



Hogan
Lovells

Public Takeovers in Germany

Newsletter 2022

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1. Introduction

Welcome to the fifth edition of our “Public Takeovers in Germany” newsletter. It provides an overview of public takeovers carried out in Germany in 2021 under the German Securities Acquisition and Takeover Act (WpÜG) and of recent developments in German public takeover law.

As a global law firm, we are constantly observing the M&A markets in Germany and abroad. We would like to share our insights with you in this newsletter.

The main part of this newsletter presents a statistical overview of the public takeovers executed in Germany in 2021 under the WpÜG. This overview is based on the database of German takeover bids published by the German Federal Financial Supervisory Authority (BaFin). In addition, we have analyzed the management statements published by the management boards and supervisory boards of the target companies. Wherever a public offer was amended, our analysis reflects only the data from the final version of the offer, unless indicated otherwise.

In the “Profile” section we showcase in more detail what we consider the most noteworthy public takeover bids of the past calendar year in Germany. In 2021, this undoubtedly was the takeover of Deutsche Wohnen SE by Vonovia SE, which failed at the first attempt but was subsequently successful.

Finally, we discuss recent legal developments which are relevant for the German takeover market. This newsletter first discusses the judgment issued by the German Federal Court on 23 November 2021 (Case No. II ZR 312/19) in which the court considers the question whether shareholders who have not tendered their shares into a voluntary takeover offer are nonetheless entitled to receive the appropriate consideration under sec. 31 para. 1 WpÜG. Further we review the judgment issued by the Higher Regional Court of Frankfurt a. M. on 11 January 2021 (Case No. WpÜG 1/20), in which the court significantly tightened the liquidity requirements for shares granted as consideration in an exchange offer, in deviation from BaFin’s previous practice.



2. Statistics

2.1 Overview – market trends

In 2021, the public takeover market in Germany showed the following trends:

- With 34 public offers, last year saw by far the highest activity in the German takeover market within the period of the last six years.
- With an offer volume of EUR 59.24 billion in 2021, the previous highest volume of 2019 was almost doubled.
- In contrast, the average offer premium reached a relatively low 14.52% in relation to the weighted three-month average price prior to the offer in comparison to the period of the last six years.
- The technology and real estate sectors were by far the most active industry sectors. Slightly less than half of the public takeover bids took place in these sectors.
- Although the proportion of neutral statements has decreased compared to the previous year, with 21%, it still represents a significant proportion.
- Foreign investors accounted for 70% of public takeovers, either submitting bids directly or via German acquisition vehicles.

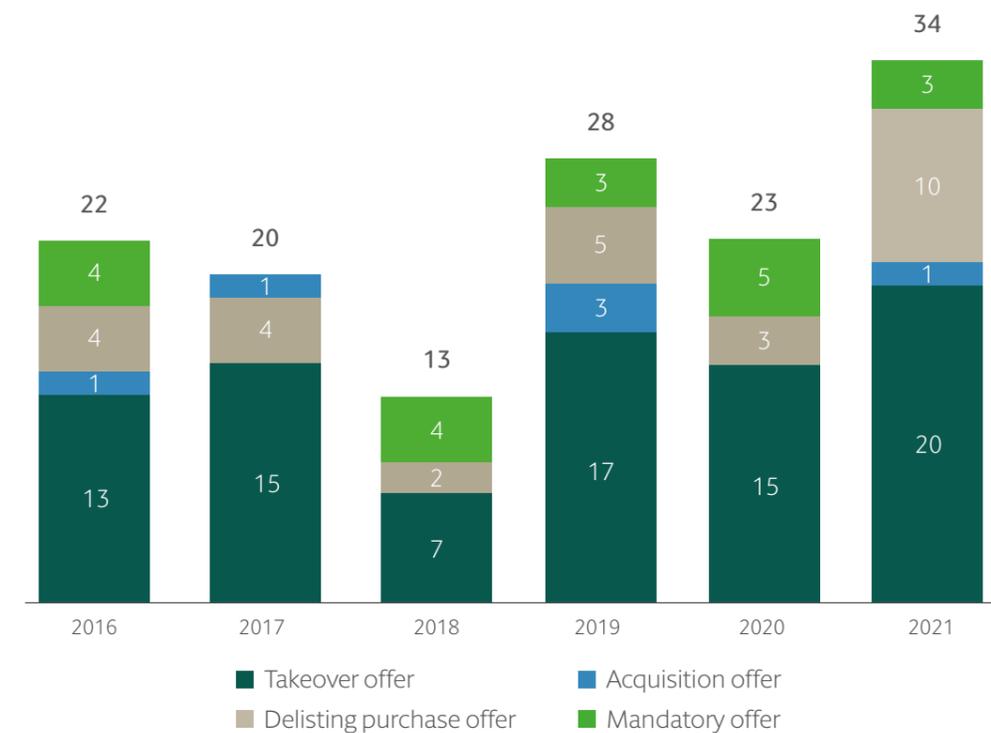
2.2 Public takeovers and offer types

By the end of 2021, there were a total of 34 public offers in Germany. Within the period of the last six years, last year saw by far the highest level of activity in the German takeover market. This significantly exceeded the previous peak from 2019 (28 public takeovers).

Once again, most of the offers made in 2021 were takeover offers. The number of mandatory offers decreased slightly to three. Compared with previous years, there was also a significant increase in delisting purchase offers. Not only were ten stand-alone delisting purchase offers published in 2021, but three of the 20 takeover offers were combined with a delisting purchase offer. Furthermore, two of the mandatory offers were combined with a delisting purchase offer. For the statistics, the combinations with delisting purchase offers were each qualified as takeover offers or mandatory offers.

With the exception of the takeover offer by Acorn HoldCo Inc. to the shareholders of ADVA Optical Networking SE (exchange offer), all public offers in 2021 were made by way of a cash offer.

An intended exchange offer by 4basebio AG to the shareholders of KROMI Logistik AG was prohibited by BaFin pursuant to secs. 34 and 15 para. 1 no. 2 WpÜG. The bidder did not pursue the offer after BaFin pointed out that the bidder's own shares offered as consideration were not to be regarded as liquid and thus not as valid consideration within the meaning of sec. 31 para. 2 sentence 1 WpÜG in light of the judgment issued by the Higher Regional Court of Frankfurt a.M. dated 11 January 2021, case no. 1/20 WpÜG (the judgment is discussed in detail in Section 4).



2.3 Offer volume

The total volume of offers in 2021 amounted to EUR 59.24 billion. Thus, the offer volume has almost doubled compared to the previous year (EUR 31.20 billion) and the peak from 2019 (EUR 31.34 billion).

