particular those involving the antitrust authorities and, in individual cases, ownership control procedures) in a large number of transactions mean that all bidders will aim to initiate regulatory screening proceedings at the earliest possible point in time so as to obtain legal certainty. In these cases, the inclusion of regulatory conditions in the offer document is also mandatory.

5.2 COVID-19 and the German Economic Stabilisation Fund Act (WStFG)

In view of the COVID-19 pandemic, the German legislator has taken action to protect the economy, creating a new Economic Stabilisation Fund (*Wirtschaftsstabilisierungsfonds*, WSF) in order to take targeted measures to prop up the real economy and safeguard jobs for a limited period of time. These efforts are based on the German Economic Stabilisation Fund Act (*Wirtschaftsstabilisierungsfondsgesetz*, WStFG) of 27 March 2020, which comprises the Stabilisation Fund Act (*Stabilisierungsfondsgesetz*, StFG, Article 1) and the Economic Stabilisation Acceleration Act (*Wirtschaftsstabilisierungsbeschleunigungsgesetz*, WStBG, Article 2).

For the purposes of recapitalisation, the German federal government can, for example, acquire stakes in companies

in need of stabilisation – including listed companies – via the Economic Stabilisation Fund in accordance with section 22 para. 1 StFG. The Economic Stabilisation Fund Act provides for some procedural relief in this regard. When shares are acquired by the fund, for example, there is no obligation to inform the economic committee/works council, nor is there a duty to make a disclosure under securities trading law. When control is obtained within the meaning of the Securities Acquisition and Takeover Act (WpÜG), BaFin exempts the fund from the obligation to make a mandatory offer. There is also no attribution of voting rights if shareholders coordinate the exercise of voting rights with the federal government or the fund in connection with stabilisation measures.

If the federal government (or the Economic Stabilisation Fund) submits a voluntary takeover offer, special regulations apply, in particular with regard to the length of the acceptance period and the offer price. The fund can carry out a squeeze-out under stock corporation law if it owns 90 percent of the shares (instead of the 95 percent otherwise required under stock corporation law). No cases in which the takeover law exemptions provided for in the Economic Stabilisation Fund Act have been applied have come to light in the market to date. Major proceedings under the Economic Stabilisation Acceleration Act in 2020 were the stabilisation package for Deutsche Lufthansa (involving White & Case) and the restructuring of TUI AG.

5.3 Market Abuse Regulation and Issuer Guidelines

In takeover law, BaFin's administrative practice on ad hoc disclosures and insider law is of particular importance. On 22 April 2020, BaFin published Module C (Requirements based on the Market Abuse Regulation (MAR)) as a further part of the 5th edition of the Issuer Guidelines, which were most recently revamped in full in 2013, on its website. The background to the new edition was the MAR, which came into force in 2016, court decisions that have been made in the meantime and adjustments to current administrative practice. The new edition provides capital market participants with a transparent guide to topics covered by the MAR, namely ad hoc disclosures, insider trading and market abuse, which also provides assistance in evaluating individual questions in connection with transactions under the Securities Acquisition and Takeover Act.

Particularly in the preparatory phase of a public takeover, it is important to consider intermediate steps that are relevant from an inside information perspective. In this respect, BaFin has supplemented its requirements to include examples, illustrating how important it is to consider each case individually, as was already the case in the draft version of Module C. The following changes compared to the draft are particularly worth noting:

- The question as to whether the conclusion of a letter of intent in connection with an M&A transaction is relevant from an inside information perspective depends on whether it contains, for example, agreements on the key aspects of the future agreement, a price range or another agreement that documents the serious willingness of the negotiation parties to reach an agreement. Based on BaFin's new wording, even an existing firm company takeover intention is only considered a relevant intermediate step if the potential buyer has "manifested" the firm intention.
- A non-disclosure agreement for the initial exchange of information in transactions is often concluded at an early stage in the process, meaning that the success of the transaction is still "unlikely" at this point in time and the agreement is not, as a rule, considered to give rise to inside information.
- In cases involving the internal reservation of consent by governing bodies, it is emphasised that relevance for the purposes of inside information depends on the circumstances of the individual case. In the absence of any special circumstances, it can generally be assumed that the management board, due to its cooperation with the supervisory board, already has an idea as to what the supervisory board's decision will be in advance.

The overall conditions for the delay of disclosure of insider information were also adjusted - instead of "self-exemption", the term "delay of disclosure" is now used throughout. If the confidentiality of the inside information is no longer guaranteed during the period of delay, it must be disclosed to the public immediately pursuant to Article 17 para 7 MAR. This also includes situations where a "sufficiently accurate rumour" that relates to the inside information has been made public. BaFin points out that there is no standard response in Europe to the question of when a rumour is sufficiently accurate. According to BaFin, a rumour is sufficiently accurate if it contains a kernel of truth and explicitly relates to inside information. This will always be the case if the information that can be derived from the rumour indicates that there has been a leak of information and that the confidentiality of that inside information can therefore no longer be ensured. That is the case if parts of the circumstances underlying the inside information have been circulated or if even details or the entire information have become known. In such cases, (which, in BaFin's view, are likely to be the exception

rather than the rule, and) which must be assessed by the issuer on a case-by-case basis, silence of the issuer or a "no comment" policy would not be acceptable. However, circulating speculations or rumours without any substance is not sufficient to trigger a disclosure obligation – a new clarification in this respect as well.

5.4 German Corporate Governance Code

The German Corporate Governance Commission had already adopted an amended version of the Code on 16 December 2019, although it was not published in the Federal Gazette, and therefore did not enter into force, until 20 March 2020. With regard to the conduct of the management board in the event of takeover offers, the new version keeps the suggestion already contained in the previous version of the Code, namely that in the event of a takeover offer, the management board should convene an Extraordinary General Meeting at which the shareholders discuss the takeover offer and may decide on corporate actions. In practice, this suggestion is often not applied. It was only in connection with the takeover of Rhön-Klinikum AG by Asklepios Kliniken that an extraordinary general meeting was held at the request of two shareholders – i.e. not at the instigation of the management board.

6. Outlook

The COVID-19 pandemic continues to dominate the news without any immediate impact on the capital markets. Nevertheless, many investors are taking a sceptical view of current stock market valuations and appear to be waiting for a market adjustment. After the public takeover market escaped the impact of the crisis largely unscathed in 2020, many are eager to see how things will develop going forward.

The 2020 bidder structure shows that the significant tightening up of foreign trade law at German and European level seems to be deterring some foreign (non-EU/EFTA) bidders. The German government demonstrated its interest in protecting German companies operating in what are known as "key sectors" in June 2020 with its "preventative" acquisition of a stake in the vaccine manufacturer Curevac via the German state-owned development bank KfW. The announced increase in the scope of reportable transactions in the technology sector in the next amendment to the German Foreign Trade and Payments Ordinance referred to above is likely to increase the number of transactions subject to regulatory screening.

White & Case remains very active in the area of public takeovers, most recently in the cross-border takeover of Dialog Semiconductor plc, which is listed exclusively in Frankfurt, by the Japanese bidder Renesas Electronics Corporation, announced on 8 February 2021, with a transaction volume of EUR 4.886 billion.

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