However, the largest portion of the 2021 volume was attributable to the two takeover offers by Vonovia SE to the shareholders of Deutsche Wohnen SE for EUR 17.81 billion and EUR 15.8 billion. Both takeover offers were included in the statistics because Vonovia SE submitted a (new) amended takeover offer following the failure of the first takeover offer (for more details, please refer to our fact sheet in section 3).

The respective offer volume regarding the takeover battle over zooplus AG was taken into account three times for the statistics: The takeover offer by Zorro BidCo S.à r.l. (EUR 3.36 billion), the takeover offer by Pet Bidco GmbH (EUR 3.36 billion) and most recently the delisting purchase offer by Zorro BidCo S.à r.l. (EUR 0.62 billion).

Furthermore eight other public offers in the large cap segment (determined on the basis of market capitalization, see section 2.4) with the following offer volumes should be highlighted in 2021:

- The takeover offer by GlobalWafers GmbH to the shareholders of Siltronic AG (EUR 3.59 billion);
- the takeover offer by Faurecia Participations GmbH to the shareholders of HELLA GmbH & Co. KGaA (EUR 2.74 billion);
- the takeover offer by Alexandrite Lake Lux Holding S.a r.l. to the shareholders of alstria office REIT-AG (EUR 2.38 billion);
- the takeover offer by Atlantic BidCo GmbH to the shareholders of Aareal Bank AG (EUR 1.74 billion);
- the takeover offer by GRIFOLS S.A. to the shareholders of Biotest Aktiengesellschaft (EUR 1.58 billion);
- the delisting purchase offer of ams Offer GmbH to the shareholders of OSRAM Licht AG (EUR 1.55 billion);
- the delisting purchase offer of Aroundtown S.A. to the shareholders of TLG Immobilien AG (EUR 0.55 billion); and
- the takeover offer by Vonovia SE to the shareholders of GSW Immobilien AG (EUR 0.39 billion).



2.4 Developments in the market segments

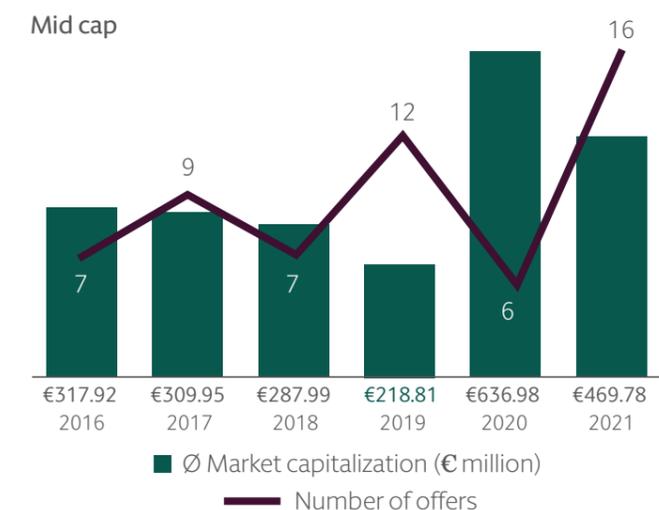
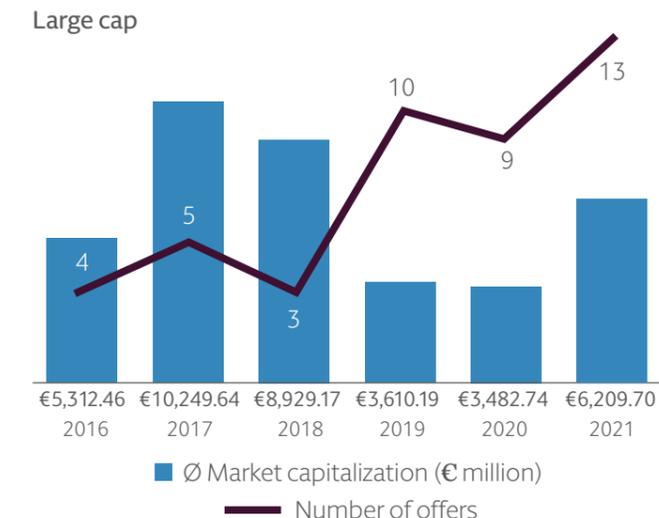
The market segments are defined as follows based on the respective market capitalization of the target company:

- small cap under EUR 100 million;
- mid cap EUR 100 million to under EUR 1 billion;
- large cap EUR 1 billion or higher.

The high level of takeover activity in 2021 took place primarily in the mid and large cap sector. With 13 bids in the large cap sector, a peak was reached within the period of the last six years. Compared to 2019 and 2020, the average value of the market capitalization in the large cap sector increased significantly to EUR 6.21 billion in 2021 but did not reach the previous highs of 2017 and 2018.

About half of all takeover bids took place in the mid cap segment, which with 16 takeover bids also constitutes a peak in the period of the last six years. Although the average market capitalization decreased to EUR 469.78 million compared to the previous year, this amount remains significantly above the level of the years 2016 to 2019.

Since the low peak in 2018, the upward trend of 2019 has continued in the small cap segment in 2021. The average market capitalization reached a new peak of EUR 63.33 billion, while the number decreased to only 5 takeover bids in the small cap segment.

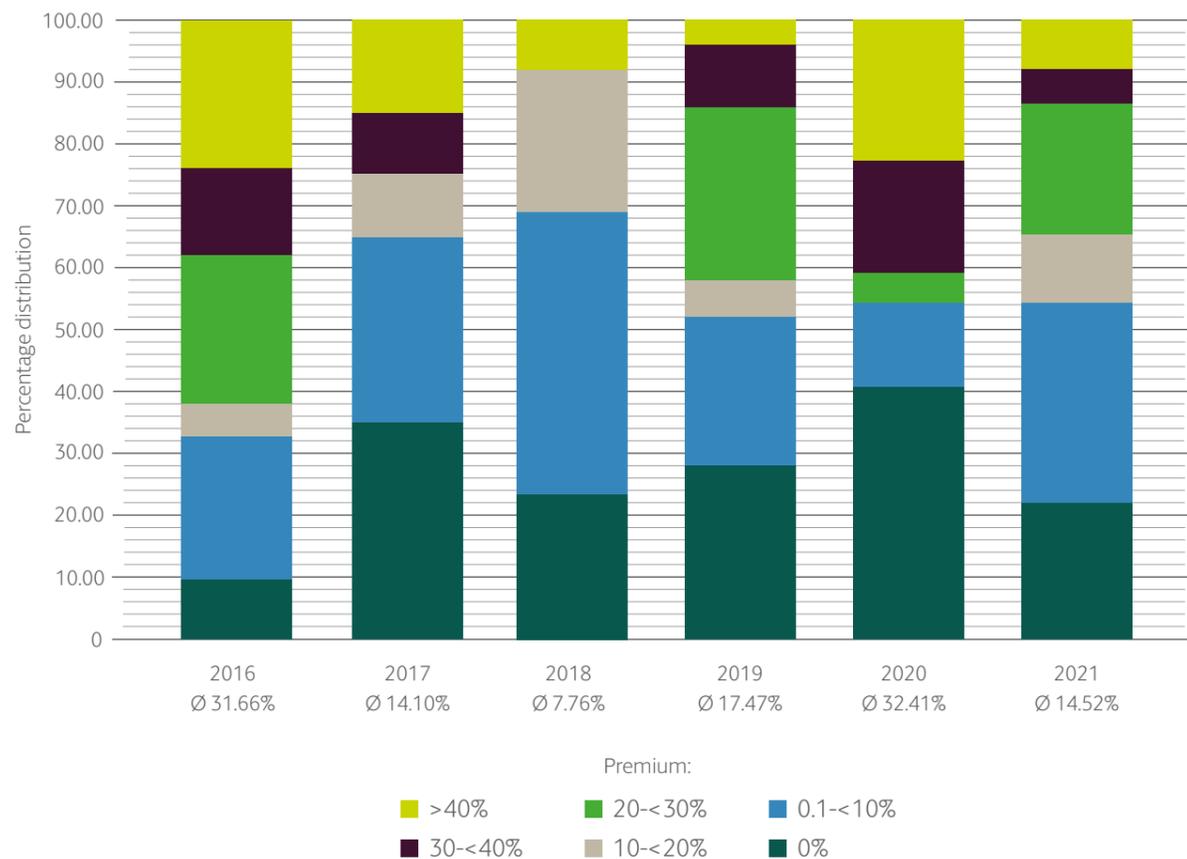


2.5 Offer premium

The chart below shows the offer premium in relation to the weighted three-month average domestic stock market price prior to the announcement of the offer (for delisting offers, the legally relevant six-month average stock price was taken into account).

The average (unweighted) offer premium in 2021 amounted to 14.52%. This represents a significant decrease compared to the previous year, ending the upward trend since 2018.

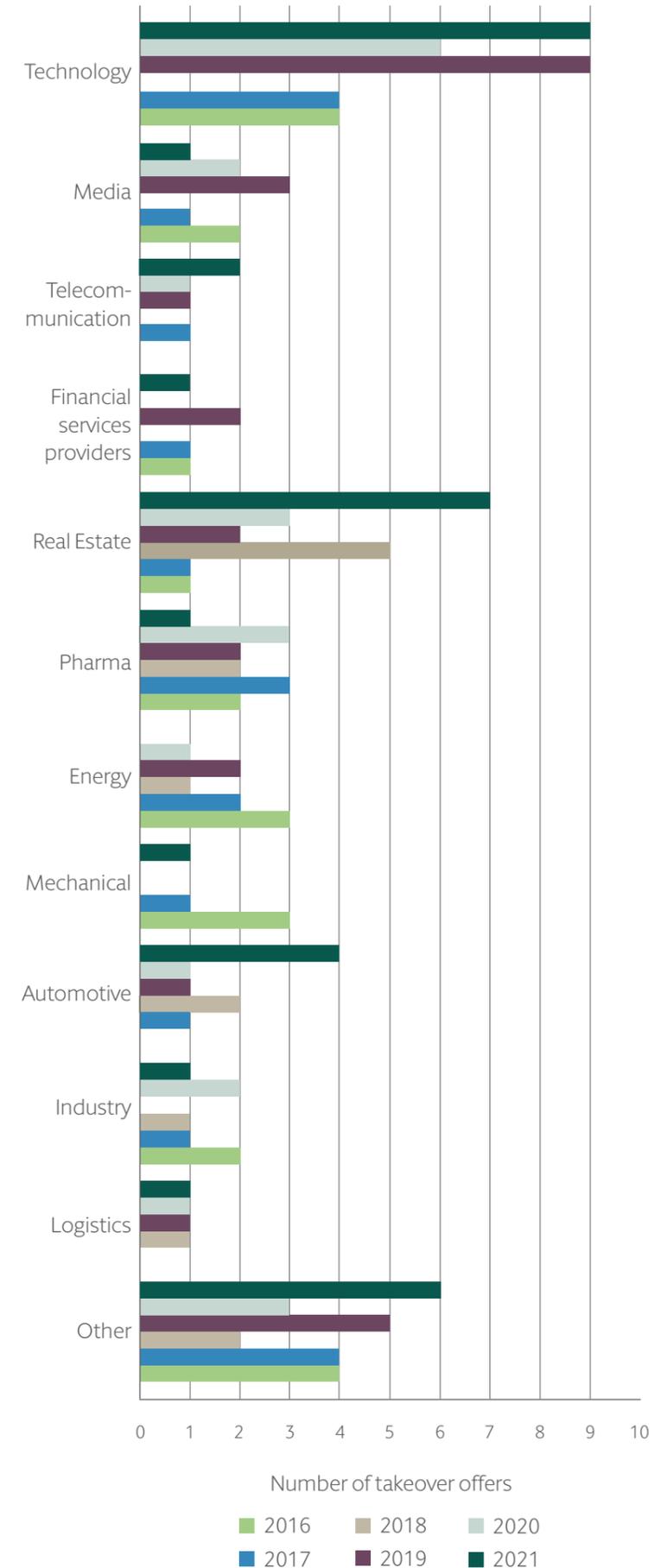
Last year, around 54% of the bids offered a maximum premium of 10%, which is on a par with the previous two years. A further approximately 32% of bids included a premium of between 10% and 30%. By contrast, the percentage of premiums of more than 30% amounted to 13%, the second lowest value after 2018.



2.6 Takeovers by sector

2021 saw once again a continuation of the trend in 2016, 2017, 2019 and 2020 that the technology sector recorded the highest level of activity in the takeover market. At the same time, however, the real estate sector reached a new high in 2021 and, together with the technology sector, covers almost half of all public takeovers. In addition, the automotive sector should be highlighted which also reached a new absolute high in 2021.

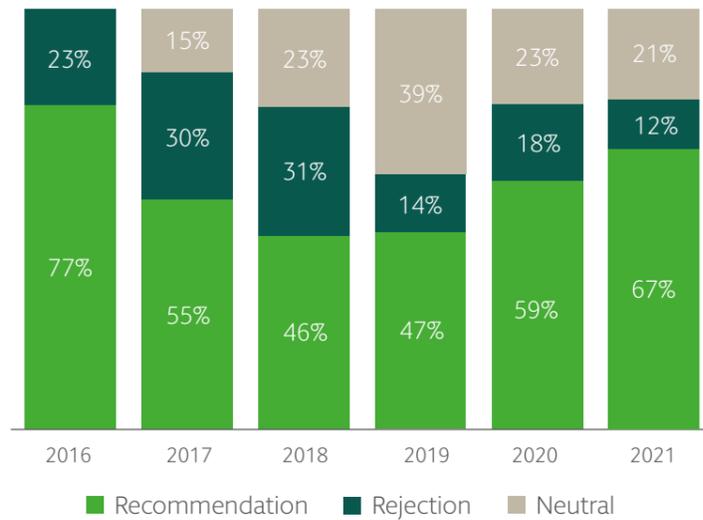
In addition, an even distribution can be seen in the media, telecommunications, financial services, pharma, mechanical engineering, industry and logistics sectors, while no acquisitions were recorded in the energy sector.



2.7 Management board and supervisory board statements

In accordance with sec. 27 WpÜG, both the management board and the supervisory board of the target company must issue a reasoned statement on the public offer.

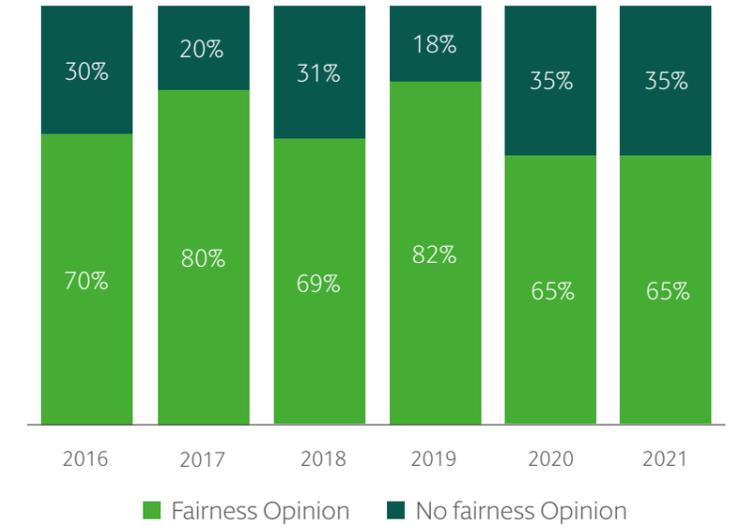
In 2021, 67% of the statements recommended accepting the public offer, whereas 12% recommended rejecting it. This confirms the trend that the proportion of recommendations has been constantly increasing since 2018. Accordingly, the rejecting statements reached their lowest percentage in 2021. Compared to the previous year, neutral statements have decreased slightly to 21%.



2.8 Fairness opinions

Fairness opinions are statements by external experts on the appropriateness of the offer price. These expert opinions are often obtained by the management board and the supervisory board as a basis for their statement.

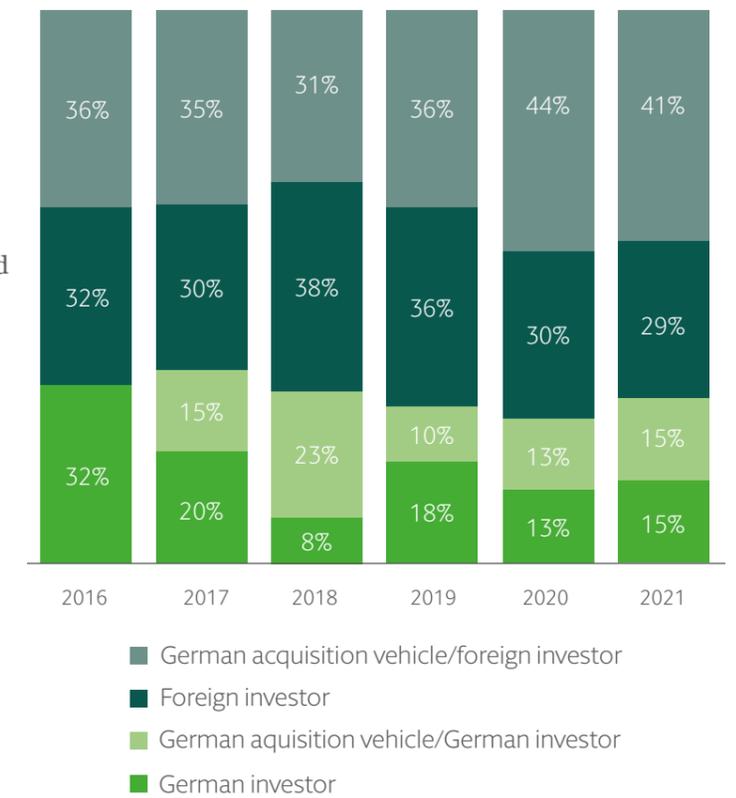
In 2021, management boards and supervisory boards obtained an external fairness opinion for 65% of the offers. This represents (together with the same value as in the previous year) the lowest value over the comparative period of the last six years.



2.9 Origin of bidders

In 2021, 70% of the offers came from foreign investors who launched an offer either directly or via German acquisition vehicles. For the first time since 2018, this value has decreased slightly compared to the previous year.

In contrast, 30% of takeover offers were submitted by domestic companies directly or via a German acquisition vehicle.



3. Profile

M&A thriller in the real estate sector: Vonovia - Deutsche Wohnen

On 23 June 2021, Vonovia SE submitted a takeover offer for Deutsche Wohnen SE at a price of EUR 52.00 per share with a minimum acceptance threshold of 50%. At that time, Vonovia SE already held approximately 18.35% of the shares in Deutsche Wohnen SE. Although the offer was supported by the management board and supervisory board of Deutsche Wohnen SE – which was not the case during the hostile takeover attempt back in 2016 – Vonovia SE again failed to reach the minimum acceptance threshold. At the end of the acceptance period, Vonovia SE's shares in Deutsche Wohnen SE amounted to approximately 47.62%.

An exemption by the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungen*, hereinafter “**BaFin**”) from the one-year lock-up period pursuant to sec. 26 para. 2 WpÜG enabled Vonovia SE to submit a new takeover offer for Deutsche Wohnen SE on 23 August 2021. In the meantime, Vonovia SE had increased its stake in Deutsche Wohnen SE to 29.99%. In the course of this second takeover offer, the consideration offered was increased to EUR 53.00 per share in Deutsche Wohnen SE, while the previous minimum acceptance threshold of 50% was initially maintained.

In order to ensure the success of the transaction and to eliminate all risks, Vonovia SE submitted an amended takeover offer on 13 September 2021, according to which all offer conditions, including the minimum acceptance threshold, were waived. At the end of the acceptance period, which had been extended due to the amendment to the offer, Vonovia SE was already the majority shareholder of Deutsche Wohnen SE in accordance with its original plan, having achieved an acceptance rate

of 64.78%, which increased to 87.71% by the end of the further acceptance period. Two factors were essential for the failure of the first offer. Firstly, the high shareholding of index funds in Deutsche Wohnen SE (approx. 20%) was a disadvantage. Secondly, too many investors and hedge funds speculated on an increase of the offer in the context of structural measures in order to achieve an arbitrage in the takeover. In order to address this problem, Vonovia SE made a binding and irrevocable statement in the offer document dated 23 August 2021 that Vonovia SE would not increase the offer price any further (so-called “no increase statement”) and that no structural measures would be implemented after the takeover. These statements within the offer document, which were intended to prevent renewed speculation from the outset, are indeed interesting from a legal point of view.

Such a “no increase statement” is likely to be permissible in principle. However, it is legally controversial whether this statement is binding with regard to a later waiver. The majority would reject the possibility of a subsequent waiver, because the bidder, disregarding the no increase statement, does not only change the offer by increasing the consideration within the meaning of sec. 21 para. 1 sentence 1 no. 1 WpÜG. Rather, the bidder would also amend the part of the “no increase statement” in the offer document without this amendment being covered by the *numerus clausus* of sec. 21 para. 1 WpÜG. Therefore, an amendment of the offer price would result in a prohibition by BaFin.

Similar problems are likely to arise with regard to the undertaking to refrain from structural measures. Deviations only arise with regard to the sanction of violations, because a possible violation becomes effective only after the conclusion of the offer procedure, so that in this case a prohibition by BaFin is no longer possible. Instead, the company will then be confronted with claims for damages by the (former) shareholders. Practical difficulties are likely to arise in such cases as to what extent the subsequent structural measures have led to causal damage for the (former) shareholders.

Also worth mentioning in both takeover offers is the involvement of the French bank Société Générale as a third party purchaser for the acquisition of shares in Deutsche Wohnen SE in the event that more than 90% minus 10,000 of the outstanding shares in Deutsche Wohnen SE should be tendered in response to the takeover offer. This was introduced in order to avoid the unintentional triggering of real estate transfer tax (RETT) in respect of the real estate portfolio held by Deutsche Wohnen SE, since under the legal situation applicable since 1 July 2021, the holding of 90% or more of the shares by one shareholder in a company (directly or indirectly) owning real estate is already sufficient to trigger RETT. In order to implement this structure, it was envisaged that the settlement agent, as representative of the shareholders accepting the offer, would be allowed to transfer a maximum of 90% minus 10,000 of the outstanding Deutsche Wohnen shares to Vonovia SE and would transfer the excess shares to Société Générale, which would acquire the shares in its own name and for its own account and could sell them freely without being bound by any instructions from Vonovia SE.



Overview	
Bidder	Vonovia SE
Target company	Deutsche Wohnen SE
Sector	Real Estate
Acceptance period	<p><i>First offer dated 23 June 2021:</i> 23 June 2021 to 21 July 2021, 24:00 (local time Frankfurt/Main)</p> <p><i>Second offer dated 23 August 2021:</i> Initial by 23 August to 20 September 2021, 24:00 (local time Frankfurt/Main), extended to 4 October 2021, 24:00 (local time Frankfurt/Main) due to offer amendment (sec. 21 para. 5 sentence 1 WpÜG).</p> <p>Additional acceptance period until 21 October 2021, 24:00 (local time Frankfurt/Main).</p>
Acceptance rate	<p><i>First offer:</i> approx. 47.62% (21 July 2021).</p> <p><i>Second offer:</i> approx. 64.78% (4 October 2021); approx. 87.71% (21 October 2021).</p>
Minimum acceptance threshold	<p><i>First offer:</i> 50%</p> <p><i>Second offer:</i> initially 50%, subsequently waiver of minimum acceptance threshold</p>
Status	Successful
Over volume (max.)	EUR 15,798.16 million.
Type of offer	Voluntary takeover cash offer
Offer price	<p><i>First offer:</i> EUR 52.00 per Deutsche Wohnen SE share</p> <p><i>Second offer:</i> EUR 53.00 per Deutsche Wohnen SE share</p>
Structure of participation	<p><i>First offer:</i> Vonovia SE already held approximately 18.35% of the shares in Deutsche Wohnen SE at the time of publication of the offer document.</p> <p><i>Second offer:</i> Vonovia SE already held approximately 29.99% of the shares in Deutsche Wohnen SE at the time of publication of the offer document.</p>
Agreements with major shareholders	n.a.
Statement by the management board and supervisory board	The management board and the supervisory board have recommended accepting both the first offer dated 23 June 2021 and the second offer dated 23 August 2021, including the offer amendment dated 13 September 2021.
Financing	Equity and debt capital
Friendly/hostile	Friendly
Closing conditions	<p>Initial closing conditions of the second offer:</p> <ul style="list-style-type: none"> • Minimum acceptance threshold of 50% of the shares; • Between the publication of the offer document and the expiry of the acceptance period: <ul style="list-style-type: none"> - Closing price of the FTSE EPRA/NAREIT Developed Europe Index (EPRA:IND) is not below 1,848.71 points for six consecutive trading days; - no increase in share capital and no issue of conversion, option or other rights by Deutsche Wohnen SE; - no cash, non-cash or stock dividend, no sale of treasury shares, no capital increase resolution, no amendments to the articles of association, no liquidation at Deutsche Wohnen SE; - no acquisition or sale of material assets by Deutsche Wohnen; - no material deterioration of the financial situation at Deutsche Wohnen SE; - no material compliance violation has become known at Deutsche Wohnen SE; - no ad hoc announcement has been made by Deutsche Wohnen SE stating that a loss amounting to half of the share capital has occurred or that insolvency proceedings have been applied for or opened in respect of the assets of Deutsche Wohnen SE. <p>Subsequently: full waiver of all closing conditions.</p>
Links	<p>Offer document 23 June 2021</p> <p>Statement by management and supervisory board 1 July 2021</p> <p>Offer document 23 August 2021</p> <p>Statement by management and supervisory board 31 August 2021</p> <p>Offer amendment 13 September 2021</p> <p>Statement by management and supervisory board to offer amendment 15 September 2021</p>

4. Recent legal developments in the German public takeover law

4.1 Right to appropriate consideration (sec. 31 para. 1 WpÜG) solely for shareholders of the target company who have accepted the offer - BGH dated 23 November 2021 – II ZR 312/19

We previously reported on the court decisions regarding the McKesson/Celesio case in the first two issues of our newsletters for 2017 and 2018:

The German High Court of Justice (*Bundesgerichtshof*, hereinafter “**BGH**”) ruled in its judgment of 7 November 2017 (II ZR 37/16) in the legal dispute between McKesson (hereinafter “**Bidder**”) and shareholders of Celesio AG (hereinafter “**Target Company**”) that the prices paid by the bidder for the acquisition of convertible bonds must be taken into account for the calculation of an adequate purchase price, because the derivative acquisition of convertible bonds should be qualified as a pre-acquisition within the meaning of sec. 31 para. 6 WpÜG. Therefore, the appropriate consideration should amount to EUR 30.95 per Celesio AG share. The decision nevertheless only related to those shareholders who had accepted the takeover offer.

The decision of the Higher Regional Court Frankfurt/M. of January 8, 2018 (WpÜG 1/17) concerned those shareholders who had not accepted the offer and now also demanded an increased offer price of EUR 30.95 per Celesio AG share and requested that BaFin should – due to the initially low consideration – be obliged to request the Bidder to submit a mandatory offer. As the Higher Regional Court expressly clarified, the shareholders who did not accept the offer have no claim to the requested administrative action by BaFin due to the lack of third party protection provided by the provisions of the WpÜG (in particular sec. 35 para 1 and 2 WpÜG). However, the civil liability arising out of so-called culpa in contrahendo (“c.i.c.”) pursuant to secs. 280 para. 1, 311 para. 2, 241 para. 2 German Civil Code (*Bürgerliches Gesetzbuch*, hereinafter “**BGB**”) was not discussed.

(a) Facts

In the recent decision of the BGH of 23 November 2021 (Case No. II ZR 312/19), the plaintiffs asserted a claim for damages in the amount of EUR 30.95 per allocated share of the defendant (McKesson Europe AG) against transfer of ownership as well as for loss of profit. They based this claim (i) directly on sec. 31 para. 1 sentence 1 WpÜG, (ii) on a claim arising out of c.i.c. pursuant to secs. 280 para. 1, 311 para. 2, 241 para. 2 BGB and (iii) thirdly on a tort claim based on sec. 823 para. 2 BGB in connection with sec. 31 para. 1 sentence 1 WpÜG.

The plaintiffs were linked as investment funds via so-called total return swap agreements with various banks as counterparties with respect to the shares of the former Celesio AG. The plaintiffs claimed that shares were allocated to them on the basis of their rights under the swap agreements, so that they could have decided whether to accept the offer. Accordingly, they would have accepted the offer if the defendant had paid the appropriate consideration of EUR 30.95 per share.

(b) Legal considerations

The BGH assumed in favor of the plaintiffs that they had the right to bring an action on the basis of their rights under the swap agreements.

In a first step, the BGH then rejected a claim by the plaintiffs directly under sec. 31 para. 1 sentence 1 WpÜG. In a detailed statement of reasons based on the wording, systematic structure and history of the relevant statute, the BGH followed the prevailing view that sec. 31 para. 1 sentence 1 WpÜG only gives the shareholders of the target company who accept the public offer a claim to appropriate consideration.

Thereafter, the BGH considered the claim arising out of c.i.c. raised by the plaintiffs: Whereas the decision of the Regional Court of Stuttgart on 17 September 2018 (31 O 1/15) in the context of appraisal proceedings indicated via obiter dictum that a claim arising out of c.i.c. might be conceivable in the event of an inappropriate consideration, the BGH has now expressly rejected this: the plaintiffs are not entitled to any claim for damages against the defendant under secs. 280 para. 1, 311 para. 2, 241 para. 2 BGB. The obligation of the bidder under sec. 31 para. 1 sentence 1 WpÜG to offer the shareholders of the target company an appropriate consideration does not constitute an obligation within the meaning of secs. 311 para. 2, 241 para. 2 BGB.

The obligation to offer an appropriate consideration outlined in this way would not constitute a pre-contractual accessory obligation of the bidder vis-à-vis the shareholders of the target company within the meaning of secs. 311 para. 2, 241 para. 2 BGB. In the view of the BGH, the bidder's duty of consideration under the WpÜG would only be aimed at informing the shareholders about the relevant circumstances for assessing the appropriateness of the consideration. The WpÜG would merely create the guidelines for a fair, structured and transparent offer procedure, which would be clarified by the provisions on the information and appropriateness of the consideration (cf. sec. 11 para. 2 sentence 2 no. 4 WpÜG as well as sec. 11 para. 4 no. 2 WpÜG in conjunction with sec. 2 no. 3 WpÜG Offer Ordinance).

Neither the protective purpose of sec. 31 para. 1 sentence 1 WpÜG nor the pre-contractual accessory obligation require that an appropriate consideration would be worthy of protection prior to the conclusion of the respective agreement. Firstly, obvious deficiencies in the determination of the appropriateness of the consideration would be already protected during the examination of the offer document and a possible prohibition by BaFin pursuant to secs. 14 et seq. WpÜG. Secondly, the shareholders are sufficiently protected by the

information in the offer document with regard to the uncertainties in the determination of the consideration, because this would enable them to make a sufficiently informed decision. On the other hand, the Bidder could not reasonably be expected to bear the risk of any incorrect calculation for legal or factual reasons prior to the conclusion of the contract.

Finally, the BGH also rejected a claim for damages under Section 823 para. 2 BGB in conjunction with Section 31 para. 1 sentence 1 WpÜG. § Section 31 para. 1 sentence 1 of the WpÜG with reference, among other things, to the fact that Section 31 para. 1 sentence 1 of the WpÜG is not a protective law.

(c) Practical implications

The BGH has now expressly clarified that those shareholders who did not accept the offer have no claim to the differential amount, whether directly under sec. 31 para. 1 sentence 1 WpÜG or via c.i.c. under secs. 280 para. 1, 311 para. 2, 241 para. 2 BGB or under Section 823 para. 2 BGB in conjunction with Section 31 para. 1 sentence 1 WpÜG. This leads in any case to more transaction security on part of the bidder. Otherwise, the bidder would have had to fear that shareholders who did not accept the offer could demand fulfillment of the takeover offer at the higher offer price claimed by them, even after a completed offer procedure. In case of uncertainties in the determination of the appropriateness of the consideration, the bidder should, however, always provide comprehensive information in the offer document.

Conversely, shareholders who do not consider the offer price to be in compliance with the law only have the option of accepting the takeover offer and subsequently asserting any difference by taking legal action.

4.2 Liquidity of shares as consideration within the meaning of sec. 31 para. 2 sentence 1 WpÜG – Judgment by Higher Regional Court Frankfurt a.M. 11 January 2020 – WpÜG 1/20

In the event of a public takeover, the bidder must offer the shareholders of the target company an appropriate consideration for their shares as part of the offer document pursuant to sec. 31 para. 1 sentence 1 WpÜG. In accordance with sec. 31 para. 2 sentence 1 WpÜG, such consideration may consist in a cash payment or liquid shares admitted to trading on an organized market within the meaning of sec. 2 para. 7 WpÜG. The definition of “liquidity” has been controversial since the publication of the first draft bill on the WpÜG. In a recent judgment issued by the Higher Regional Court of Frankfurt a. M. on 11 January 2021 (Case No. WpÜG 1/20), the court commented on the requirements for liquid shares in deviation from BaFin's previous practice.

(a) Facts

The decision was triggered by the appeal of Heidelberger Beteiligungsholding AG (hereinafter “**Bidder**”) against a prohibition order of BaFin in connection with the intended takeover of Biofrontera AG (hereinafter “**Target Company**”) in spring 2020 by way of an exchange offer. For this purpose, after publication of the offer document, it was intended to carry out a capital increase and to offer the newly issued shares to the shareholders of the Target Company as consideration. At the time of filing of the offer document, the main shareholder of the Bidder held a total of 88.88% (directly and indirectly) of the shares issued by the Bidder, so that the free float of its shares was extremely low. Not surprisingly, stock exchange prices for the Bidder's shares were recorded on less than one third of the trading days in the past three-month period. This was partly due to a capital reduction carried out shortly before this period. The Bidder attempted to achieve a higher free float of more than 30% through various measures, such as a minimum acceptance threshold, non-replacement

agreements by shareholders and depository locks, taking place after a successful takeover. In order to ensure a sufficient trading volume of the newly issued shares, mwb fairtrade Wertpapierhandelsbank was appointed as designated sponsor.

(b) BaFin's prohibition decision

BaFin nevertheless prohibited the publication of the offer document on the grounds that the Bidder's shares offered as consideration could not be classified as liquid within the meaning of sec. 31 para. 2 sentence 1 WpÜG, even taking into account the newly issued shares and the supplementary measures sought by the Bidder. Decisive for the required forecast decision would be, first of all, the poor liquidity values in the past, which have not substantially improved since the publication of the decision to submit an offer pursuant to sec. 10 para. 1 sentence 1 WpÜG. Regarding the future perspective, there would be no different result despite the envisaged minimum acceptance threshold, because it is expected that the main shareholder of the Bidder would repurchase shares after the completion of the offer. The separate view of the free float resulting from reaching the minimum acceptance threshold would therefore not be sufficient. The mandating of a designated sponsor would also be irrelevant, as the minimum quotation volume in the lowest liquidity class given here would only be 50 shares of the Bidder. With a total of 2,375,675 shares, this would not lead to a positive liquidity forecast. Since the other measures mentioned by the Bidder were only “proposals submitted” and “possibilities considered”, they would also have to be disregarded in the liquidity forecast. As a result, BaFin made a forecast decision following a detailed review of all available information, which was based on the individual case and not on formal criteria.

(c) Legal considerations

On appeal by the bidder, the Higher Regional Court of Frankfurt a. M. upheld BaFin's decision, but significantly tightened the liquidity requirements applied by BaFin.

The senate's considerations were based on the purpose of sec. 31 para. 2 sentence 1 WpÜG: In the event of public takeover offers, both permitted types of mandatory consideration must ensure an equivalent level of protection for the shareholders of the Target Company. Therefore, shares offered in exchange may only be considered liquid if they are – as much as possible – as good an asset as the respective cash amount. This presupposes that the shareholder would be able to sell the share offered in exchange without further delay and at any time – in particular shortly after completion of the takeover offer – and that in the event of a sale on the stock exchange shortly after completion of the takeover offer, it could be assumed on the basis of a regular course of events that the shareholder would receive the value determined as appropriate for the shares in the target company originally held by him pursuant to sec. 31 para. 1 sentence 2 WpÜG in conjunction with secs. 3 to 7 WpÜG Offer Regulation (WpÜG Angebotsverordnung).

Contrary to BaFin's previous practice, however, the senate then based its definition of liquidity on a formal definition of liquidity derived from a comparable concept of liquidity from European Law. Specifically, the court based its analysis on the concept of liquid shares as defined in Article 22 para. 1 of Commission Regulation (EC) No. 1287/2006 of 10 August 2006 (Financial Instruments Recording Obligation Implementing Regulation, hereinafter "**Implementing Regulation**"). Accordingly, shares offered in exchange would only be considered "liquid" within the meaning of sec. 31 para. 2 sentence 1 WpÜG if (i) they would be traded daily, (ii) the free float would not be less than EUR 500 million and either (iii) the average daily number of transactions with the shares would not be less than 500 or the average daily turnover of the shares would not be less than EUR 2 million. The senate based its application of the concept of liquidity in Art. 22 para. 1

Implementing Regulation on the understanding that the concept of liquid shares in the WpÜG is be influenced by European Law. Further the court takes the view that requirement derived from the purpose of sec. 31 para. 2 sentence 1 WpÜG regarding the liquidity of the exchange shares – i.e. that they must have a similar quality as a cash offer with regard to the protection of the shareholders – would be easily fulfilled by shares which meet the criteria of Art. 22 para. 1 Implementing Regulation. Finally, the court argued that a formal criteria would provide legal certainty for both the Bidder and the minority shareholders of the Target Company.

In the view of the court, in case the requirements of Art. 22 para. 1 Implementing Regulation are not fulfilled, it would nonetheless be conceivable in exceptional cases to regard shares as sufficiently liquid within the meaning of sec. 31 para. 2 sentence 1 WpÜG if the relevant shares offer the guarantee that a shareholder can sell them on the stock exchange at any time and without further delay with a similar degree of probability as in case of shares which fulfil the requirements of Art. 22 para. 1 Implementing Regulation.

For the purpose of the above test, the senate made a forecast analysis for which the court used the past trading volume as an indication of the future development. Purely speculative assumptions that make a certain liquidity on the closing date appear only possible but not likely are irrelevant in the court's opinion. In particular, full acceptance of the offer cannot be assumed, since the protection of the shareholders accepting the offer must be guaranteed even if the minimum acceptance threshold is reached.

In this specific case, these requirements were not fulfilled for the shares offered as consideration in the view of the senate; these exchange shares would not even "approximately" meet the criteria of Art. 22 para. 1 Implementing Regulation. For this reason, the senate was able to leave open the decision as to whether the criteria of Art. 22 para. 1 Implementing Regulation should ultimately apply without any exception.

(d) Practical implications

The ruling of the OLG Frankfurt a. M. has already been reflected in BaFin's most recent decision practice. For example, BaFin prohibited 4basebio AG's takeover offer to the shareholders of KROMI Logistik AG, which also included an exchange offer with newly issued bidder shares. A further problem arising here was whether the shares of 4basebio AG would be liquid within the meaning of sec. 31 para. 2 sentence 1 WpÜG at the time the takeover was completed. It is clear from BaFin's negative decision that BaFin also, and in particular, used historical data regarding the shares of the bidder already traded as indications for its forecast decision. The negative prognosis is then recognizably based on the finding that it was already foreseeable on the basis of this data that the newly issued shares would not meet the requirements of Article 22 para. 1 Implementing Regulation.

In order to avoid a prohibition by BaFin in the future in advance, the offered shares of the bidder company will have to be subjected to a strict liquidity test in accordance with Art. 22 para. 1 Implementing Regulation. This has recently become clear in the case of the takeover of Deutsche Industrie Reit-AG by CTP N.V. The offer document submitted on 7 December 2021 contains a detailed liquidity test in section 9.2.4 based on the decision of the Higher Regional Court of Frankfurt a. M. In this context, also the business combination of ADVA Optical Networking SE with ADTRAN Inc is interesting to note. The takeover offer was made

by a NewCo – Acorn HoldCo – for which no historical data on the liquidity of the shares was available when the offer document was submitted. Due to the merger of ADTRAN Inc. into NewCo prior to the takeover, the historical liquidity of ADTRAN Inc. was used in the present constellation, which was not objected to by BaFin.

After all, the high formal requirements set by the Higher Regional Court of Frankfurt a. M. for the liquidity of the bidder's shares within the meaning of sec 31 para. 2 sentence 1 WpÜG will lead to exchange offers only being permissible in exceptional cases in the future. As it seems, the requirements of Art. 22 para. 1 Implementing Regulation are currently met only by approximately 80 German listed companies. Not without reason, the only two exchange offers permitted by BaFin in 2021 were submitted by foreign bidders.

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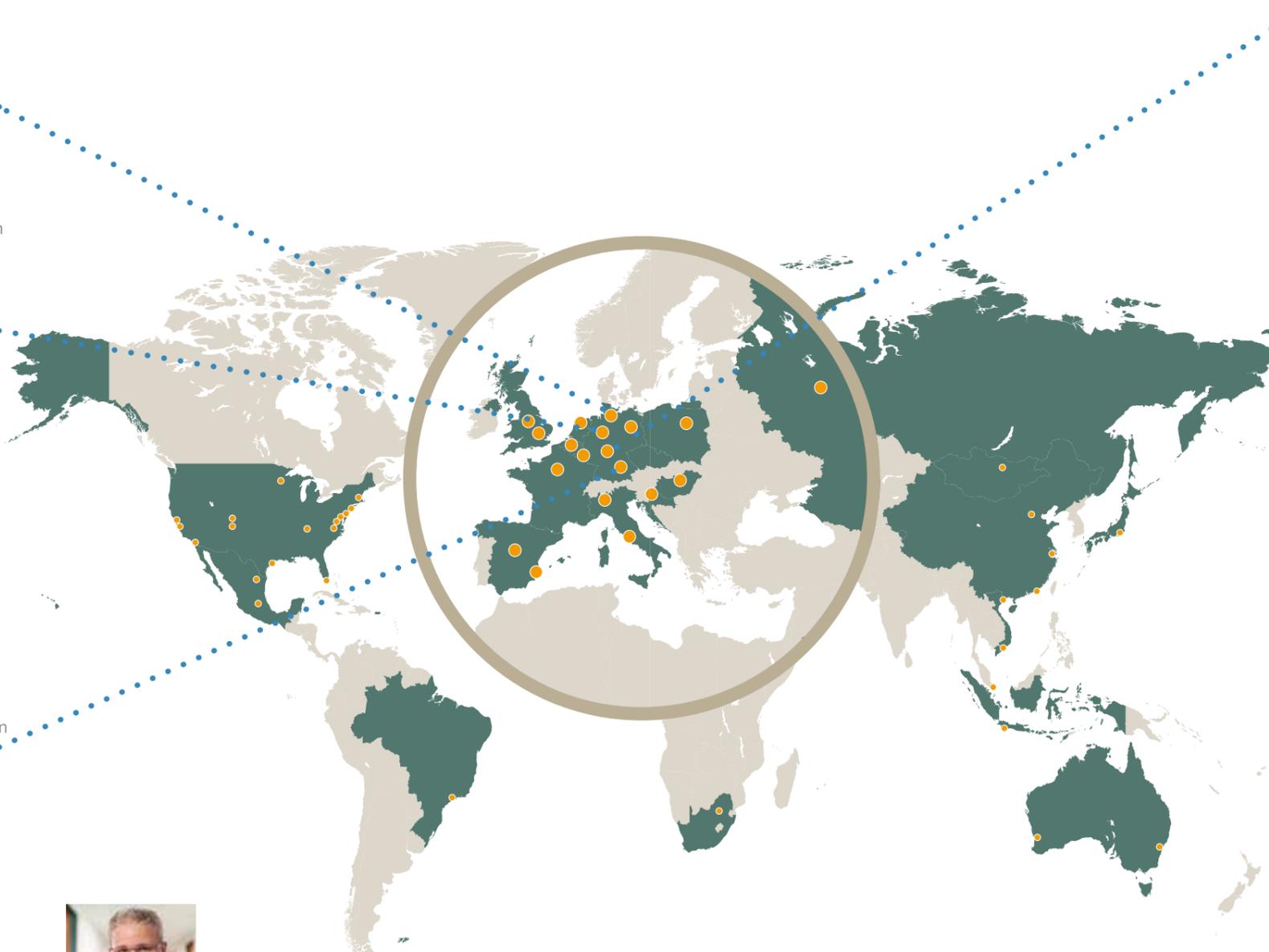
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